

Wholesale Infrastructure Access Wholesale Broadband Access

Public Consultation

8th September 2022

C05/22

FOREWORD

On 10th April 2007, the Authority issued public consultation 02/07 regarding a review of Wholesale Fixed Markets, including the Wholesale Broadband Access and Wholesale Unbundled Access markets. Having considered the views of all respondents, the Authority issued Decision Notice 04/08 on 11th August 2008.

The electronic communications environment has evolved considerably since Decision Notice 04/08 came into effect and the Authority has opted to revisit the matter.

In instances where markets are deemed to be effectively competitive or will become effectively competitive within the lifetime of the review, the Authority shall not impose any Significant Market Power (SMP) obligations and any existing SMP obligations must be withdrawn.

Where markets are deemed to be uncompetitive, the Authority must consider the imposition of appropriate regulatory obligations on any undertaking which has SMP.

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1. INTRODUCTION

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.

The objective of any ex-ante regulatory intervention is ultimately to produce benefits for end-users by making retail markets effectively competitive on a sustainable basis. If the Gibraltar Regulatory Authority (the "Authority") finds that there is SMP, it is because 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 competition problems that can be caused by the party found to have SMP. If there is no SMP, the market is effectively competitive and does not require ex-ante regulation¹.

One of the aims of the regulatory framework is to progressively reduce ex-ante sector-specific rules as competition in the markets develops and, ultimately, to ensure that electronic communications markets are governed only by competition law.

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*).

In order to identify markets that may be susceptible to ex-ante regulation, the Authority will apply the three criteria test which considers three questions regarding barriers to entry, tendency towards competition and competition law.

This review considers an assessment of the following wholesale markets in Gibraltar:

- **Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location ("WIA")**

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.

- **Wholesale broadband access (“WBA”)**

Since the Authority first reviewed these markets², no operator has purchased any wholesale products or services, given that all operators have rolled out each of their networks on the basis of their own infrastructure. Therefore, no wholesale agreements are currently in place for the provision of the corresponding retail services in these markets.

The starting point for the identification of wholesale markets susceptible to ex-ante regulation should always be the analysis of corresponding retail market(s). In this case, the Authority considers the retail fixed access market through which retail broadband and telephony services can be provided.

National regulatory authorities should determine whether the underlying retail market(s) are prospectively competitive in the absence of wholesale regulation based on a finding of single or collective SMP, and thus whether any lack of effective competition is durable.

To this aim national regulatory authorities should consider existing market conditions, as well as expected or foreseeable market developments over the course of the next review period, in the absence of regulation based on SMP; this is known as the Modified Greenfield Approach.

If the underlying retail market(s) are prospectively competitive under the Modified Greenfield Approach, the national regulatory authority should conclude that regulation is no longer needed at wholesale level.

Retail Fixed Access

The retail fixed access market is concerned with the provision of high-quality access and connectivity services provided at a fixed location in Gibraltar. This market essentially covers the physical connection, normally from a home or business directly to the operators own network. This physical access connection is subsequently needed, together with the addition of certain equipment that provides a functional line, and ultimately supports the provision of retail fixed-line services such as voice calls and broadband internet access. Despite this however, the retail fixed access market is solely concerned with the provision of, or availability of such access in its simplest form, despite the subsequent services that may be obtained via the same line.

The Authority recently reviewed the retail fixed access market on 7th February 2022³ and established that no operator had SMP in this market. Consequently, all SMP obligations previously imposed on Gibtelecom were removed.

There are currently three operators providing retail fixed access services to their customers.

These are:

- Broadband (Gibraltar) Ltd trading as (Sapphire Networks and u-mee)

² Public Consultation 02/07, www.gra.gi

³ Public Consultation C01/22, www.gra.gi

- GibFibre Ltd
- Gibtelecom Ltd

As mentioned previously, none of the operators above are currently providing any WIA or WBA services to any of the other local operators. The Authority's preliminary view, therefore, is that no operator has SMP in the wholesale markets listed above and that this is not likely to change in the future. The SMP obligations currently imposed on Gibtelecom have not had any material impact on these markets in terms of promoting competition since 2008. These markets, therefore, do not fulfil the three criteria test and are therefore, not considered to be susceptible to ex-ante regulation.

Furthermore, all three operators are currently providing a full complement of retail services on the basis of their own physical network, including retail broadband services, and are all well established in the local market. The Authority deems the retail market to be currently competitive and also competitive on a forward-looking basis, even in the absence of ex-ante regulation in the upstream wholesale markets. It is the view of the Authority, therefore, that ex-ante regulation in the wholesale markets is not warranted.

The Authority, therefore, proposes to withdraw all existing SMP obligations currently imposed upon Gibtelecom in both the abovementioned wholesale markets.

The Authority invites all interested parties to provide comments on the questions set out in this public consultation (See Annex A). Written comments will be accepted no later than **10th October 2022**.

In order to promote further openness and transparency, the Authority will publish the names of all respondents and their responses on its website and will also 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.

1.1 LEGISLATION

Sections 38 to 40 of the Communications Act 2006 (the "Act") set out the procedures with regards to persons with SMP, market definition and market analysis and market power determinations respectively.

In particular, where markets are established as not effectively competitive, section 40(7) of the Act applies –

40(7) Where, as a result of a market analysis conducted pursuant to subsection (2)(b), the Authority determines that the relevant market is not effectively competitive, it shall-

(a) where no market power determination has previously been made in respect to that market or in respect to the person or combination of persons the Authority seeks to designate as having significant market power in that market-

(i) make a market power determination designating the person or combination of persons who have significant market power in that market; and

(ii) impose on that person or combination of persons such SMP obligations authorised by this Act as the Authority considers appropriate to impose on that person or combination of persons in respect to that market;

(b) where a market power determination has previously been made imposing SMP obligations in relation to that market and the Authority seeks to designate the same person or combination of persons as having significant market power in that market-

(i) make a market power determination confirming the previous designation;

(ii) maintain or amend, as the Authority considers appropriate, the SMP obligations imposed on that person or combination of persons under the previous designation in so far as such SMP obligations are authorised by this Act; and

(iii) impose on that person or combination of persons such further SMP obligations authorised by this Act as the Authority considers appropriate to impose on that person or combination of persons in relation to that market.

Given that this review assesses **wholesale markets only**, the corresponding wholesale SMP obligations are set pursuant to Regulations 10 to 14B of the Communications (Access) Regulations 2006 and concerns obligations of transparency, non-discrimination, accounting separation, access to civil engineering, obligations of access to and use of network facilities, price control and cost accounting obligations and functional separation.

Where markets are established as effectively competitive, section 40(5) of the Act applies

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40(5) Where, as a result of a market analysis conducted pursuant to subsection (2)(b), the Authority determines that the relevant market is effectively competitive, it shall –

(a) not impose any SMP obligations on any person or combination of persons in relation to that market;

(b) withdraw any SMP obligations which have been previously imposed on any person or combination of persons in relation to that market.

1.2 OVERVIEW OF PREVIOUS CONSULTATION

The Authority previously carried out a review of the WIA and WBA markets⁴ in 2007 and designated Gibtelecom as having SMP in both wholesale markets. This decision was also supported by the fact that Gibtelecom was the sole operator at the time, providing internet and telephony services to residential and business subscribers throughout Gibraltar.

During the consultation process, the Authority examined several key criteria, namely market shares, barriers to entry, vertical integration, potential competition and countervailing buyer power. As a result, the Authority concluded that there was a need for ex-ante regulatory

⁴ Public Consultation 02/07, Response to Consultation 14/07 and Decision Notice 04/08 – www.gra.gi

intervention in these markets and to this end, imposed upon Gibtelecom obligations of transparency, non-discrimination, accounting separation, access and price control and cost accounting.

1.3 EXISTING SMP OBLIGATIONS

The only operator designated with SMP in the two wholesale markets listed above is Gibtelecom.

Gibtelecom's current SMP obligations are as follows:

Wholesale Broadband Access

Transparency

1. If by 31 December 2009 other authorised network operators have not purchased products off the Reference Unbundling Offer (RUO), Gibtelecom shall make available in response to a reasonable request or requests thereafter, wholesale broadband access services in the form of a Reference Wholesale Broadband Access Offer (RWBAO) within 60 days of any such reasonable request or requests being made.
2. The RWBAO shall describe relevant offerings and their associated terms and conditions, including prices.
3. The terms and conditions applicable to wholesale broadband services in the RWBAO may be subject to amendment and/or direction by the Authority.
4. Gibtelecom shall notify the Authority at least 60 days in advance of changes to terms and conditions (excluding price decreases).
5. Gibtelecom shall notify the Authority at least 30 days in advance for price reductions.
6. Gibtelecom shall publish changes to terms and conditions (excluding price decreases) at least 30 days in advance of implementation.
7. Gibtelecom shall provide at least 14 days notice to publish a decrease in prices.
8. Publication shall include a prominent notice on the company's website.

Non-Discrimination

1. Gibtelecom shall not unduly discriminate between customers.
2. Gibtelecom shall apply equivalent conditions in equivalent circumstances to other authorised operators providing equivalent services.
3. Gibtelecom shall provide services and information to other authorised operators under the same conditions and of the same quality as it provides for its own services.

Access

1. Gibtelecom shall meet reasonable requests for access to, and use of, specific network elements and associated facilities as described in Regulation 13 of the Communications (Access) Regulations 2006.
2. Gibtelecom shall meet access requests made under 1 above using terms which are fair and processes which are timely.
3. In the event of a dispute between an entity and Gibtelecom regarding the reasonableness of the entity's request for access to wholesale broadband access services, the Authority shall intervene if either party writes to the Authority seeking intervention. The Authority shall determine whether the request is reasonable within a period of 60 days following receipt of a written request for intervention. The Authority shall be guided by Regulation 13(1) "Obligations of access to and use of specific network facilities" of the Communications (Access) Regulations 2006 when assessing whether an access request is reasonable.

Price controls

1. Gibtelecom shall ensure that its prices are cost oriented.

Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location

Transparency

1. Gibtelecom shall make available unbundled services and make public the terms and conditions in a Reference Unbundling Offer (RUO) by 1 January 2009.
2. The RUO shall describe relevant offerings and their associated terms and conditions, including prices, as specified in Regulation 10(7) of the Communications (Access) Regulations 2006.
3. The terms and conditions applicable to unbundled services in the RUO may be subject to amendment and/or direction by the Authority.
4. Gibtelecom shall notify the Authority at least 60 days in advance of changes to terms and conditions (excluding price decreases).
5. Gibtelecom shall notify the Authority at least 30 days in advance for price reductions.
6. Gibtelecom shall publish changes to terms and conditions (excluding price decreases) at least 30 days in advance of implementation.
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Access

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2. Gibtelecom shall meet access requests made under 1 above, using terms which are fair and processes which are timely.
3. In the event of a dispute between an entity and Gibtelecom regarding the reasonableness of the entity's request for access to wholesale (physical) network infrastructure access (including shared or fully unbundled access), the Authority shall intervene if either party writes to the Authority seeking intervention. The Authority shall determine whether the request is reasonable within a period of 60 days following receipt of a written request for intervention. The Authority shall be guided by Regulation 13(1) "Obligations of access to and use of specific network facilities" of the Communications (Access) Regulations 2006 when assessing whether an access request is reasonable.

Price controls

1. Gibtelecom shall ensure that its prices are cost oriented.

1.4 DESCRIPTION OF THE MARKETS IN GIBRALTAR

As previously indicated, wholesale fixed markets in Gibraltar have seen no take-up since 2008 as the alternative operators (Broadband (Gibraltar) Ltd and GibFibre), began providing retail services to customers via their own private fixed networks. Prior to this date Gibtelecom was the only operator with a fixed network substantial enough to provide retail fixed services to customers in every residence and business in Gibraltar and as such, amassed an almost 100% market share in all retail fixed markets, including broadband and retail local and international calls.

Retail fixed access services in Gibraltar have traditionally been provided by the incumbent operator, Gibtelecom, via traditional copper means. Gibtelecom's decision to later deploy both "Fibre to the Node" (FTTN) and "Fibre to the Home" (FTTH) technologies has now resulted in greatly improved end-to-end fibre performance for homes and businesses across Gibraltar.

Additionally, competition in this sector has developed gradually with two alternative operators, namely GibFibre and Broadband (Gibraltar) Ltd laying their own independent FTTH networks with an ever-increasing network reach in Gibraltar.

Broadband (Gibraltar) Ltd currently trades as two separate entities, namely "u-mee" and "Sapphire Networks" with u-mee providing a range of retail access and calls products to both residential and business customers whereas Sapphire Network's sole focus is providing retail access and telephony to larger corporate and enterprise customers who require strict service level agreements, flexible/bespoke solutions, increased connectivity and resilience as well as 24-hour support.

Sapphire Networks commenced offering fixed internet access services in July 2005 and in October 2014 started offering telephony services to the general public. Additionally, u-mee began offering internet access services in June 2015 and followed with telephony services shortly after in November 2015.

GibFibre also started offering a range of retail access products back in 2015 to both residential and business customers alike. GibFibre officially launched their telephony services in the beginning of 2017, meaning that consumers can now avail themselves of a range of competitively priced retail access and call services.

Consequently, end users are now enjoying a large range of electronic communications services from several operators, and at a variety of price points which range from high value, multi-service bundles to premium high-speed offerings. The effects of competition in the local telecoms market are now being felt more than ever with all operators demonstrating increased improvement and innovation.

In terms of retail fixed access market shares, as of 2021, GibFibre held 40%, Gibtelecom was at 38%, u-mee at 22% and Sapphire Networks at less than 1%⁵. Over the previous five years, the alternative operators managed to establish a sizeable foothold of the customer base and the Authority considered the market to be effectively competitive within the lifetime of the review.

⁵ Public Consultation C01/22 on Retail Fixed Markets – www.gra.gi

2. MARKET DEFINITIONS

2.1 METHODOLOGY

The Authority has a duty to define relevant markets under section 39 of the Act and this is a prerequisite before assessing whether a particular market is characterised by effective competition or should be subject to ex-ante regulation. This market definition should be appropriate to national circumstances, the purpose of which is to set the boundaries within which competitive dynamics are analysed, and systematically identifies direct and indirect competition constraints faced by providers of electronic communications network and services that are present in the relevant market in question. These procedures will also facilitate the subsequent market analysis procedure.

According to EU guidance, a relevant product market comprises of all products and/or services that are interchangeable or substitutable by the end-user due to the product's characteristics, prices and intended use. The overall objective, therefore, is to identify whether companies are capable of constraining each other's behaviour and preventing the others from behaving independently of their competitors, customers and ultimately consumers within the defined market.

Hypothetical Monopolist Test

The market definition process is about identifying the boundaries of a market in order to correctly apply ex-ante regulation and the process involves considering constraints on both the demand and supply sides of a market as well as their interaction and subsequent impact on an operator's price setting behaviour. Further to this, the existence of any demand and supply side substitution shall be determined through the hypothetical monopolist test. The test, used in competition analysis, seeks to define a market by establishing the closest substitute to the product being considered. The test identifies products as being substitutes by evaluating what would happen if there was a small but significant, lasting increase in the price of a given product, assuming that the prices of all other products remain constant.

Demand-side and Supply-side substitution.

Demand-side substitution is used to measure the extent to which consumers are prepared to substitute other services or products for the service or product under investigation, whereas supply-side substitution indicates whether suppliers other than those offering the product or service in question would switch their line of production in the immediate to short term, to offer the relevant products or services without incurring considerable additional costs. If there is a lack of current or potential substitutability on either the demand or supply-side of a market, the overall scope of the market will need to be more tightly defined. If substitutability or its potential exists, a broader definition may be appropriate. The competitive status of each relevant market can then be considered.

Three Criteria Test

In addition to identifying the boundaries of markets, a market may be considered to justify the imposition of regulatory obligations if all of the following criteria are met in accordance with section 40(7A) of the Act.

The three criteria are:

- high and non-transitory structural, legal or regulatory barriers to entry are present;
- there is a market structure which does not tend towards effective competition within the relevant time horizon, having regard to the state of infrastructure-based competition and other sources of competition behind the barriers to entry;
- applicable competition law alone is insufficient to adequately address the identified market failure(s).

The **first criterion** relates to the presence of high and non-transitory barriers to entry. It seeks to establish whether, when, and to what extent market entry is likely to occur, and to identify the relevant factors for a successful entry into an electronic communications market. From a static point of view, two types of barriers to entry are particularly relevant, namely, structural barriers and legal or regulatory barriers.

Structural barriers to entry derive from different cost or demand conditions that determine asymmetric conditions between incumbents and new entrants, impeding or preventing market entry of the latter. High structural barriers may also be found, for instance, when the market is characterised by absolute cost advantages or substantial economies of scale and/or network effects, capacity constraints and/or high sunk costs. Structural barriers can also exist where the provision of service requires a network component that cannot be technically duplicated or its duplication is not economically feasible.

Legal or regulatory barriers may have a direct effect on the conditions of entry and/or the positioning of operators on the relevant market. In regulated sectors, authorisation procedures, territorial restrictions, safety and security standards, and other legal requirements may deter or delay entry. Legal or regulatory barriers that are likely to be removed within the relevant time horizon of 5 years should not normally constitute a barrier to entry such as to fulfil the first criterion.

In innovation-driven markets characterised by ongoing technological progress, such as the electronic communications markets, barriers to entry may progressively become less relevant. In such markets, competitive constraints often come from threats exerted by potential innovative competitors that are not currently in the market. Therefore, the possibilities to overcome barriers to entry within the relevant time horizon should also be taken into consideration when identifying the relevant markets for possible ex-ante regulation.

The **second criterion** addresses whether a market structure tends towards effective competition within the relevant time horizon, having regard to the state and prospect of infrastructure-based competition and other sources of competition behind the barriers to entry. An analysis of effective competition implies that the market will become effectively competitive absent ex-ante regulation within the period of review, or will do so after that period, provided that clear evidence of positive dynamics in the market is observable already within the period of review.

Even when a market is characterised by high barriers to entry, other structural factors in that market may indicate that the market still tends towards effective competition within the relevant time horizon. In markets where an increased number of networks can be expected on a forward-looking basis, the application of this criterion entails primarily examining the state and likely future development of infrastructure-based competition.

The decision to define a market as susceptible to ex-ante regulation should also depend on an assessment of the sufficiency of competition law to address adequately the market failures identified. This **third criterion** aims to assess the adequacy of competition law to tackle identified persistent market failure(s), in particular given that ex-ante regulatory obligations may effectively prevent competition law infringements. Competition law based interventions are likely to be insufficient where frequent and/or timely intervention is indispensable to redress persistent market failure(s). In such circumstances, ex-ante regulation should be considered an appropriate complement to competition law. In general, the application of general competition rules in markets characterised by sustainable and effective infrastructure-based competition should be sufficient.

The application of these three cumulative criteria should limit the number of regulated markets within the electronic communications sector and thereby contribute to reducing ex-ante sector-specific regulation progressively as competition in those markets develops. Failure to meet any of the three criteria would indicate that a market is not susceptible to ex-ante regulation. Therefore, if the Authority determines that one or more of such criteria have not been met because of specific circumstances applying to Gibraltar, the Authority may determine from the outset, that the market concerned is not a market susceptible to ex-ante regulation. In particular, if the retail market(s) concerned are effectively competitive from a forward-looking perspective in the absence of ex-ante wholesale regulation on the corresponding wholesale market(s), this should indicate to the Authority that regulation is no longer needed at the wholesale level.

2.2 DELINEATION OF MARKETS

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

- Are WIA and WBA services in the same market?

WIA and WBA services are wholesale inputs used both directly and indirectly in the supply of a range of downstream wholesale and retail services, including (but not limited to) fixed telephone, broadband connectivity, leased lines services, to residential and business customers. WIA inputs can also be utilised by operators to supply downstream WBA or other wholesale services.

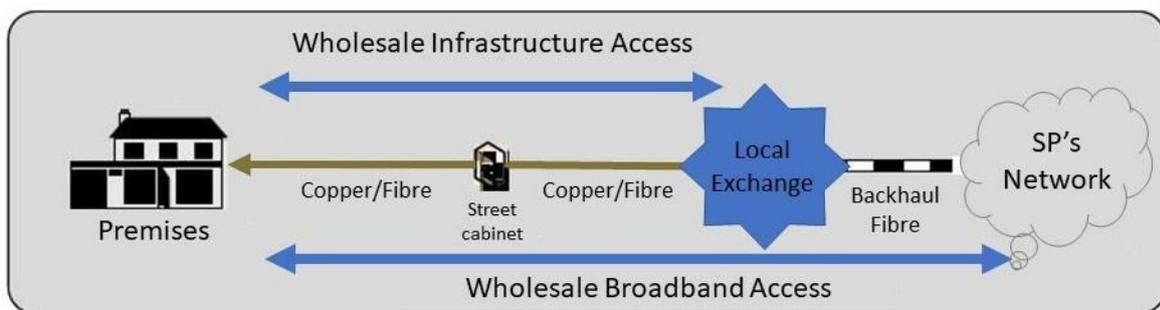
WIA provides a connection between the local serving exchange/access node (often referred to as the Point of Presence) and the customers premises, with this connection being either provided by the operator themselves or purchased/rented from another operator through

a wholesale agreement. For the purposes of this review and as per the previous market assessment⁶, the WIA market is limited to the market for wholesale unbundled local loops.

The WBA market lies downstream from the WIA market but upstream from the retail broadband (and other retail) markets (although WBA services can be used to support services other than broadband) and encompasses the rental of an active broadband connection between the customers premises and an aggregation point in a network.

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 following image shows typical WIA and WBA provision:



Key: SP = Service Provider i.e. the operator.

Since the Authority first reviewed these markets⁷, no operator has purchased any wholesale products or services, given that all operators have rolled out each of their networks on the basis of their own infrastructure. Despite the existence of a Reference Unbundling Offer (RUO) offered by Gibtelecom, no wholesale agreements are currently in place for the provision of the corresponding retail services in these markets.

For the reasons outlined above, the Authority considers that WIA and WBA are in separate markets.

Proposal: WIA and WBA are in separate markets.

⁶ Public Consultation 02/07, Response to Consultation 14/07 and Decision Notice 04/08 – www.gra.gi

⁷ *Ibid*

2.3 GEOGRAPHICAL MARKET

According to established case law⁸, 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 believes that the geographic market for all retail fixed communications access and calls services is Gibraltar in its entirety. This is so because the Authority has concluded that 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. In other words, in the case of electronic communications, Gibraltar's size does not lend towards the existence or possibility of the existence of geographical markets.

Proposal: The geographical boundary for all markets defined above is Gibraltar in its entirety.

2.4 PRELIMINARY MARKETS TO BE DEFINED

The Authority's preliminary conclusions with regards to the markets being defined are as follows:

- WIA and WBA are in separate markets.
- The geographic market is Gibraltar in its entirety.

The Authority therefore proposes to define the relevant markets as follows:

- **Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location**
- **Wholesale broadband access.**

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

⁸ Case 27/76 EU:C:1978:22 – *United Brands v Commission*

3. APPLICATION OF THE THREE CRITERIA TEST

Having defined the markets, it is now necessary to ascertain whether these markets may be susceptible to ex-ante regulation. This is done by applying the three criteria test as described in Section 2.1 above.

The three criteria are:

- high and non-transitory structural, legal or regulatory barriers to entry are present;
- there is a market structure which does not tend towards effective competition within the relevant time horizon, having regard to the state of infrastructure-based competition and other sources of competition behind the barriers to entry;
- applicable competition law alone is insufficient to adequately address the identified market failure(s).

3.1 WHOLESALE INFRASTRUCTURE ACCESS AND WHOLESALE BROADBAND ACCESS

The WIA market, which is concerned with the provision of a physical connection from a fixed location, includes homes and offices, and the connection could be used to access a range of retail services, such as voice calls and broadband services. As WBA services are a complementary service to WIA and the considerations to both markets are very similar, these shall be assessed jointly.

Criterion 1 – High and non-transitory structural, legal or regulatory barriers to entry are present.

Gibraltar is a small and densely populated jurisdiction with a high concentration of buildings within the majority of habitable areas. Given its small geographical size, alternative operators have managed to roll out their networks throughout most of Gibraltar within a relatively short amount of time. Since 2013, alternative operators (u-mee and GibFibre) began rolling out their FTTH networks and as of 2022, have achieved a significant foothold on the retail market, with a large number of customers switching from Gibtelecom (the traditional incumbent) to these newly competing operators.⁹

⁹ See Public Consultation C01/22 and Decision Notice C02/22 on Retail Fixed Markets – www.gra.gi

The market now boasts of three operators providing competitively priced retail services. Given the extensive roll out carried out within approximately seven years and the availability of a wide range of competing products and services all fostering consumer choice, it is the Authority's view that high and non-transitory structural, legal or regulatory barriers to entry are not present in both the WIA and WBA markets. Furthermore, given the recent trend, the Authority does not foresee the market undergoing any changes which would indicate the contrary.

The Authority therefore considers that the first criteria has not been met as high and non-transitory structural, legal or regulatory barriers to entry are not present.

Criterion 2 - There is a market structure which does not tend towards effective competition within the relevant time horizon, having regard to the state of infrastructure-based competition and other sources of competition behind the barriers to entry.

Throughout the last decade, the wholesale infrastructure access market has experienced zero sales between operators. New market entrants have decided instead, to roll out and develop their own networks, bypassing traditional barriers to entry and building their own access infrastructure with which to provide retail services to their customers, and thus omitting any wholesale relationships.

Gibraltar has a very unique set of parameters which have made the decisions on the part of the alternative operators, come to fruition in a relatively short timeframe. Gibraltar is extremely densely populated as a result of its small land mass and small number of residents, putting Gibraltar amongst the top five most densely populated nations in the world. To add to this, the landscape is largely dominated by a rock which runs from north to south throughout the territory, further compressing the population around its perimeter, meaning that for the purposes of infrastructure deployment, the density is increased.

Although deploying a network is in relative terms, a financially onerous task, the Authority has found that the incentives for doing so in Gibraltar, despite the expense, do still exist. For example, relatively short distances need to be covered in order to access very densely populated areas and gain quick and efficient access to a relatively large percentage of the population.

The ability for the alternative operators to roll out their networks in a relatively short amount of time means that the WIA and WBA markets have been by-passed all together. Furthermore, in terms of the downstream retail markets, these have become fully competitive with competitors gaining a substantial amount of the market and providing a whole range of competing retail products¹⁰.

¹⁰ *Ibid*

The Authority is, therefore, of the view that the second criteria has not been met insofar as the market structure is effectively competitive within the relevant time horizon, having regard to the state of infrastructure-based competition.

Criterion 3 - Applicable competition law alone is insufficient to adequately address the identified market failure(s)

According to the Commission Recommendation on Relevant Markets¹¹, “*The decision to define a market as susceptible to ex-ante regulation should also depend on an assessment of the sufficiency of competition law to adequately address the market failures identified. Competition law based interventions are likely to be insufficient where frequent and/or timely intervention is indispensable to redress persistent market failure(s)*”.

Furthermore, the same recommendation states that, “*In general, the application of general competition rules in markets characterised by sustainable and effective infrastructure-based competition should be sufficient*”.

Taking into account the Authority’s assessment under the first two criteria, in which it has established that there are no high and non-transitory barriers to entry and that the market is tending towards competition, it is of the view that any significant market failures are unlikely to occur. The probability of the Authority’s intervention in this regard is very low and so it considers that the applicable competition law is sufficient to address any potential market failures.

With the above in mind, the Authority is of the view that the third criteria has not been met owing to the likelihood that competition law alone is sufficient to adequately address any potential market failure(s) that may arise.

¹¹ Commission Recommendation (EU) 2020/2245 of 18 December 2020 on relevant product and service markets within the electronic communications sector susceptible to *ex-ante* regulation in accordance with Directive (EU) 2018/1972 of the European Parliament and of the Council establishing the European Electronic Communications Code.

4. FURTHER CONSIDERATIONS

In addition to conducting the three criteria test above, the Authority has also considered other possible outcomes of this market review and the effect on both markets. One hypothetical scenario could result in all operators which have the ability to operate within the WIA and WBA markets being designated as having SMP. This outcome would ensure that entry into the market by a new operator would not be hindered by the lack of at least one SMP operator being obliged to enter into wholesale agreements in the WIA and WBA markets by way of SMP obligations of access.

However, the Authority has taken account of Commission Recommendation 2020/2245¹² which provides that “[W]hen carrying out a market analysis...the national regulatory authorities...should start the analysis from the retail markets. The assessment of a market should be done with a forward-looking perspective in the absence of regulation based on a finding of significant market power and starting from existing market conditions. The analysis should assess whether the market is prospectively competitive and whether any lack of competition is durable, by taking into account expected or foreseeable market developments.”¹³

In order to make a proper assessment, one must first examine the history of these markets and more importantly how they have been regulated in the past and what results have been achieved, if any. The review of the WIA and WBA markets was first commenced in 2007 and resulted in Gibtelecom being designated with SMP in both markets. At the time, the wholesale markets were non-existent and Gibtelecom was the only operator providing retail fixed telephony and broadband services to residential and business customers.

During the consultation process, the Authority examined several key criteria, namely market shares, barriers to entry, vertical integration, potential competition and countervailing buyer power. As a result of this, the Authority concluded that there was a need for ex-ante regulatory intervention in these markets and to this end, imposed upon Gibtelecom obligations of transparency, non-discrimination, accounting separation, access and price control and cost accounting.

At the time, given that Gibtelecom was the only provider and had absolute control of the retail markets, it was deemed appropriate to regulate the wholesale markets accordingly especially if there was an opportunity for other operators to enter the market and offer competitively priced products and services. During 2012 and 2013, GibFibre and u-mee were authorised to provide electronic communications services and started competing in the retail telephony and broadband markets. However, when it came to rolling out their networks, instead of requesting access from Gibtelecom, they deployed their own physical infrastructure and in doing so took full control over their own respective products and service provision.

¹² *Ibid*

¹³ *Ibid*, at Recital 22

This ultimately meant that, despite Gibtelecom being subject to the various SMP obligations mentioned above, both alternative operators chose not to engage in any wholesale activity either between themselves or with Gibtelecom. Furthermore, to this day, no operator has conducted any wholesale transactions in the WIA and WBA markets. Given the fact that Gibraltar already has three fibre networks covering the territory, it is the Authority's view that no existing or new operator will likely participate in these markets in the future unless market conditions change drastically.

If, as per the results of the three criteria test above, the Authority were to remove all regulation in both markets, the risk of disrupting the market conditions and competitive outcomes is considered to be minimal. This is because, since 2007, the Authority is not aware of any other alternative operator having shown any interest in entering these markets and providing competing services. As mentioned previously, the corresponding retail markets have now become effectively competitive and given the WIA and WBA market assessments, there is no reason to support the finding of dominance in these markets and consequently the imposition of SMP obligations. Moreover, given that the imposition of SMP on Gibtelecom has not had any beneficial effect on both markets, there is no reason to believe that imposing the same obligations on all operators will have a positive effect. On the contrary, the Authority believes that operators may find the imposition of SMP obligations to be burdensome, resource and financially intensive and in some cases disproportionate especially when the effects of these do not necessarily contribute to healthy and competitive markets.

The Authority therefore concludes that the market for wholesale infrastructure access (WIA) and wholesale broadband access (WBA) are not susceptible to ex-ante regulation and as such, the Authority will not be taking this analysis any further.

Q2: Do you agree that the market for wholesale infrastructure access (WIA) and wholesale broadband access (WBA) should no longer be subject to ex-ante regulation?

Please give reasons for your answer.

5. REMOVAL OF SMP OBLIGATIONS

With reference to the evidence presented in the analyses above, the Authority concludes there is no finding of dominance and that each market is considered to be effectively competitive.

Given these conclusions and considerations, the Authority does not deem it justifiable to mandate regulatory obligations on operators in the WIA and WBA markets. Therefore, pursuant to the provisions of section 40(5)(b) of the Act, the Authority proposes to withdraw all SMP obligations currently imposed on Gibtelecom in these markets.

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. Therefore, the Authority is proposing to withdraw the existing obligations within 30 calendar days following the publication of the final decision notice concerning these markets.

The Authority believes that this notice period is justified and sufficient to allow all stakeholders to make necessary arrangements for the new regulatory approach to the markets identified in this market review.

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.

ANNEX A: CONSULTATION QUESTIONS

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

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

***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.***

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