

Market Analysis – Wholesale Fixed Markets

Public Consultation 02/07

10th April 2007

Gibraltar Regulatory Authority
Suite 603, Europort
Gibraltar
Telephone +350 20074636 Fax +350 20072166
Web:<http://www.gra.gi>

CONTENTS

Executive Summary	1
1. Introduction.....	3
1.1 Background.....	3
1.2 Scope of the review	5
2. Market Definition.....	7
2.1 Methodology	7
2.2 Description of the market.....	7
2.3 Delineation of the market	9
2.4 Geographical market.....	14
2.5 Preliminary markets to be defined	15
3. Market Analysis	16
3.1 Methodology	16
3.2 Market analysis: interconnection markets.....	16
3.3 Preliminary conclusions and SMP designation if appropriate	18
3.4 Market analysis: wholesale unbundled access.....	19
3.5 Preliminary conclusions and SMP designation if appropriate	20
3.6 Market analysis: wholesale broadband access	20
3.7 Preliminary conclusions and SMP designation if appropriate	22
3.8 Market analysis: wholesale leased lines.....	23
3.9 Preliminary conclusions and SMP designation if appropriate	24
4. Proposed SMP Obligations.....	25
4.1 Competition problems in the wholesale fixed markets	25
4.2 Principles in determining SMP obligations.....	26
4.3 SMP obligations proposed	26
4.4 Interconnection markets	27
4.5 Market for wholesale unbundled access	28
4.6 Market for wholesale broadband access	30
4.7 Market for wholesale leased lines	30
5. Assessment of Regulatory Measures.....	32
Annex A: Consultation Questions	33

Executive Summary

The communications regulatory framework requires the Gibraltar Regulatory Authority (GRA or the Authority) to define relevant markets appropriate to national circumstances in accordance with the market definition procedure outlined in the Framework Directive¹. In addition, the GRA is required to conduct an analysis of the relevant markets to decide whether or not they are effectively competitive and, having identified competition problems, propose appropriate regulatory measures.

In carrying out market definition and market analysis, the GRA must take the utmost account of the Relevant Markets Recommendation² (the Recommendation) and the Commission's Guidelines³ (the Guidelines) on Market Analysis and Significant Market Power.

The markets defined were analysed to see if there was evidence of market power. The analyses took into consideration a range of factors in the assessment of market power including high market shares; pricing behaviour; conduct which would indicate market power; countervailing buyer power; barriers to entry; potential competition and vertical integration.

According to the Guidelines the purpose of imposing ex ante obligations on undertakings designated as having significant market power (SMP) is to ensure that undertakings cannot use their market power to restrict or distort competition in the relevant market, or to lever market power into an adjacent market.

Where there is a finding of SMP, the GRA is obliged to impose obligations to remedy competition problems. SMP obligations are listed in Regulation 10 to Regulation 14 inclusive of the Communication (Access) Regulations 2006⁴ (the Access Regulations) and include:

- Obligation of transparency
- Obligation of non-discrimination
- Obligation of accounting separation
- Obligation of access to, and use of, specific network facilities
- Price control and cost accounting obligations.

1 DIRECTIVE 2002/21/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) OJ [2002] L 108/33.

2 Commission Recommendation 2003/311/EC of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services OJ [2003] L 114/45.

3 Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03) OJ [2002] C 165/6.

4 Communications (Access) Regulations 2006, Communications Act 2006.

The Authority has identified a range of obligations which it proposes should be imposed on the operators with significant market power in the markets defined in this review. These obligations are considered to be appropriate, proportionate and justified, in light of the competition problems identified.

The GRA welcomes comments from all interested parties on the questions posed in this market review (full list of questions is set out in Annex A) and will accept written comments up until 4pm on Monday 11th June 2007. Under Regulation 15 of the Access Regulations and in order to promote further openness and transparency, the GRA will publish the names of all respondents and will make available for inspection responses to the consultation at its offices. Please note that this is subject to confidentiality. Respondents are asked to clearly identify material which is to be treated as confidential.

1. Introduction

1.1 Background

A new European regulatory framework for electronic communications networks and services entered into force on the 25th July 2003. The framework is designed to create harmonised regulation across Europe and is aimed at reducing entry barriers and fostering prospects for effective competition to the benefit of consumers. The basis for the new regulatory framework is a set of five Directives:

- Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (the Framework Directive)⁵
- Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (the Access Directive)⁶
- Directive 2002/20/EC on the authorisation of electronic communications networks and services (the Authorisation Directive)⁷
- Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (the Universal Service Directive)⁸
- Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (the Privacy Directive)⁹.

These five Directives were implemented as part of the Communications Act 2006¹⁰, Gibraltar, June 2006 (the Act). The legislation enables the Authority to carry out reviews of competition in relevant electronic communications markets to ensure that regulation remains appropriate in the light of changing market conditions, otherwise known as market reviews.

5 See footnote 1 above.

6 DIRECTIVE 2002/19/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) OJ [2002] L 108/7.

7 DIRECTIVE 2002/20/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) OJ [2002] L 108/21.

8 DIRECTIVE 2002/22/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) OJ [2002] L 108/51.

9 DIRECTIVE 2002/58/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) OJ [2002] L 201/37.

10 Communications Act 2006, Act No. 15, 2006.

Market review methodology

In conducting a market review the Authority must take account of the SMP procedures in the Act, sections 38-41, as well as the provisions dealing with co-operation with the European Commission and the regulatory authorities in the Member States, sections 22-24.

Section 39 of the Act requires the Authority to take due account of all applicable guidelines and recommendations which have been issued or made by the European Commission in pursuance of the provisions of a European Community instrument. Therefore the Authority should take due account of the Recommendation.

Once the Authority has defined relevant markets, it shall analyse the state of competition within these markets to determine whether they are effectively competitive or not. Where markets are deemed to be effectively competitive or prospectively effectively competitive within the lifetime of the review, any existing regulation must be withdrawn. Where markets are deemed to be uncompetitive, the Authority must consider appropriate regulatory obligations on any undertaking which has significant market power.

The main purpose of a market review is to identify the competitive conditions prevailing in a market by assessing systematically the competitive constraints which are faced by undertakings in the market. A market review commences by defining a market, which is then analysed to assess the degree of effective competition.

In accordance with European Commission Guidelines, the market analysis procedure is prospective – that is, it must be forward-looking.

A market review has three main components:

- Definition of the relevant market or markets
- Assessment of competition in each market, in order to identify competitive constraints and assess whether any undertaking has SMP
- Where market power is identified, consideration of the appropriate SMP obligations in relation to that market.

The European Commission identified a set of product and service markets which may be susceptible to ex ante regulation¹¹. The EC is currently consulting on a revised set of markets. Both the initial recommendation and the principles outlined in the current consultation have been taken into account in this review. It should be noted that Gibraltar does not have competition legislation. This is important because any SMP obligations proposed within the communications sector will be regulated only within that sector, there will be no recourse to competition law as there is in other jurisdictions.

It is important to recognise that the markets in this review are already subject to regulation. In order to take this into account, the EC recommends the use of a “modified greenfield” approach, where markets are analysed absent regulation,

¹¹ See footnote 2 above.

except when that regulation is not to do with an SMP obligation, or is related to another market. In the wholesale fixed markets, for example, the obligation to negotiate interconnection is given in accordance with section 34 of the Act, hence the reviews will assume interconnection can be negotiated.

The market for wholesale fixed communications services in Gibraltar

In the Recommendation, the EC identified three types of wholesale fixed communication markets as being susceptible to ex ante regulation. These are:

- Wholesale markets concerned with the supply of inputs necessary to enable the offer of retail access to, and use of, the public telephone network at a fixed location. These are the interconnection markets of (i) call origination, (ii) transit and (iii) call termination, which together offer end-to-end connectivity on the fixed public telephone network
- Wholesale markets concerned with the provision of broadband data and related services. These markets are defined as (i) wholesale unbundled access to metallic loops and sub-loops, and (ii) wholesale broadband access
- Wholesale markets related to the provision of dedicated connections and capacity (i.e. leased lines), with separate markets defined for the (i) terminating and (ii) trunk segments.

The EC Recommendation is the starting point for the Authority's consideration of the particular circumstances of the wholesale fixed communications services market in Gibraltar.

1.2 Scope of the review

In order to define the boundaries of product and service markets in wholesale fixed communications, the GRA has considered the following:

- Should self-supply be included in the wholesale fixed markets?
- In the interconnection markets, is the EC proposed definition of call origination, transit and termination appropriate for Gibraltar?
- Is there a separate market for wholesale unbundled access to metallic loops and sub-loops?
- Is there a separate product market for wholesale broadband access?
- Is there a separate market for dedicated connections and capacity?

Structure of this document

Chapter 2 of this document proposes how the wholesale fixed markets should be defined. Chapter 3 analyses competitive conditions in each market which has been defined, and, where appropriate, designates undertakings with SMP. Chapter 4 identifies competition problems and outlines proposed SMP obligations. An

assessment of regulatory measures is presented in Chapter 5 and Annex A summarises the consultation questions.

2. Market Definition

2.1 Methodology

The market definition procedures are designed to identify in a systematic way the competitive constraints encountered by providers of electronic communications networks and services. They do so in a way which also facilitates subsequent market analysis procedures. According to the European Court of Justice,¹² a relevant product market comprises all products or services that are sufficiently interchangeable or substitutable with its products, not only in terms of the objective characteristic of those products, their prices or their intended use, but also in terms of the conditions of competition and/or the structure of supply and demand for the product in question. In essence, this leads to a definition of the market's boundaries.

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

If there is a lack of current or potential substitutability on either the demand or supply-side of a market, the overall scope of the market will need to be more tightly defined. If substitutability or its potential exists, a broader definition may be appropriate¹³. The competitive status of each relevant market can then be considered.

European guidelines also require the geographic coverage of markets to be considered. A relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products and/or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

2.2 Description of the market

In Gibraltar, there is currently no wholesale market for fixed communications services. Wholesale markets where they exist reflect the emergence of competition in downstream retail markets. In Gibraltar, despite the absence of merchant transactions at the wholesale level, there is nevertheless a degree of competition taking place in retail markets.

¹² See, for example, Case 322/81, *Michelin v. Commission* [1983] ECR 3461, as well as the Commission Notice on the definition of relevant markets for the purposes of Community competition law ("the Commission Notice on Market Definition") OJ 1997 C 372/3, and the SMP Guidelines.

¹³ A method for identifying market boundaries is known as the hypothetical monopolist test (also known as the SSNIP test, small but significant non-transitory increase in price test). This test assesses whether a hypothetical monopolist is able to increase price profitably for a product or service.

Retail competition in the fixed markets currently includes international VoIP calls services provided by three undertakings in addition to the incumbent, and dial-up and ADSL internet services which are offered by a second undertaking, Sapphire Networks, as well as by the incumbent. However, VoIP services are provided by undertakings with access agreements which do not constitute interconnection and the internet services offered by Sapphire is currently limited to the resale of Gibtelecom's service¹⁴.

The Authority has taken initial steps to facilitate the introduction of a Carrier Pre-Selection (CPS) service. The Authority has carried out a consultation on CPS, and has agreed and determined how it should be implemented in Gibraltar. The timing for the implementation has been delayed pending the outcome of this current consultation, and pending the implementation of the recent commitments expressed in the Trilateral Agreement¹⁵ (the Agreement). Any operator seeking to enter the market with a CPS product would purchase wholesale inputs from Gibtelecom, and would therefore interconnect with the incumbent.

This means that while there is some limited competition at a retail level, there is currently no corresponding wholesale competition in the fixed narrowband market.

The EC considers that the retail broadband markets are not susceptible to ex ante regulation, but that NRAs should consider the status of wholesale provision of broadband.

In Gibraltar, retail broadband may be bought in the form of ADSL service, either from Gibtelecom, or from Sapphire Networks. ADSL is provided over Gibtelecom's fixed public telephone network, and Sapphire resells Gibtelecom's service.

Sapphire also offers direct connection by ethernet to customers who are located close to the operator's facilities. This is used primarily for internet access.

Retail broadband may also be provided by traditional leased line, solely by the incumbent.

14 Public Consultation 01/07 - Retail Fixed Markets.

15 Electronic communications features significantly in the Tripartite Agreement concluded in Cordoba in September 2006. In the official communiqué the following were stated: "8. In the field of electronic communications, and in order to both address the current limitation on the quantity of telephone numbers in Gibraltar accessible from and through the Spanish network, and also enable roaming agreements between networks in Spain and Gibraltar for mobile telephones, telephone calls from Spain to Gibraltar will be channelled using the technical procedures for international direct dialling recommended by the International Telecommunications Union for all States and territories, including the territory of Gibraltar. In addition, the Spanish network operators will be able to accept the codes assigned to Gibraltar by the aforementioned organization, in order to identify the operators in that territory. These arrangements will become operational within four months of to-day's date, and the 30,000 telephone numbers reserved by Spain in its national numbering plan for access to the Gibraltar network will then be available for reassignment in Spain. Since the introduction of mobile roaming is a matter for the Network operators, the participants shall request from their respective telephone Network operators that, as soon as possible, they enter into appropriate commercial agreements, in accordance with the rules of the free market and in compliance with the EC Electronic Communications Directives (Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services) and other legal community provisions on electronic communications, all of which have been brought into effect." See http://www.gibraltar.gov.gi/latest_news/press_releases/2006/Official_Documents_Released_After_the_meeting_Cordoba.pdf

The retail broadband markets can be addressed in several ways. The provision of wholesale products which would allow an operator to enter and compete in the retail broadband markets could include the provision of wholesale broadband access (WBA), the unbundling of the local loop, and/or the provision of wholesale dedicated capacity and connections (leased lines).

There is currently no wholesale broadband access product available, and the incumbent does not currently sell any wholesale leased lines. The Authority has made progress with the implementation of local loop unbundling (LLU) but only to the extent that Gibtelecom has published a Reference Unbundling Offer (RUO). At present no undertaking has connected to the local loop.

2.3 Delineation of the market

Should self-supply be included in the wholesale fixed markets?

In Gibraltar, the incumbent is the only undertaking which could potentially provide wholesale products and services, although there is at present no merchant market. The Authority's analysis has considered a notional market where the incumbent supplies a wholesale product to its own retail arm, and believes that supply of this kind would form part of the overall wholesale market.

The Authority proposes that the self-provision of wholesale inputs should be considered as part of the wholesale market.

In the interconnection markets, is the definition proposed by the EC of call origination, transit and termination appropriate for Gibraltar?

The EC has defined three wholesale interconnection markets as potentially susceptible to ex ante regulation. These are:

- Call origination on the public telephone network provided at a fixed location
- Transit services in the fixed public telephone network
- Call termination on individual public telephone networks provided at a fixed location.

The three markets combined enable the conveyance of a call across the public telephone network. The EC Recommendation indicates that NRAs are to define the boundaries of each element of the interconnection market according to the particular network topology in their jurisdiction. In Gibraltar, the network is based on a single switch, and there is therefore no transit element.

The Authority proposes to define the boundaries of the markets for call origination and call termination in line with the way those functions are performed by a local exchange.

In considering the market for wholesale call origination, other potential means of providing a retail calling service would include the construction of an alternative access network to the end-user location, or the purchase or lease of an existing connection. An example of the latter could be, for instance, through local loop unbundling.

It is the Authority's view that both alternative direct access and the leasing of existing connections involve considerable time and investment, and that a large part of the investment would entail sunk costs. The Authority does not consider that the construction of alternative direct access or the leasing of existing access constitute realistic potential substitutes for wholesale call origination, and that a market should therefore be defined for call origination for calls services offered on the fixed public telephone network.

Wholesale call termination is needed to terminate calls to a subscriber. An operator wishing to terminate a call can only terminate it on the network to which the called subscriber is connected. As the EC has noted, "Each market for call termination on an individual fixed network is a monopolistic market with no tendency towards effective competition"¹⁶.

There are therefore no alternatives for demand or supply side substitution, and it is proposed that the relevant market is call termination on individual fixed networks.

The small size of Gibraltar means that transit of calls does not occur and therefore the Authority is not defining a transit market.

Proposal: two interconnection markets should be defined:

- **Call origination provided at a fixed location**
- **Call termination on individual networks.**

Is there a separate market for wholesale unbundled access to metallic loops and sub-loops?

A potential market for wholesale unbundled access would be concerned with retail access to voice and data services from a fixed location, particularly access to internet service. The EC has examined the market for retail internet access, consisting of the transmission to and from the end-user's location, and the provision of internet services. It has noted that three types of internet access are available: narrowband dial-up, DSL, and dedicated access.

The retail market for broadband internet access is not considered by the EC to be susceptible to ex ante regulation¹⁷. However, the wholesale inputs needed to offer

¹⁶ Section 4.2.1 of the Commission Staff Working Document Public consultation On Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services (second edition) 28.06.06 SEC(2006) 837.

¹⁷ The retail market for narrowband access is reviewed in Public Consultation 01/07 - Retail Fixed Markets.

broadband services should be considered. In order to offer retail broadband access to an end-user, an operator needs a transmission channel to the end user location. This could potentially be provided by building fibre access direct to the end-user or by leasing existing connections.

In Gibraltar, as in most EU countries, the main means of addressing the end user market is over the local access network loops of the public telephone network. A market entrant could enter the market to supply retail services by using the incumbent's unbundled local loops.

The Authority has considered whether a market for unbundled local loops would be distinct from a market for wholesale broadband access, and from dedicated direct access.

It is the Authority's preliminary view that a market for unbundled local loops would be a distinct product market because:

- Neither wholesale broadband access nor dedicated capacity would be a close substitute in terms of demand. Wholesale broadband access does not allow the provision of the range of services which could be offered over an unbundled local loop. At the wholesale level, a customer for unbundled local loops would not be able to offer a similar service to end-users via leased lines. Experience in other jurisdictions indicates that the price structure of dedicated capacity would mean that customers would not switch to leased lines if there were a small increase in the price of unbundled local loops
- Considering supply, an operator which supplied unbundled local loops could switch to supply wholesale broadband access, but this would mean that investment associated with unbundling would be lost, and so the switch would be unlikely. This is because the level of investment required in unbundled local loop is considerable compared to investment in wholesale broadband access, and much of the investment is sunk costs. An operator which supplied unbundled local loops would not switch to supply leased lines due to the investment and time needed to construct alternative infrastructure, and again because of the loss of sunk investment in unbundled local loops.

Proposal: there is a separate market for wholesale unbundled access to metallic loops and sub-loops

Is there a separate product market for wholesale broadband access?

In order to offer a wholesale broadband access product, an undertaking (typically the incumbent) installs a high speed access link to a customer's premises, then makes this access link available to a third party, so that they can offer high speed services to customers. At present, the product is mainly the supply of bitstream, although the EC makes clear that any other wholesale access which offers similar transmission of broadband data in both directions can be considered part of the same market. Wholesale broadband access is provided mainly over the public telephone network, but may include other networks such as the ATM or IP backbone networks.

Wholesale broadband access is the corresponding wholesale product for DSL services. A key element of the market is that new entrants should be able to offer their own value-added services. This means that resale would not be considered as a wholesale broadband access product because it does not allow the new entrant to differentiate its product from that of the incumbent¹⁸. The distinction between wholesale broadband access and resale depends on the level of control of the new entrant, and this is generally determined by the point at which traffic is handed over, and so constrains how technical parameters are defined. If the new entrant is not allowed by contract, or is not technically capable, of changing the technical features or profile then the product is commercially similar to that of the incumbent, and is classed as resale.

The Authority has considered whether wholesale broadband access may be a substitute for unbundled access. The main technical difference between the two is the provisioning of the DSLAM¹⁹. In the case of unbundled or shared access, the new entrant operates the DSLAM while for bitstream, the DSLAM is operated by the incumbent. This difference is in the point at which traffic is handed over between operators. This affects the level of investment needed to enter the market, as well as the degree of service differentiation which the operator is able to offer its customers. Unbundled access entails higher investment, and greater control over the technical parameters of the retail product, than bitstream, because the unbundled access operator is responsible for a greater part of the product.

While a customer for wholesale broadband access may be able to fulfil its service demand by switching to unbundled access, and may be able to offer a similar retail product based on wholesale broadband access and unbundled access, the two are not substitutes in terms of supply. The investment costs associated with unbundled access are considerably higher than for wholesale broadband access, because the new entrant invests more in its own network.

The Authority therefore proposes that there is a separate market for wholesale broadband access. This market does not include broadband access defined as resale.

Proposal: a market should be defined for wholesale broadband access

Is there a separate market for dedicated connections and capacity?

In its original Recommendation on Relevant Product and service markets, the EC indicated that NRAs should consider three leased line markets as potentially susceptible to ex ante regulation. These were:

- Retail leased lines in the minimum set
- Wholesale terminating segments of leased lines

¹⁸ ERG Common Position on wholesale Bitstream access, ERG (03) 33rev2 amended 25.05.05.

¹⁹ Digital Subscriber Line Access Multiplexer receives signals from multiple customer DSL lines and connects to high speed backbone.

- Wholesale trunk segments of leased lines.

With regard to retail leased lines in the minimum set, there is a specific obligation in Regulation 15 of the Communications (Universal Service and Users' Rights) Regulations 2006²⁰ (the Universal Service Regulations) that a minimum set of leased lines should be made available on standard conditions and standard prices throughout a jurisdiction. This is to do with universal service provision, and is not derived from an assessment of competitive conditions in the market. However, the Authority's approach takes into account existing non-SMP regulation, and so assumes that the requirement to provide a minimum set of leased lines will continue.

It should be noted that in the latest consultation, the EC does not consider that the retail leased line market is likely to be susceptible to ex ante regulation, and instead advises that NRAs should consider the wholesale market.

Leased lines are generally used by businesses which need high quality and high speed always-on internet access, and/or run critical applications. A business would typically choose a leased line for security, and for guaranteed quality of service supported by a service level agreement. A leased line may also be used to provide dedicated point-to-point services, for example to link offices.

The retail market for leased lines is where an operator offers leased line capacity direct to an end-user. This could be a business which uses the facility for internet access, or it could be another operator which leases capacity for its own use.

In Gibraltar at present, there is no wholesale market for leased lines. A potential wholesale market for leased lines would involve an operator (fixed or mobile) purchasing leased line capacity from another operator in order to construct, or extend its own network and so offer service to end-users.

In considering the nature of a potential wholesale leased line market in Gibraltar, the Authority has already proposed that a potential market for dedicated connections and capacity would not form part of the markets for unbundled local loop, or wholesale broadband access. While the market for dedicated connections may be an alternative to unbundled local loops in some circumstances, differences in function and in pricing indicate that dedicated connections are not a close substitute for unbundled local loops, and so should not be defined as part of the same product market.

A customer who purchased leased line capacity would not be likely to consider wholesale broadband access as a close substitute, because WBA would not offer the service reliability or guaranteed bandwidth provided by a leased line.

Taking a broader view of a potential market for dedicated connections and capacity, the Authority has examined the extent to which capacity may be available over managed data services, which could be functionally equivalent to a traditional leased line. For example, in Gibraltar, customers can connect to the alternative operator's internet service by ethernet (if they are physically close). It is the Authority's view

²⁰ Communications (Universal Service and Users' Rights) Regulations 2006, Communications Act 2006.

that ethernet connection in this instance offers similar functionality to a leased line, and should be considered as part of the same product market.

The Authority is aware that ethernet services can be contended and may under perform in periods of congestion in a way which is not likely with leased lines. Further, the pricing of ethernet is typically significantly less than the price of a leased line. However, in Gibraltar, a customer using leased lines for internet access could switch to use ethernet connection, and vice versa. It should be noted that this conclusion applies to ethernet when it is used as if it were a leased line – where the network is configured on a point-to-multipoint basis as opposed to the point-to-point typical of leased lines, then the products would not be sufficiently similar to be considered as part of the same market.

The Authority has considered whether leased lines of different bandwidths should fall within the same product market. The bandwidths currently available in Gibraltar are 64kbit/s and multiples²¹, and 1 and 2 Mbit/s²². Higher bandwidth leased lines are available on request, but most customers use 2Mbit or under²³. In terms of functionality, it is generally possible to use multiples of lower capacity leased lines as substitutes for higher capacity leased lines, and higher capacity lines could meet the functional requirements of a low capacity user.

The Authority has examined the pricing structure of leased lines of different capacity, and notes that there is a chain of substitution, such that a customer would be able to purchase multiples should there be a small but significant price increase in the price of one level of capacity by a hypothetical monopolist. This suggests that all leased lines up to 2Mbit/s fall within the same product market.

The EC recommends that there may be different competitive conditions for different segments of the leased line market, particularly between the trunk and terminating segments. This distinction is not relevant for Gibraltar because of its geographical size and concentrated population.

Proposal: there should be a single market for wholesale leased lines

2.4 Geographical market

According to established case law, the relevant geographic market comprises an area in which the conditions of competition are similar across the area, and which can be distinguished from neighbouring areas where the conditions of competition are different.

The Authority has considered the extent to which the possibility of contracting a leased line in Spain and delivering via microwave link to Gibraltar would indicate a broader geographical market. While this is a possibility for Gibraltar-based companies, the take-up is minimal.

²¹ 128, 256 and 512 kbit/s.

²² Response to data request, Gibtelecom.

²³ Gibtelecom website, www.gibtele.com

The Authority believes that the geographic market for all wholesale fixed communications services is Gibraltar. There are no appreciable differences in the conditions of demand or supply within Gibraltar, and similar services are offered on the same terms and conditions throughout.

Proposal: the geographical market is Gibraltar

2.5 Preliminary markets to be defined

Summary of preliminary conclusions

The Authority proposes to define the following wholesale fixed communications markets:

- Call origination provided at a fixed location
- Call termination on individual networks
- Wholesale unbundled access (including shared access) to metallic loops and sub-loops (or equivalent)
- Wholesale broadband access
- Wholesale leased lines.

In all cases, the proposed geographical market is Gibraltar.

Q1: Do you agree with the proposed market definitions?

Please give reasons for your answer

3. Market Analysis

3.1 Methodology

Having defined the scope of the relevant product and geographic markets, the Authority must assess the level of competition within each market. An undertaking will be deemed to have SMP if it is in a position of economic strength affording it the power to behave independently to an appreciable extent of competitors, customers and ultimately consumers.

The Authority must now assess the current and prospective level of competition within each of these markets:

- Call origination provided at a fixed location
- Call termination on individual networks
- Wholesale unbundled access (including shared access) to metallic loops and sub-loops (or equivalent)
- Wholesale broadband access
- Wholesale leased lines.

The market analysis begins by considering market share. In the SMP Guidelines, it is clear that although a high market share alone is not sufficient to establish the possession of significant market power, it is unlikely that a firm will be dominant without a large market share. The SMP Guidelines note that:

"...very large market shares – in excess of 50% - are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position"²⁴.

It is important to consider the changes to market shares over time, as this will indicate trends in the market and will contribute to an assessment of whether or not the market may tend towards effective competition over the period of this review.

As large market shares are not in themselves sufficient to find SMP, the market analysis must also consider whether there are other factors which may contribute to, or offset, SMP.

3.2 Market analysis: the interconnection markets of call origination and call termination provided at a fixed location

Current situation

Call origination and call termination together form the interconnection facility needed to convey a call from the caller to the destination. There is currently no wholesale interconnection product available in Gibraltar although work has commenced on CPS.

²⁴ At paragraph 75.

This means that all of the call origination and termination activity in the market in Gibraltar is self-supply by Gibtelecom, where the wholesale elements of call origination and termination are used to provide a retail fixed calls service.

Gibtelecom therefore currently has 100% share of the market for call origination provided at a fixed location.

The nature of call termination is such that all operators have 100% market share of termination on their own networks – the call has to be terminated to the specific end-user to whom it is addressed. Gibtelecom therefore has 100% market share of calls terminated on its own network.

A major concern in the interconnection market has been the impact of Spain's non-recognition of Gibraltar's International Direct Dial code. One aspect of this is a historic Sender Keeps All agreement between Spain and Gibraltar which was forced by Spain at the time of the introduction of IDD in the 1970s. This agreement means that Gibtelecom derives no benefit from calls which originate in Spain and terminate in Gibraltar. Gibtelecom has estimated that the imbalance of traffic was around 12.5 million minutes in 2005²⁵.

The Authority notes that following the political trilateral discussions there has been progress in commercial negotiations between Gibtelecom and Telefonica which should resolve this issue.

Barriers to entry

The barriers to entry into the interconnection markets are associated with the incumbent's control of the fixed access network.

According to the Explanatory Memorandum accompanying the Relevant Markets Recommendation,

"...high structural barriers may be found to exist when the market is characterised by substantial economies of scale, scope and density and high sunk costs. Such barriers can still be identified with respect to the widespread deployment and/or provision of local access networks to fixed locations"²⁶.

Economies of scale generally refer to the cost advantage which a large-scale operator may have over a smaller operator in the situation where the marginal cost of production decreases as output quantity increases. Economies of scope refer to the potential efficiencies which may be gained through supplying a range of goods and services, while economies of density refer to potential efficiencies associated with supplying customers who are geographically concentrated.

²⁵ Gibtelecom reply to Q3, qualitative questions, wholesale fixed data request.

²⁶ Section 2.2(i) of the Commission's Recommendation Explanatory Memorandum of the public consultation on a draft Commission recommendation On Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services (second edition) 28.06.06 SEC(2006) 837.

Should an operator decide to enter the market via direct access, it would require significant investment in an electronic communications network. Most of this will be sunk costs, as such costs will not be recoverable if the entrant decides to, or is forced to, exit the market. Significant sunk costs create an asymmetry in the market. A potential entrant has to consider whether prices would be high enough to recover sunk costs.

Vertical integration

An organisation which is dominant at the wholesale level of a market has the opportunity to leverage market power into downstream markets. In the case of the interconnection market, a vertically integrated operator may be dominant in the interconnection markets and in the retail fixed calls and access markets.

A vertically integrated operator may enjoy efficiencies arising from its presence in the upstream and downstream markets. Further, a new entrant to the downstream retail market may be dependent on a wholesale input supplied by a vertically-integrated operator which is its competitor in the retail market.

Potential competition

The numbering issue has acted as a major constraint to competition in Gibraltar, and its resolution should offer an opportunity to move forwards. Given the size of the market in Gibraltar, it is unlikely that it would be an economic option to replicate access infrastructure. However, there may be other technological approaches to providing the necessary inputs for a retail calls service. Almost one third of international calls are currently provided by VoIP, which effectively bypasses the issue of wholesale call origination.

The Authority is in train with measures designed to introduce further competition to the retail calls market. The implementation of a regulatory obligation to enable other operators to offer a calls service using Gibtelecom's access infrastructure would involve the introduction of a wholesale call origination product.

All operators will always have 100% of the market for termination on their own networks. However, it is conceivable that other factors could come into play which would constrain an operator's ability to price independently. The Authority notes the experience in other jurisdictions, where an examination of Countervailing Buyer Power (CBP) has suggested that, in some circumstances, an operator's behaviour may be constrained. The Authority does not believe that CBP is a relevant issue in Gibraltar.

Overall, the Authority does not consider that the interconnection markets are likely to become competitive within the lifetime of this review.

3.3 Preliminary conclusions and SMP designation if appropriate

Gibtelecom has 100% of the market for call origination and call termination on its own network. The Authority has assessed prospective competition and has assessed factors which may qualify Gibtelecom's ability to price independently of any

competitors. The conclusion is that Gibtelecom will remain dominant in this market for the lifetime of this review.

The Authority proposes that Gibtelecom should be designated with SMP in the market for wholesale call origination for a fixed location and in the market for call termination on its own network.

Q2: Do you agree with the market analysis and proposed SMP designation of the interconnection markets?

Please give reasons for your answer

3.4 Market analysis: wholesale unbundled access (including shared access) to metallic loops and sub-loops

Current situation

There is currently no wholesale unbundled access product available in Gibraltar even though a RUO has been produced. The only operator which could potentially offer an unbundled local loop product in Gibraltar is Gibtelecom, and Gibtelecom therefore has 100% of the potential market.

Barriers to entry

Barriers to entry into the market for unbundled access are associated with control of the access network.

The Authority has already noted the barriers to entry associated with economies of scale scope and density in the access network, and these would constitute barriers to entry for the provision of unbundled local loops. Absent regulation, it is not likely that a wholesale product enabling local loop unbundling would be made available.

Vertical integration

An organisation which is dominant at the wholesale level of a market has the opportunity to leverage market power into downstream markets. In the case of the wholesale unbundled access market, the relevant downstream market would be the provision of retail internet services, and possibly voice calls services.

A vertically integrated operator may enjoy efficiencies arising from its presence in the upstream and downstream markets. Further, a new entrant to the downstream retail market may be dependent on a wholesale input supplied by a vertically-integrated operator which is its competitor in the retail market.

Potential competition

The Authority has noted interest in introducing an unbundled access product in Gibraltar, but this is at a very early stage and it is difficult to judge its potential impact. It is most likely that such a service would be purchased by an ADSL service

provider seeking to extend its service offering, and to increase its control over the products it could offer.

The Authority does not believe that competition is likely to come from an entrant replicating Gibtelecom's fixed access network. It is suggested that potential competition is more likely to come from an entrant employing an alternative technology which could be used to offer broadband access. The most immediate option is probably WiFi/WiMax. However, it should be noted that unbundled local loops are often used to offer service bundles of broadband plus narrowband voice, and WiFi/WiMax at present is less likely to be used in this way.

Countervailing Buyer Power

The Authority has considered whether CBP is an issue in this market. A potential constraint on a supplier's market power is the strength of buyers, if for example a purchaser was sufficiently important to its supplier to influence the price it was charged. In Gibraltar, a purchaser is not able to switch to suppliers of other access products, so the potential exercise of CBP is not relevant.

3.5 Preliminary conclusions and SMP designation if appropriate

Gibtelecom has 100% of the potential market for the supply of wholesale unbundled access. The Authority has assessed prospective competition and has assessed factors which may qualify Gibtelecom's ability to price independently of any competitors. The conclusion is that Gibtelecom will remain dominant in this market for the lifetime of this review.

The Authority proposes that Gibtelecom should be designated with SMP in the market for wholesale unbundled access (including shared access) to metallic loops and sub-loops.

Q3: Do you agree with the market analysis and proposed SMP designation in the market for wholesale unbundled access?

Please give reasons for your answer

3.6 Market analysis: wholesale broadband access

Current situation

Wholesale broadband access products are wholesale products bought and sold by electronic communications operators (not by end-users) in order to offer DSL services.

Before considering the wholesale market, it is important to establish the characteristics of the retail broadband market, as demand in the wholesale market will be derived from retail demand. In Gibraltar, there are two Internet Service Providers (ISPs), Sapphire Networks and Gibconnect. The latter is owned by the

incumbent. At the end of Q2 2006, there were just over 4,800 ADSL subscribers²⁷. This represents an increase of over 60% from the previous year, and although part of the increase is due to migration from dial-up ISDN, a considerable part is down to new broadband subscription. Gibconnect has approximately 88% of the retail ADSL market.

At present, Sapphire Networks resells Gibtelecom's ADSL product. As discussed when defining a wholesale broadband access market, resale is not equivalent to a bitstream type product, and is not part of the same market.

No other operator is currently in the position of being able to offer a wholesale broadband access product, and so Gibtelecom has 100% share of this potential market.

Barriers to entry

Generally, barriers to entry in the retail broadband market are relatively low, in terms of investment and time required to offer a retail service. However, entry to the retail market depends on the availability of a wholesale product on appropriate terms and conditions. If a wholesale product were not available, entry at the retail level would entail replicating an access network to ensure end-to-end connectivity. The networks needed to provide equivalents to a wholesale broadband access product are characterised by high entry barriers, particularly economies of scale, scope and density, high sunk costs, and inability to replicate infrastructure.

An operator which wished to offer a wholesale broadband access product in Gibraltar would need to be able to replicate some or the entire public telephone network. The time taken to do this, and the investment required, suggests that this is not likely in the timeframe of this review.

Vertical integration

An organisation which is dominant at the wholesale level of a market has the opportunity to leverage market power into downstream markets. In the case of the wholesale broadband access market, the relevant upstream market would be that associated with the supply of wholesale broadband inputs required to offer a retail DSL service downstream.

A vertically integrated operator may enjoy efficiencies arising from its presence in the upstream and downstream markets. Further, a new entrant to the downstream retail market may be dependent on a wholesale input supplied by a vertically-integrated operator which is its competitor in the retail market.

Potential competition

The Authority has considered whether different technologies could be used to offer similar services to wholesale broadband access. This means considering how inputs

²⁷ Both ISPs also offer narrowband dial-up internet access – the review of WBA is concerned only with broadband.

could be supplied which would allow a new entrant to offer a retail broadband service to end-users.

A key technological development which could impact on this market is the increased use of WiMax. This facilitates wireless broadband access, usually from a laptop or PDA. Generally, WiMax extends the coverage of WiFi, which is associated with "hotspots" – geographically limited access points – but as more access points are created, so network coverage increases. A new entrant could consider using WiMax to reach the end-user, which would be an alternative to purchasing wholesale broadband access.

At present, there is no WiMax in Gibraltar. Although interest has been expressed in introducing this service, it is the Authority's view that, given the uncertainty concerning its introduction in terms of timing, pricing, extent of the service and so on, it cannot be considered as potential competition in the wholesale broadband access market at this time. However, because of the potential impact, the Authority will keep the introduction of WiMax under review.

Another potential alternative to wholesale broadband access may be the use of 3G mobile to offer broadband internet services. On a technical level, this could offer similar service levels. However, as far as the Authority is aware, there is no plan to offer 3G service in Gibraltar. Again, should such a service become available, the Authority would review its conclusions regarding WBA.

Countervailing Buyer Power

The Authority has considered whether CBP is an issue in this market. A potential constraint on a supplier's market power is the strength of buyers, if for example a purchaser was sufficiently important to its supplier to influence the price it was charged. In Gibraltar, a purchaser is not able to switch to other suppliers of wholesale broadband access services, so the potential exercise of CBP is not relevant.

3.7 Preliminary conclusions and SMP designation if appropriate

Gibtelecom has 100% of the market for wholesale broadband access. The Authority has assessed prospective competition and has assessed factors which may qualify Gibtelecom's ability to price independently of any competitors.

Proposal: Gibtelecom should be designated with SMP in the market for wholesale broadband access

Q4: Do you agree with the market analysis and proposed SMP designation in the market for WBA?

Please give reasons for your answer

3.8 Market analysis: wholesale leased lines

Current situation

There is currently no wholesale market for leased lines in Gibraltar. In the retail market, customers can buy leased lines from Gibconnect, which is a wholly owned subsidiary of the incumbent. It is also possible to connect to Sapphire Networks by a direct ethernet connection, and as was discussed earlier in this review, this offers similar functionality to a leased line.

According to operators, most leased line use in Gibraltar is for internet access, though there is some use, particularly in the finance and gaming sectors, of leased lines to guarantee critical applications.

The Authority has examined the retail market for leased lines, which although not considered susceptible to ex ante regulation, indicates the type of wholesale demand which may be derived were such a product available. The retail market has shown a decline in the use of lower capacity leased lines (64kbit/s) and an increase in 2Mbit/s lines. Between Q1 2004 and Q2 2006, the number of 64kbit/s circuits used within Gibraltar fell by 45%, and the number of 64kbit/s international circuits fell by 60%. During the same period, the number of 2Mbit/s circuits used within Gibraltar increased by 91%, and for international connection by 76%²⁸. There is therefore a clear trend towards higher capacity connection at the expense of lower capacity.

In calculating the market share, the Authority has used revenue as a measure. This is because the Authority proposes that ethernet connection, when used in a similar way to a leased line, forms part of the same market. However, data on ethernet links is not available in a comparable form, so revenue is judged to be the most appropriate measure. On this basis, Gibtelecom has 87% of the retail market for dedicated connections and capacity, and Sapphire has 13%.

In a potential wholesale market for dedicated connections and capacity, Gibtelecom has close to 100% market share.

Barriers to entry

It is the Authority's view that high barriers to entry persist in the creation of a wholesale market for leased lines in Gibraltar. Gibtelecom has a market share of 87% in the retail market, and this assumes that ethernet connection is considered comparable to leased lines. If ethernet is excluded, then Gibtelecom's share of the retail leased line market would be 100%.

The provision of a wholesale leased line product depends to some extent on the existence of an access network. As noted earlier, Gibtelecom achieves economies of scale, scope and density because of its control of the access network. An operator which wished to enter the market with a wholesale leased line product would need to be able to replicate some elements of the access network, and the required time and investment in sunk costs makes this very unlikely.

²⁸ Response to data request, Gibtelecom.

Potential competition

It is unlikely that a new entrant would enter the traditional leased line market, either at a retail or a wholesale level, by replicating some of the fixed access network.

Potential competition is most likely to come from the provision of other types of managed data services which offer similar functionality to leased lines. As discussed earlier, in Gibraltar this is currently direct connection by ethernet. The Authority is aware of the limitations of the current ethernet option, notably that it is restricted geographically. However, it is conceivable that a retail service could be extended.

The Authority does not believe that a wholesale service is likely based on the current ethernet service. There would be no rationale for Sapphire to offer excess capacity to another operator, nor to extend their network with that in mind. The Authority therefore suggests that ethernet is offering some competition in the retail market, but that this is limited. It will not be a means of developing a wholesale market.

There is currently no merchant market for wholesale leased lines in Gibraltar, and it is the Authority's view that, absent regulation, this situation will continue.

Countervailing Buyer Power

GRA has considered whether CBP is an issue in this market. A potential constraint on a supplier's market power is the strength of buyers, if for example a purchaser was sufficiently important to its supplier to influence the price it was charged. In Gibraltar, in the absence of a wholesale leased line market, the potential exercise of CBP is not relevant.

3.9 Preliminary conclusions and SMP designation if appropriate

Gibtelecom has 100% of the potential market for wholesale dedicated capacity and connections. The Authority has assessed prospective competition and has assessed factors which may qualify Gibtelecom's ability to price independently of any competitors. The conclusion is that Gibtelecom should be designated with SMP in the market for wholesale leased lines.

Proposal: Gibtelecom should be designated with SMP in the market for wholesale leased lines.

Q5: Do you agree with the market analysis and proposed SMP designation in the market for wholesale leased lines?

Please give reasons for your answer

4. Proposed SMP Obligations

4.1 Competition problems in the wholesale fixed markets

In considering the implications of an undertaking's dominance in a market, the EC notes that:

"dominance is a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers"²⁹.

It should be noted that the market review process is not concerned with whether or not there has been a demonstrable abuse of a dominant position. The forward-looking approach recommended by the EC examines the dynamic characteristics of a market, and considers remedying instances of ineffective competition. The concern is therefore with the dynamics of the market, and not with the behaviour of any particular undertaking.

In a market which is not effectively competitive, an undertaking which is dominant has the potential ability to influence a range of competition parameters, such as prices, innovation, output and the variety or quality of goods and services. Absent regulation, a dominant firm would rationally have an incentive to raise prices above costs, as there would be insufficient competitive pressure to prevent this.

In addition, a firm which was dominant in an upstream market could leverage this market power in the closely related downstream markets. In the wholesale fixed markets, potential vertical leverage could involve an undertaking which was dominant in the wholesale market – that is, which controlled the wholesale inputs required to offer a retail service – using its dominance to affect competitive conditions in the related retail market.

As well as being able to leverage power vertically from a wholesale market into a downstream retail market, a firm which was dominant in one market could attempt to leverage power horizontally into a related market. In the fixed wholesale markets, horizontal leverage could include, for example, leverage from the wholesale leased line market into the broadband access market.

The market analysis which has been carried out in Gibraltar concludes that Gibtelecom should be designated with SMP in the wholesale markets for call origination, call termination, wholesale unbundled access, wholesale broadband access, and wholesale dedicated connections and capacity. The Authority is therefore obliged to consider how best to remedy the lack of effective competition in these markets.

²⁹ DG Competition Discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, Brussels, Dec 2005.

4.2 Principles in determining SMP obligations

Where a National Regulatory Authority (NRA) has made an SMP designation, it is obliged to impose an SMP obligation on the undertaking which has been found dominant. All NRAs have a suite of regulatory tools at their disposal. These are set out in the Access and Universal Service Directives which have been implemented in Gibraltar by the Act, the Access Regulations and the Universal Service Regulations.

Article 8 of the Framework Directive sets out the NRA's basic objectives, such that the NRA is required to:

- Promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services
- Contribute to the development of the internal market
- Promote the interests of the citizens of the European Union.

The NRA must ensure that the proposed obligation best addresses the problem it has identified, and must ensure that any SMP obligation is proportionate to the competition problem it intends to resolve. It is important that any proposed obligation constitutes the least possible burden on the undertaking to which it applies.

It should be noted that there is no recourse to competition law in Gibraltar. This means that the SMP obligations proposed must be sufficient in themselves to address competition problems.

4.3 SMP obligations proposed

The Act sets out the potential SMP obligations which can be imposed where the Authority finds that any undertaking has SMP. Regulations 10 to 14 of the Access Regulations implement Articles 9 to 13 of the Access Directive, and Regulations 14 to 16 of the Universal Service Regulations implement Articles 17 to 19 of the Universal Service Directive. The regulatory options which are relevant for this review of the wholesale fixed markets are:

- Network access
- Transparency
- No undue discrimination
- Cost recovery, including price control
- Cost accounting and accounting separation.

The Authority has considered regulatory options in light of its overall regulatory objectives, and in the context of the problems identified in the wholesale fixed markets. An assessment of regulatory measures is presented in Chapter 5.

Proposed regulatory SMP obligations are discussed under each of the relevant markets.

4.4 The interconnection markets: market for wholesale fixed call origination and market for wholesale fixed call termination

The Authority believes that the competition problems identified in the analysis of the markets for wholesale call origination and wholesale call termination should be addressed by ensuring that operators have access on fair and reasonable terms to the wholesale inputs necessary to offer retail products.

The Authority notes that the review of the retail fixed access market has proposed that Gibtelecom should be designated with SMP. Under Regulation 16 of the Universal Service Regulations an undertaking which has SMP for the provision of connection to, and use of, the public telephone network at a fixed location is required to enable its subscribers to access the services of any interconnected provider of publicly available telephone services.

This may be done:

- On a call-by-call basis by dialling a carrier selection code and
- By means of pre-selection, with a facility to override any pre-selected choice on a call-by-call basis by dialling a carrier selection code.

The Authority therefore proposes to impose the following obligations on Gibtelecom:

Access

Regulation 13 of the Access Regulations specifies the conditions under which an undertaking with SMP should meet reasonable requests for access.

The Authority proposes to impose an obligation on Gibtelecom to meet reasonable requests for access to, and use of, specific network elements and associated facilities as described in Regulation 13. These requests must be met in terms which are fair and timely.

Transparency

In accordance with Regulation 10 of the Access Regulations, the Authority proposes to oblige Gibtelecom to publish a Reference Interconnect Offer (RIO). The RIO should describe relevant offerings, and their associated terms and conditions, including prices. The Authority notes that the RIO is a document which evolves with changing market and technological developments. The RIO may therefore be subject to amendment and/or direction by the Authority.

The Authority proposes that Gibtelecom should be obliged to notify the Authority 60 days in advance of changes to terms and conditions, including prices.

The Authority proposes that Gibtelecom should be obliged to publish changes to terms and conditions 30 days in advance of implementation. As regards tariffs, Gibtelecom will require 30 days notice to publish an increase in tariffs and 14 days for a reduction. Publication should be by prominent notice in the local press and on the company website.

Non-discrimination

In accordance with Regulation 11 of the Access Regulations, the Authority proposes that Gibtelecom should be obliged to apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services. Also, Gibtelecom should be obliged to provide services and information to others under the same conditions and of the same quality as it provides for its own services. This means that there should be no discrimination at a wholesale level between Gibtelecom's retail service arm and that of any other operator.

Proposal: Gibtelecom should be obliged not to unduly discriminate between customers.

Price control and cost accounting

In accordance with Regulation 14 of the Access Regulations, the Authority proposes to oblige Gibtelecom to ensure that its prices for wholesale call origination and wholesale call termination are cost-oriented. The Authority may require Gibtelecom to provide full justification for its prices, and may, where appropriate, require prices to be adjusted.

In order to support the cost-orientation obligation, the Authority proposes that Gibtelecom should be obliged to maintain cost accounting systems which produce appropriate information to demonstrate compliance with cost-orientation.

Accounting separation

The Authority considers that Gibtelecom should be required to make transparent its wholesale prices and terms and conditions. The Authority believes that an obligation of accounting separation is a necessary support for the obligations of transparency and non-discrimination, and helps ensure that there is no unfair cross-subsidy.

In accordance with Regulation 12 of the Access Regulations, the Authority proposes to oblige Gibtelecom to maintain separated accounts.

Q6: Do you agree with the proposed SMP obligations?

Please give reasons for your answer

4.5 Market for wholesale unbundled access

The Authority believes that the competition problems identified in the analysis of the market for unbundled access should be addressed by ensuring that operators have access on fair and reasonable terms to the wholesale inputs necessary to offer retail

products based on unbundled local loops. The Authority therefore proposes to impose the following obligations on Gibtelecom:

Access

Regulation 13 of the Access Regulations specifies the conditions under which an undertaking with SMP should meet reasonable requests for access.

The Authority proposes to impose an obligation on Gibtelecom to meet reasonable requests for access to, and use of, specific network elements and associated facilities as described in Regulation 13. These requests must be met in terms which are fair and timely.

Transparency

In accordance with Regulation 10 of the Access Regulations, the Authority proposes to oblige Gibtelecom to publish a Reference Unbundling Offer. The RUO should describe relevant offerings, and their associated terms and conditions, including prices. The content of the RUO is specified in Regulation 10(7). The Authority notes that the RUO is a document which evolves with changing market and technological developments. The RUO may therefore be subject to amendment and/or direction by the Authority.

The Authority proposes that Gibtelecom should be obliged to notify the Authority 60 days in advance of changes to terms and conditions, including prices.

The Authority proposes that Gibtelecom should be obliged to publish changes to terms and conditions 30 days in advance of implementation. As regards tariffs, Gibtelecom will require 30 days notice to publish an increase in tariffs and 14 days for a reduction. Publication should be by prominent notice in the local press and on the company website.

Non-discrimination

In accordance with Regulation 11 of the Access Regulations, the Authority proposes that Gibtelecom should be obliged to apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services. Also, Gibtelecom should be obliged to provide services and information to others under the same conditions and of the same quality as it provides for its own services.

Proposal: Gibtelecom should be obliged not to unduly discriminate between customers.

Price control and cost accounting

In accordance with Regulation 14 of the Access Regulations, the Authority proposes to oblige Gibtelecom to ensure that its prices for wholesale unbundled access are cost-oriented. The Authority may require Gibtelecom to provide full justification for its prices, and may, where appropriate, require prices to be adjusted.

In order to support the cost-orientation obligation, the Authority proposes that Gibtelecom should be obliged to maintain cost accounting systems which produce appropriate information to demonstrate compliance with cost-orientation.

Accounting separation

The Authority considers that Gibtelecom should be required to make transparent its wholesale prices and terms and conditions. The Authority believes that an obligation of accounting separation is a necessary support for the obligations of transparency and non-discrimination, and helps ensure that there is no unfair cross-subsidy.

In accordance with Regulation 12 of the Access Regulations, the Authority proposes to oblige Gibtelecom to maintain separated accounts.

Q7: Do you agree with the proposed SMP obligations?

Please give reasons for your answer

4.6 Market for Wholesale Broadband Access

The Authority has found Gibtelecom to have SMP in the market for Wholesale Broadband Access, and is therefore bound to impose obligations on the SMP operator. At present, there is no merchant market for WBA in Gibraltar, and the emphasis on the development of broadband access has been on access via the unbundled local loop. The Authority has encouraged this approach, as it is directed more towards infrastructure based competition.

However, given the finding of SMP, the Authority proposes to oblige Gibtelecom to offer a WBA product on terms which are fair, reasonable and non-discriminatory, in response to reasonable requests for access. The Authority proposes to implement this obligation in line with the following:

Regulation 13 – access

Regulation 10 – transparency

Regulation 11 – non-discrimination

Regulation 12 – accounting separation

Regulation 14 – price control and cost accounting obligations

Q8: Do you agree with the proposed SMP obligations?

Please give reasons for your answer

4.7 Market for wholesale leased lines

The Authority has found Gibtelecom to have SMP in the market for wholesale leased lines, and is therefore bound to impose obligations on the SMP operator. At present,

there is no merchant market for wholesale leased lines in Gibraltar. However, given the finding of SMP, the Authority proposes to oblige Gibtelecom to offer a wholesale leased line product on terms which are fair, reasonable and non-discriminatory, in response to reasonable requests for access. The Authority proposes to implement this obligation in line with the following:

Regulation 13 – access

Regulation 10 – transparency

Regulation 11 – non-discrimination

Regulation 12 – accounting separation

Regulation 14 – price control and cost accounting obligations

Q9: Do you agree with the proposed SMP obligations?

Please give reasons for your answer

5. Assessment of Regulatory Measures

The following table summaries the assessment of proportionality of the proposed measures.

Proposal	Gibtelecom	Market Entrants	Consumers	Overall
Option 1 – No Regulation	Positive impact on Gibtelecom: Gibtelecom would benefit from removal of all regulatory obligations and may use its market power to influence market to its advantage	Negative impact on competition: High barriers to entry reducing the possibility of potential competition	Negative impact on consumers: No constraint on Gibtelecom's pricing and quality of service	Positive impact on Gibtelecom; Highly negative impact for the development of competition and consumers
Option 2 – Minimal Regulation	Positive impact on Gibtelecom: Gibtelecom would benefit from reduced regulatory burden. May use power to set wholesale prices to influence retail markets	Negative impact on competition: Not sufficient to establish regulation. Difficult entry into wholesale market	Negative impact on competition: Gibtelecom will have no constraint on pricing and service delivery	Positive impact on Gibtelecom; Negative impact for the development of competition and consumers
Option 3 – Full Regulation	Negative impact on Gibtelecom: Increased regulatory burden therefore less influence over the market	Positive impact on competition: Lower barriers to entry and possibility of increased competition	Positive impact on consumers: Potential gains in quality and price by the introduction of competition	Negative impact on Gibtelecom but SMP obligations designed to minimise burden; Positive for market overall

Annex A: Consultation Questions

Q1: Do you agree with the proposed market definitions?

Please give reasons for your answer

Q2: Do you agree with the market analysis and proposed SMP designation of the interconnection markets?

Please give reasons for your answer

Q3: Do you agree with the market analysis and proposed SMP designation in the market for wholesale unbundled access?

Please give reasons for your answer

Q4: Do you agree with the market analysis and proposed SMP designation in the market for WBA?

Please give reasons for your answer

Q5: Do you agree with the market analysis and proposed SMP designation in the market for wholesale leased lines?

Please give reasons for your answer

The interconnection markets: market for wholesale fixed call origination and market for wholesale fixed call termination

Q6: Do you agree with the proposed SMP obligations?

Please give reasons for your answer

Market for wholesale unbundled access

Q7: Do you agree with the proposed SMP obligations?

Please give reasons for your answer

Market for Wholesale Broadband Access

Q8: Do you agree with the proposed SMP obligations?

Please give reasons for your answer

Market for wholesale leased lines

Q9: Do you agree with the proposed SMP obligations?

Please give reasons for your answer