



GIBRALTAR REGULATORY
AUTHORITY

Wholesale voice call termination on individual mobile networks

Wholesale SMS termination on individual mobile networks

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CONTENTS

Executive Summary	1
1. Introduction	3
1.1 Scope of the review.....	3
1.2 Previous reviews	4
1.3 Market characteristics.....	5
2. Regulatory Background.....	7
2.1 European regulatory background.....	7
2.2 Gibraltar regulatory background	7
3. Market Definition	10
3.1 Methodology.....	10
3.2 Wholesale voice call termination on individual mobile networks.....	11
3.3 Wholesale SMS termination on individual mobile networks.....	12
3.4 Geographic market.....	16
3.5 Summary of preliminary conclusions	17
4. Market Analysis.....	18
4.1 Methodology.....	18
4.2 Competition assessment: wholesale voice call termination on individual mobile networks.....	19
5. Proposed SMP Obligations	22
5.1 Competition problems.....	22
5.2 Principles in determining SMP obligations	22
5.3 SMP obligations on wholesale mobile call termination.....	24

Executive Summary

The communications regulatory framework requires the Gibraltar Regulatory Authority (the Authority) to define relevant markets susceptible to *ex ante* regulation, appropriate to national circumstances in accordance with the market definition procedure outlined in the Framework Directive¹. In addition, the Authority 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 Authority 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.

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 Authority is obliged to impose obligations to remedy competition problems. SMP obligations are outlined in Regulation 10 to 14 of the Communications (Access) Regulations 2006⁴, (The Regulations).

Such obligations may include:

- Obligation of transparency
- Obligation of non-discrimination
- Obligation to meet reasonable requests for access
- Obligation of accounting separation
- Price controls and cost accounting.

The Authority has in this document set out how, on a preliminary basis, it has defined markets for wholesale call termination on individual mobile networks as susceptible to *ex ante* regulation, and has assessed those markets to see if there was evidence of market power.

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 of 9th October 2014 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 C(2014) 7174 final.

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 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; economies of scale and scope, infrastructure replication and countervailing buyer power.

There are currently two operators authorised to provide mobile services in Gibraltar. These are:

- Gibtelecom Ltd.
- Eazitelecom Ltd.

The Authority's preliminary view is that Gibtelecom and Eazitelecom have SMP in the markets for wholesale call termination on their individual mobile networks.

Gibtelecom and Eazitelecom have 100% market share in their mobile termination markets. The Authority has assessed prospective competition and has assessed factors which may qualify Gibtelecom's and Eazitelecom's ability to price independently of any competitors. The preliminary conclusion is that Gibtelecom and Eazitelecom will remain dominant in this market for the lifetime of this review.

The Authority has defined the following obligations as being appropriate, proportionate and justified in light of the market failures identified:

- Transparency
- Non-discrimination
- Access
- Accounting Separation
- Price controls and Cost Accounting.

The Authority has also in this document set out how, on a preliminary basis, it has defined markets for wholesale SMS termination on individual mobile networks as not susceptible to *ex ante* regulation. The SMS termination market did not fulfil the 3 criteria test and following a market definition exercise, this market is considered to be competitive especially when considering all issues on a forward looking basis.

The Authority therefore proposes to withdraw all SMP obligations in that market previously imposed on Gibtelecom and Eazitelecom.

The Authority 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 **3pm on 16th July 2015**. Any questions relating to the clarification of issues will need to be sent within **two weeks** of the date of publication of this document.

In order to promote further openness and transparency, the Authority will publish the consultation responses on its website. 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 Scope of the review

The main purpose of a market review is to identify the competitive conditions prevailing in a market by assessing systematically the competitive constraints that are faced by undertakings in the market. A market review commences by defining a market, which is then analysed to assess the degree of effective competition. The competition assessment determines whether any undertaking is found to have Significant Market Power (SMP), which is held to be equivalent to the concept of dominance under competition law, and is defined as the ability to behave independently of competitors, suppliers and ultimately businesses and consumers in that market. If there is no SMP, the market is effectively competitive and does not require *ex ante* regulation⁵. If there is SMP, then the market is not effectively competitive and *ex ante* regulation should be imposed, at either the wholesale or the retail level (or both), to counteract the potential negative effects of the competition problems that can be caused by the SMP operator.

This review is concerned with two markets in Gibraltar:

- Wholesale voice call termination on individual mobile networks
- Wholesale SMS termination on individual mobile networks.

The wholesale market for voice call termination on individual mobile networks is included in the Recommendation⁶ as being susceptible to *ex ante* regulation.

The market for wholesale SMS termination on individual mobile networks is not included in the Recommendation. However, given that the Authority has previously reviewed this market and imposed SMP obligations, it will be reviewing this market with the ultimate aim of establishing whether SMP obligations need to be maintained, amended or withdrawn.

The European Commission has recently published a new Recommendation on Relevant Markets. The Recommendation defines four relevant markets as being susceptible to *ex ante* regulation. These are:

Market 1: Wholesale call termination on individual public telephone networks provided at a fixed location

Market 2: Wholesale voice call termination on individual mobile networks

⁵ *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.

⁶ Commission Recommendation of 9th October 2014 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 C(2014) 7174 final.

Market 3: a) Wholesale local access provided at a fixed location
b) Wholesale central access provided at a fixed location for mass market products

Market 4: Wholesale high-quality access provided at a fixed location.

The wholesale call termination market on individual mobile networks is included as Market 2 of the Recommendation.

The Authority's three criteria assessment of the wholesale SMS termination market is unchanged by the proposals in the Recommendation.

1.2 Previous reviews

The markets for wholesale mobile voice call termination and wholesale SMS termination were last reviewed in 2011⁷ and then again in 2012⁸ on the market entry of a third operator, Eazitelecom.

The Authority designated all three mobile operators at the time, Gibtelecom, CTS and Eazitelecom with SMP on their individual networks. It is important to note however that CTS exited the market in February 2013.

In the market for voice call termination, Gibtelecom was subject to obligations on transparency, non-discrimination, access, accounting separation and price control and cost accounting. Eazitelecom had obligations of non-discrimination, access and price control and cost accounting imposed. Both operators were subject to the same price control in the form of a glide path which concluded at the end of 2014.

In the market for SMS termination, the Authority imposed obligations relating to transparency, non-discrimination and price control and cost accounting on Gibtelecom; and obligations relating to non-discrimination and price control and cost accounting on Eazitelecom. Both operators were subject to the same price control in the form of a glide path which concluded at the end of 2014.

In July 2014, the Authority commenced a review of the wholesale mobile and SMS termination market. Following a response to consultation which was sent to the Commission and requests for further information⁹, the Authority withdrew both markets following concerns expressed by the Commission on the methodology of the price controls. Consequently, the Authority adopted provisional measures under the provisions of Article 7(9) of Directive 2002/21/EC¹⁰.

⁷ GRA, Decision Notice 10/11, 30 November 2011.

⁸ GRA, Decision Notice 07/12, 8 August 2012.

⁹ Case GI/2014/1657 and GI/2014/1658.

¹⁰ As amended by Directive 2009/140/EC of 25 November 2009.

1.3 Market characteristics

Retail market

It is not necessary for the Authority to precisely define a retail market for mobile services, as this market has never been considered by the EC to be susceptible to *ex ante* regulation, and there are no circumstances particular to Gibraltar which would lead the Authority to initiate such a review. However, it is important to understand the characteristics of the retail market in order to appropriately consider the definition and analysis of the corresponding wholesale markets.

Customers purchasing retail mobile services generally buy a cluster of services from one mobile operator, which usually includes voice calls, SMS and data. The mobile operator benefits from economies of scope, and the retail customer usually benefits from a reduction in transaction costs.

In Gibraltar, there are currently two mobile operators, Gibtelecom and Eazitelecom. Both operators offer 2G (GSM) and 3G (UMTS) mobile services, and each have close to 100% population coverage. Gibtelecom offers pre-paid and post-paid packages. Eazitelecom offers only pre-paid packages so far and is currently negotiating roaming agreements with international operators.

In terms of 4G, the Authority published a response to consultation and decision in March 2014 which outlined the licensing framework, the bands available for such a service together with the corresponding fees. Authorised operators are therefore required to provide 4G mobile services by October 2015.

Residents and visitors to Gibraltar can often receive signals from Spanish mobile operators and so can connect to Spanish networks from within Gibraltar. However, it is not possible to receive a reliable signal from Spanish networks across the whole of Gibraltar. This limited geographical availability means that it is unlikely that a mobile registered with a Spanish operator could be considered to be a good substitute for a mobile registered with a Gibraltar operator in the local market.

In addition, Moroccan mobile networks only cover minor parts of the territory, much less than Spanish networks, and so mobile users based in Gibraltar can similarly connect to these networks from within Gibraltar as well. This means that although Gibraltar has around 37,000 retail mobile subscriptions, the actual population using mobile services is larger. Users registered with Spanish networks may remain on their home networks while in Gibraltar, and their mobile use is not reflected in local roaming. Due to the minimal coverage of Moroccan networks, users registered with these networks will usually roam within Gibraltar.

Wholesale market

At present, both Gibtelecom and Eazitelecom offer wholesale call termination and SMS termination on their individual mobile networks. These operators have entered into agreements to supply these services and also have a number portability arrangement in case customers want to switch operators and keep their mobile number.

1.4 Structure of this document

Chapter 2 sets out the regulatory and legislative background to the reviews. Chapter 3 describes the approach to market definition, and puts forward the Authority's proposed market definitions. Chapter 4 analyses the markets defined to identify on a preliminary basis whether any undertaking(s) enjoys a position of SMP. Chapter 5 describes competition problems and proposes obligations, should there be a finding of SMP. Annex A summarises the consultation questions.

2. Regulatory Background

2.1 European regulatory background

The European regulatory framework for electronic communications networks and services is a set of five Directives¹¹:

- Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (the Framework Directive)¹²
- Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (the Access Directive)¹³
- Directive 2002/20/EC on the authorisation of electronic communications networks and services (the Authorisation Directive)¹⁴
- Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (the Universal Service Directive)¹⁵
- Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (the Privacy Directive)¹⁶.

2.2 Gibraltar regulatory background

These five European Directives were implemented in Gibraltar as part of the Communications Act 2006¹⁷ (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.

¹¹ As Amended in 2009.

¹² See footnote 1 above.

¹³ 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.

¹⁴ 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.

¹⁵ 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.

¹⁶ 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.

¹⁷ Communications Act 2006, Act No. 15, 2006. The latest regulatory reform package of 2009 was included in the Communications Act 2006 (Amendment) Regulations 2011, 26 May 2011.

In conducting a market review the Authority must take account of the SMP procedures in the Act, sections 38-41, (the SMP procedures) as well as the provisions dealing with co-operation with the European Commission, BEREC¹⁸ 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 Commission Recommendation of 9th October 2014 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC (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 will become effectively competitive within the lifetime of the review, any existing regulation must be withdrawn¹⁹. Where markets are deemed to be uncompetitive, the Authority must consider appropriate regulatory obligations on any undertaking which has SMP.

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(s) 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
- Where market power is identified, consideration of the appropriate SMP obligations in relation to that market.

The Authority is following the approach recommended by the European Commission, and has taken account of the various guidelines and recommendations published by the European Commission, as well as the experience of other European national regulatory authorities (NRA's).

The Recommendation has been taken into account when deciding which markets will be reviewed.

¹⁸ Body of European Regulators of Electronic Communications.

¹⁹ Please note that regulation at retail level may depend on regulation at the wholesale level.

It should however be noted that Gibraltar does not have competition legislation. This is important because the 3-criteria test in the Commissions guidelines²⁰, which tests whether a market is susceptible to ex-ante regulation, presumes the existence of competition legislation. The Authority therefore has to apply a slightly modified version of the 3 criteria test, effectively applying only the first two of the three criteria. Additionally, whereas undertakings in other Member States have access to both ex-ante and *ex post* means of addressing potentially anti-competitive behaviour, only *ex ante* means are available in Gibraltar. This needs to be considered when defining the necessary SMP obligations.

It is important to recognise that the wholesale 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 regulation²¹, except when that regulation is not in relation to an SMP obligation, or is related to another market.

The Authority is following the approach recommended by the European Commission, and has taken account of the various guidelines and recommendations published by the European Commission, as well as the experience of other European NRA's.

The European Commission has recently published a new Recommendation on Relevant Markets. The Recommendation defines four relevant markets as being susceptible to *ex ante* regulation. These are:

- Market 1: Wholesale call termination on individual public telephone networks provided at a fixed location
- Market 2: Wholesale voice call termination on individual mobile networks
- Market 3: a) Wholesale local access provided at a fixed location
b) Wholesale central access provided at a fixed location for mass market products
- Market 4: Wholesale high-quality access provided at a fixed location.

The wholesale call termination market on individual mobile networks is included as Market 2 of the Recommendation.

The Authority's three criteria assessment of the wholesale SMS termination market is unchanged by the proposals in the Recommendation.

²⁰ See section 2.7 below.

²¹ At the retail level, any existing regulation at the wholesale level will be included in the analysis.

3. Market Definition

3.1 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. Market definition is not an end in itself – it is concerned with identifying the boundaries of a market so that the competitive conditions can be assessed, and, if appropriate, *ex ante* regulation can be put in place, or maintained. According to the European Court of Justice²², 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.

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,²³ 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.

The Communications Act 2006 requires the Authority to take due account of all applicable guidelines and recommendations which have been issued by the European Commission relating to market identification and analysis²⁴. As per the Commission's guidelines on market analysis and the assessment of SMP, demand-side substitutability 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 substitutability indicates whether suppliers other than those offering the product or service in question would switch in the immediate to short term their line of production to offer the relevant products or services without incurring considerable additional costs.

The Commission's 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.

The Authority's proposed definitions for the wholesale markets for voice and SMS termination on individual mobile networks are set out in the next section.

²² 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.

²³ 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.

²⁴ Section 39(1).

3 Criteria Test

In addition to identifying the boundaries of markets, the Commission's guidelines require that NRAs apply a specific test, known as the 3 criteria test.

The Commission guidelines require that the answer to each of the three criteria questions should be 'yes'. If one is answered 'no' then the market does not qualify as a market susceptible to *ex ante* regulation.

The three criteria are:

- Is there the presence of high and non-transitory barriers to entry?;
- Does the market structure not tend towards effective competition within the relevant time horizon?; and
- Is competition law alone insufficient to adequately address the market failure(s) concerned?

As there is no competition legislation in Gibraltar, the Authority can only apply the first two criteria when determining which markets are susceptible to *ex ante* regulation.

3.2 Wholesale voice call termination on individual mobile networks

When a voice call is made to a mobile phone, whether from a fixed line or from a mobile on another network, the call passes from the originating operator to the terminating operator. The terminating operator charges a fee to the originating operator for connecting the call to its customers, which is known as a call termination charge. The call termination charge is paid by the originating operator and passed on to the caller in the retail price it pays for a call. Call termination charges may take the form of a simple per-minute rate or alternatively may take the form of a two-part charge, comprising a call set-up charge and a per-minute charge. Call termination charges may be separated into peak, off-peak and weekend rates or may alternatively take the form of a single, uniform rate. Call termination charges are normally expressed on a per-minute basis (aside from any set-up charge which is expressed as a flat fee) but charges are typically levied on a per-second basis, usually rounded up to the nearest second.

The EC's Explanatory Note recognises that call termination is the least replicable wholesale input used to provide retail services. When considering the demand side and the supply side, a call can only be terminated on the called individual's network, so that the market is effectively termination on an individual mobile network. The Authority considers that, although there are no demand or supply side substitutes for wholesale call termination on an individual mobile network, it may be that there are constraints arising from the retail level.

The Authority has therefore considered whether demand side substitution at the retail level constrains the pricing of wholesale mobile call termination. Demand side substitution would need to be taken into account if alternative means of receiving calls (such as by using a fixed line rather than a mobile, so that the fixed network would terminate the call). In its review of the retail fixed markets, the Authority

found that, at the retail level, a mobile call was not a substitute for a fixed call, and in the Authority's view, a fixed call is not a substitute for a mobile call. This finding indicates that fixed call termination could not provide a sufficient constraint on the pricing of mobile call termination from a demand or supply perspective.

The Authority notes also that, due to the Calling Party Pays (CPP) structure, the terminating operator can raise its prices without a constraint from either party to the call. In the Authority's view, this would be the case for any and all mobile networks. This means that, in the event of a further market entrant, it is likely that a similar conclusion would be reached on market characteristics.

Preliminary Conclusion: It is the Authority's view that relevant market is wholesale call termination on individual mobile networks. This market definition has not changed since the last notification in 2012.

3.3 Wholesale SMS termination on individual mobile networks

The SMS termination market has never been listed in the Recommendation on Relevant Markets as a market susceptible to *ex ante* regulation. NRA's may however, decide to regulate this market, in line with national circumstances, and by taking the utmost account of the Recommendation on Relevant Markets, which provides for a three criteria test to be followed when defining such a market. In fact, the Authority has previously provided justification for defining a separate SMS termination market as it believed that potential consumer harm needed to be addressed.

It is important to recognise that the markets in this review are already subject to regulation. In order to take this into account, the European Commission recommends the use of a "modified greenfield" approach, where markets are analysed absent regulation, except when that regulation is not in relation to an SMP obligation, or is related to another market.

As noted above the markets for termination of calls and messages by an operator on its own network is characterised by the fact that no substitutes exist, as a person connected to a particular network can only be reached through that specific network, other networks therefore cannot offer a substitute.

For the SMS market, however, the above analysis may no longer apply. This is because there now exist a number of alternatives to SMS which can be sent to a subscriber on his or her mobile device. These alternatives often replicate what the SMS service can do and then offer additional features and some are free to use. Therefore, whilst it is true that a mobile network operator still is the only provider that can terminate an SMS to customers on its network, other services providers can send similar and often advanced services (such as WhatsApp etc.) to customers on the mobile operator's network without incurring a termination fee.

Although the market developments described here are at the retail level, the availability of alternative retail services is likely to impose significant constraints on the pricing of SMS termination (as the termination charge is passed on to the originating customer by his or her network provider). The Authority is therefore incorporating the impact of these alternatives into its assessment of the wholesale market for SMS termination services in Gibraltar.

Demand Side substitution

Demand-side substitution enables NRA's to determine the substitutable products or range of products to which consumers could easily switch in case of a relative price increase. In determining the existence of demand substitutability, NRA's should make use of any previous evidence of consumers' behaviour.

Even though the Authority has not conducted a Small but Significant Increase in Price (SSNIP) test, it understands that there are other tests which can be carried out in order to determine the boundaries of the market and assessing competition between different products or services.

Given that this is the case, during the months of December 2014 and January 2015, the Authority conducted a mobile usage survey of 300 mobile customers in order to get a useful insight into the habits of mobile users in Gibraltar. A varied age range was targeted in order to get a more precise representation of local mobile customers and to ensure that the results shown were as fair and accurate as possible.

When the data was collated, the results showed that 92% of customers communicate more using alternative instant messaging services²⁵ rather than traditional SMS²⁶ with 20% of customers completely substituting one service for another. Out of the proportion of customers which currently still use SMS, 33% of these used SMS very rarely.

It is therefore the Authority's view that instant messaging services such as iMessage, WhatsApp and Snapchat etc. are sufficiently interchangeable with traditional SMS in terms of satisfying the needs of consumers. The Authority therefore considers that if customers already make use of these alternative methods of sending messages then following a permanent price increase of 5-10% in SMS then it is likely that more users will switch to the alternatives.

The same applies to emails sent via smartphones which have become much more widespread in recent years and can be compared in terms of method of communication and time lag in receiving such emails between users in different locations to SMS communication. Here, the Authority also considers these two services as substitutable and therefore constrain the provision of SMS termination services.

In terms of instant messages and emails, it is the Authority's view that these methods of communications will continue increasing into the near future to the detriment of traditional SMS given its limitations such as price (as compared to other message services which are free), number of letter characters and restricted use.

Supply side substitution

In assessing supply side substitution, NRA's may take into account the likelihood that undertakings not currently active on the relevant product market may decide to enter the market, within a reasonable time frame, following a small yet significant lasting price increase.

²⁵ These include internet applications such as WhatsApp, Snapchat, iMessage and Facebook Messenger.

²⁶ SMS which are sent from one mobile handset to another and which allow 2-way communication between users.

Due to the nature of wholesale SMS termination, there is no substitute to providing this service on another operator's network and so supply side substitution is not relevant.

Preliminary Conclusion: Based on the substitutability test above, it is the Authority's view that the relevant wholesale market is the market for termination of messaging services on mobile devices connected to the Internet. This market definition has changed since the last notification in 2012.

3 criteria test

In addition to identifying the boundaries of markets, the European Commission's guidelines require that NRA's apply a specific test, known as the 3-criteria test.

The European Commission guidelines require that the answer to each of the three criteria questions should be 'yes'. If one is answered 'no' then the market does not qualify as a market susceptible to *ex ante* regulation.

The three criteria are:

- Is there the presence of high and non-transitory barriers to entry?
- Does the market structure not tend towards effective competition within the relevant time horizon? and
- Is competition law alone insufficient to adequately address the market failure(s) concerned?

High and non-transitory barriers to entry

Barriers to entry may be structural, legal or regulatory. Structural barriers exist when the market is characterised by absolute cost advantages, substantial economies of scale/scope, capacity constraints and high sunk costs. These characteristics create asymmetric conditions between operators, preventing market entry or expansion of competitors.

Legal or regulatory barriers result from legislative, administrative or other measures that have a direct effect on conditions of entry and the positioning of operators on the relevant market. Examples range from but are not limited to legal requirements to roll out infrastructure such as planning permission for civil works to price controls imposed on undertakings which may affect new entrants and existing operators.

It is widely recognised that termination services are the least replicable element in an electronic communications network as the provision of services in the retail market is dependent on the provision of termination services at wholesale level. Given that a person sending an SMS needs to contact a specific receiver, the sender's operator has no option but to buy termination services from the receiver's operator in order for the SMS to be terminated.

Therefore there is no substitute at wholesale level since the sender's operator is unable to purchase termination on a given network from an alternative source. It is

the Authority's view that the first criterion of high and non-transitory barriers to entry is not satisfied.

Tendency towards effective competition within relevant time horizon

Termination markets are structural monopolies where competitive conditions are not prone to change due to the calling party pays principle according to which terminating operators have no incentives to negotiate efficient termination rates to the benefit of consumers. As such, there are no real substitutes that could constrain the mobile operator's behaviour.

Having said this, it is important to note that market characteristics should also be analysed in a dynamic and forward-looking manner. It may be the case that market dynamics, in the absence of sector-specific *ex ante* regulation may make barriers to entry disappear over time as a result, for example, of technological developments or previously imposed wholesale regulation.

In terms of technological developments, the presence of different technologies that offer products that are demand-side substitutes in the retail market can alter competitive dynamics across the supply chain. Indeed, in innovation driven markets competitive constraints often come from threats from potential competitors that are not currently in the market and dynamic or longer term competition can take place among firms that are not necessarily competitors in an existing market. Indeed NRAs should consider all relevant competitive constraints, irrespective of whether the sources of such constraints are deemed to be electronic communications networks, electronic communications services or other types of services or applications which are comparable from the perspective of the end user.

Taking the above into account it is the Authority's view that the market is tending towards being competitive and that the second criterion is not satisfied given the following reasons.

The Authority considers that, in a forward looking perspective, SMS can be substituted by other alternative instant messaging services or emails sent via peer to peer internet applications as they currently exert a competitive constraint at the retail level. These alternative means of communication allow a two way information exchange between subscribers using the same applications while connected to the internet (such as iMessage on Apple's iPhone or WhatsApp messages on compatible devices, etc.)

The Authority notes that there is high broadband penetration due to the increased spread of smartphones, widespread coverage of 3G and a rise in the number of WiFi hotspots. In addition, according to the SMS data received via the Authority's data requests, the average number of per-subscriber SMS sent per month has fallen from 38 in 2011 to 26 in 2014 despite the fact that the average number of total mobile customers increased from 31,874 in 2011 to 38,759 in 2014. Moreover, the Authority conducted a mobile usage survey of 300 mobile customers and the results showed that 92% of customers communicate more using alternative instant messaging services rather than traditional SMS with 20% of customers completely substituting one service for another. Out of the proportion of customers which still use SMS, 33% of these used SMS very rarely.

Competition law

There is no competition legislation in Gibraltar, and so the Authority cannot apply the third criterion addressing the sufficiency or not of competition law to address market failure.

As this market does not satisfy the three criteria test, the Authority will not be taking the analysis further. Therefore under the provisions of Article 16(3) of the Framework Directive, all SMP obligations are to be withdrawn as the Authority does not consider this market to be susceptible to *ex ante* regulation.

The Recommendation states that if a retail market is effectively competitive from a forward looking perspective in the absence of *ex ante* regulation on the corresponding relevant market, this should lead the national regulatory authority to conclude that regulation is no longer needed at wholesale level. In such a case, the corresponding relevant wholesale market should be assessed with a view to withdrawing *ex ante* regulation.

In fact, SMS termination rates are not subject to *ex ante* regulation in 25 Member States where NRAs did not bring a case under Article 7 of the Framework Directive of ineffective competition in the markets concerned.

It is the Authority's view that by lifting regulation from this market there would not be a risk of excessive pricing. This is also echoed throughout the Member States where SMS termination is not regulated.

3.4 Geographic market

According to established case law, a relevant geographic market comprises an area in which the demand and supply characteristics are similar across the area, and which can be distinguished from neighbouring areas where there is evidence that there is a clear and persistent boundary in the conditions of competition²⁷.

The Authority has considered whether the areas covered by Spanish and/or Moroccan mobile networks could be considered to be separate markets, as it could be argued that there is increased competition from external operators in these areas. At the retail level, the Authority recognises that a retail customer may, without roaming, use an external network while in some parts of Gibraltar, and that this may effectively increase the volume of traffic in the retail market. However, the Authority has not seen evidence of the impact of this in the local market, or the evidence of the impact of this on the business of local operators, and is aware that discussion is generally based on estimates and conjecture. Further, the Authority does not believe that it is possible to define a clear and persistent boundary.

The Authority recognises that there are differences in the conditions of competition in the retail mobile market which are associated with local use of external networks. However, the Authority believes that the geographic markets for wholesale call and SMS termination on an individual mobile network is all of Gibraltar. There is no

²⁷ See also Draft review of the BEREC Common Position on geographical aspects of market analysis (definition and remedies), BEREC, 5 December 2013.

evidence of appreciable differences in the conditions of demand or supply within Gibraltar, no evidence of clear and persistent boundaries between different areas, and similar services are offered on the same terms and conditions throughout.

3.5 Summary of preliminary conclusions

The Authority's preliminary conclusions are as follows:

- There are separate markets for wholesale voice call and message termination on individual mobile networks;
- the market for termination of messaging services is not susceptible to ex-ante regulation;
- The geographical scope of the market is all of Gibraltar.

Q1: Do you agree with the proposed definitions of markets susceptible to ex ante regulation? If not, why not? Please give reasons for your answer.

Q2: Do you agree that the market for termination of messaging services on mobile devices connected to the Internet should not be subject to ex ante regulation and that all SMP obligations should be withdrawn?

4. Market Analysis

4.1 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 Communications Act 2006 notes that SMP is equivalent to dominance, as construed in accordance with European Community competition law²⁸.

Having proposed preliminary market definitions, the Authority must now assess the current and prospective level of competition within the following market:

- wholesale voice call termination on individual mobile networks.

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 SMP, 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"²⁹.

It is important to consider 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. While market shares and trends in market share provide an important indication of how competitive a market is, they are not determinative on their own, particularly in signalling the level of future competition. The Authority has therefore taken into account a number of other relevant criteria which may constitute barriers to entry and/or expansion in coming to its proposed finding.

In telecommunications markets, barriers to entry can be significant and are often associated with large-scale investment in infrastructure over a long time, with consequent sunk costs, and could also entail an operator's need to achieve economies of scale, scope and density. Another barrier to entry could arise where an SMP operator is vertically integrated; that is where the operator offers a wholesale and a retail service. In this case, an entrant to the market may find it difficult to compete if the SMP operator's retail arm benefits from preferential treatment from its parent company, particularly if the market entrant is dependent on purchasing a wholesale input from the SMP operator, or if the business/offering is structured in such a way that the wholesale part of the business is able to support or cross-subsidise the retail part of the business. The competition assessment takes into account other factors that could dilute market power, such as countervailing buyer

²⁸ Section 38(1) and (2).

²⁹ At paragraph 75.

power, where a purchaser buys enough of the operator's services to be able to influence the pricing and market behaviour of the operator.

The conclusion of the competition assessment for each market is a preliminary view as to whether any undertaking has Significant Market Power in the defined market.

4.2 Competiton assessment: wholesale voice call termination on individual mobile networks

Market shares

Each network constitutes a separate wholesale termination market given that there is no substitute for termination on a particular Network. This implies that each MNO has a 100% market share in terms of voice call traffic volumes terminating on its own network.

This market share is the result of the way termination services are provided exclusively on each individual undertaking, with no alternatives available for those purchasing the service. By definition, therefore, each MNO is a monopolist when terminating calls on its own network.

Since the payment of mobile termination charges abides by the CPP arrangement and the network operator purchasing the termination service has no control over this rate, mobile operators have an incentive to set their termination charge above the competitive level.

Gibtelecom is the only provider of wholesale voice call termination on its own mobile network, and so Gibtelecom has a market share of 100%.

Eazitelecom is the only provider of wholesale voice call termination on its own mobile network, and so Eazitelecom has a market share of 100%.

Market trends

When analysing the mobile voice call termination market, a good indication of the current state of the market and how the market is progressing is to assess any apparent trends starting from previous years.

From 2011 to 2014, the total number of mobile customers increased from 31,874 to 38,879. This represents an increase of 22%. Market shares in terms of customers between both mobile operators was calculated at 95%/5% split between Gibtelecom and Eazitelecom in Q1 2014 and by Q4 2014, Gibtelecom's share fell 5% to a 90%/10% split. It is therefore the Authority's view that even though Gibtelecom still has a very high share of the market that this percentage may decline further every year.

When analysing call termination minutes, there has been a marked increase since 2012. Annual minutes show figures of around 31 million minutes in 2012 to over 40.5 million minutes in 2014. This represents an increase of around 32%.

Evolution of wholesale mobile call termination (applicable to all SMP operators)

Date	Maximum termination rate (GBP pence per min)	Maximum termination rate (EUR cents per min)
1st January 2012	5.5	6.82
1st January 2013	3.0	3.72
1st January 2014	1.0	1.24

Due to the fact that the glide path above does not include 2015, the Authority adopted provisional measures at the same rate³⁰ as that for 2014 until the current market review has been completed.

Control of infrastructure not easily replicated

Gibraltar is a very small market, in both physical and economic terms, with specific circumstances including high density of buildings in a very small space. In business terms this equals relatively high cost of network construction (which will be sunk cost once invested) and relatively low revenue potential for a new entrant. Gibtelecom and Eazitelecom have the advantage of existing infrastructure, which is not easily replicated.

Economies of scale and scope

Generally, telecoms operators with greater network scale and scope will benefit from lower costs in supplying the retail market. Scale and scope economies may be achieved by the high proportion of fixed and common costs associated with the ownership of network infrastructure. In the Authority's view, Gibtelecom is more likely to benefit from economies of scale and scope than Eazitelecom, due to its ownership of both fixed and mobile networks. The Authority recognises that the level of this benefit is relative and is limited by the small size of the market.

Countervailing buyer power

The Authority has no evidence to suggest that any customer or group(s) of customers in Gibraltar are in a position to exercise countervailing buyer power in the wholesale market for call termination on a mobile network.

At the wholesale level, each network operator does not face countervailing buyer power as each network operator has a monopolistic position on the market for mobile call termination on its own network and therefore has no control over mobile termination rates for another network.

³⁰ This rate started on 1st January 2015.

Preliminary conclusion

Gibtelecom has 100% of the markets for wholesale voice call termination on its own mobile 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 these markets for the lifetime of this review.

Eazitelecom has 100% of the markets for wholesale voice call termination on its own mobile network. The Authority has assessed prospective competition and has assessed factors which may qualify Eazitelecom's ability to price independently of any competitors. The conclusion is that Eazitelecom will remain dominant in these markets for the lifetime of this review.

Q3: Do you agree with the market analysis of the wholesale voice call termination markets on mobile networks? Please give reasons for your answer.

The Authority proposes that Gibtelecom should be designated with SMP in the market for wholesale call termination on its own mobile network.

The Authority proposes that Eazitelecom should be designated with SMP in the market for wholesale call termination on its own mobile network.

5. Proposed SMP Obligations

5.1 Competition problems

The Authority has taken into account the implications of designating an operator with SMP, such that the SMP designation has no bearing on whether that undertaking has already committed an abuse of a dominant position within the meaning of Article 82 of the EC Treaty or national competition laws. It merely implies that, from a structural perspective, and in the short to medium term, the operator has and will have, on the relevant market identified, sufficient market power to behave to an appreciable extent independently of competitors, customers, and ultimately consumers.³¹ This means that, in proposing *ex ante* remedies should there be a confirmed SMP finding, the Authority is not obliged to prove that there have been abuses of dominance, but rather notes that the finding of SMP itself indicates that the SMP operator has the ability and incentive to take advantage of a dominant position.

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. 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 influence competitive conditions in the related retail market.

The market analysis which has been carried out in Gibraltar concludes on a preliminary basis that Gibtelecom and Eazitelecom should be designated with SMP in the wholesale market for voice call termination on their individual mobile networks. The Authority is therefore obliged to consider how best to prevent abuse of a dominant position.

5.2 Principles in determining SMP obligations

The Communications Act 2006 provides that, where the Authority designates a person or combination of persons as having significant market power in a relevant market, it shall impose such significant market power obligations ("SMP obligations") on that person or combination of persons as it considers appropriate.³²

Regulation 9(8) of the Communications (Access) Regulations states that an obligation shall be:

"(a) based on the nature of the problem identified;

(b) proportionate to what the obligation is intended to achieve;

³¹ SMP Guidelines, Para 30.

³² Section 38(7).

(c) objectively justified in the light of the objectives laid down in section 19 of the Act; and
(d) imposed only after a public consultation procedure and a consultation under section 22 of the Act have been carried out."

The objectives of the Authority, as laid out in section 19 of the Act, require it to:

- (i) Promote competition;
- (ii) Contribute to the development of the European internal market; and
- (iii) Promote the interests of users in Gibraltar.

The Authority is empowered to adopt all reasonable measures to achieve the above objectives including:

- (i) Ensuring there is no distortion or restriction of competition; while
- (ii) Encouraging efficient investment in infrastructure and promoting innovation.

The Authority must therefore ensure that the proposed SMP obligations best address the problems it has identified and must ensure that the obligations are proportionate to the competition problems it intends to resolve.

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.

The Communications Act 2006 specifies that SMP obligations shall include:

"access or interconnection, including obligations on transparency, non-discrimination, accounting separation, use of specific network facilities, price control and cost accounting in relation to matters concerning access or interconnection".³³

The Authority has considered regulatory options for SMP obligations in the areas of wholesale voice call termination on individual mobile networks in light of its overall regulatory objectives. In the following sections, the Authority sets out its proposals in this regard.

The Authority has taken into account Eazitelecom's very recent market entry when considering appropriate remedies. The Authority notes that the Commission Recommendation³⁴ on termination rates recognises that new market entrants may be subject to higher unit costs for a transitional period before reaching the minimum efficient scale, defined as a market share of between 15% and 20%, and that it may be appropriate to apply asymmetric remedies during this transitional period. The Authority proposes that both mobile operators in Gibraltar should be subject to the same regulated price control, but that Eazitelecom should be subject to lighter supporting remedies.

³³ Section 38(8)d.

³⁴ COMMISSION RECOMMENDATION of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (2009/396/EC).

In summary, the Authority proposes the following obligations, which are specified in the next section:

SMP obligations on the market for wholesale mobile call termination

Gibtelecom

The Authority proposes obligations associated with:

- Transparency
- Non-discrimination
- Accounting separation
- Access
- Price control and cost accounting

Eazitelecom

The Authority proposes obligations associated with:

- Non-discrimination
- Access
- Price control

5.3 SMP obligations on wholesale mobile call termination

Gibtelecom

Transparency

Regulation 10 of the Communications (Access) Regulations sets out the transparency obligations which the Authority can impose on an SMP operator. A transparency obligation sets out the manner in which an SMP operator should provide information about its activities in the market in which it has been found dominant. Generally, a transparency obligation supports other obligations addressing how the SMP operator is expected to behave, and the transparency obligation sets out how the SMP operator will demonstrate compliance with its other obligations.

It is the Authority's view that where an SMP operator offers products on a wholesale market where it has been found to have SMP, these products should be appropriately documented. A potential market entrant should be able to easily access technical information about wholesale products; information about prices and other terms and conditions; and process information including a charge mechanism.

The Authority proposes that, should the SMP obligation be confirmed, Gibtelecom should be subject to the following transparency obligations:

Gibtelecom shall make public the terms and conditions of its wholesale mobile call termination services in a Reference Interconnection Offer (RIO). The RIO should include appropriate technical specifications, and should explain the mechanism for publishing charges.

The terms and conditions applicable to wholesale mobile call termination services may be subject to amendment and/or direction by the Authority.

The Authority proposes that Gibtelecom should be obliged to notify the Authority 45 days in advance of changes to terms and conditions and price increases. In addition the Authority proposes the same obligation to apply to prices of new services.

The Authority further proposes that Gibtelecom should be obliged to notify the Authority 30 days in advance for price reductions.

Gibtelecom shall also be obliged to publish changes to terms and conditions, information on increase to tariffs and information on prices for new services 30 days in advance. Publication shall include direct notification to all other operators in the market.

In terms of a decrease in tariffs, Gibtelecom shall be obliged to publish this information at least 14 days in advance. Publication shall include direct notification to all other operators in the market.

Non discrimination

Regulation 11 of the Communications (Access) Regulations sets out the approach to non-discrimination. The non-discrimination obligation has two elements. First of all, it obliges an SMP operator to treat all wholesale purchasers in an equivalent manner – it cannot discriminate between them. Secondly, it obliges the SMP operator to treat wholesale purchasers in the same way as it treats its own downstream (or retail) arm. This means, for example, that where a wholesale purchaser is buying a wholesale input so that it can offer a retail service, it should not be disadvantaged compared with the SMP operator's own retail operation. The onus is on the SMP operator to show that its behaviour is not discriminatory.

The Authority proposes that Gibtelecom should be subject to an obligation to not unduly discriminate between wholesale customers.

The Authority proposes that Gibtelecom shall apply equivalent conditions in equivalent circumstances to other persons providing equivalent services.

The Authority proposes that Gibtelecom should be obliged to provide services and information to others under the same conditions, and of the same quality, as it provides to itself, its subsidiaries and partners.

Accounting separation

Regulation 12 of the Communications (Access) Regulations describes the remedies which the Authority can impose to oblige an SMP operator to produce separated accounts. Generally, accounting remedies are imposed in order to ensure that the SMP operator is not discriminating against wholesale purchasers, for example by cross-subsidising some products at the expense of others, and is not leveraging its power in one market into another.

The Authority notes that the production of separated accounts is not an end in itself, but should be designed to demonstrate compliance with other obligations, particularly those relating to transparency, non-discrimination and price controls.

In the Authority's view, there must be visibility of how costs are allocated to particular products and services, that the information must be discrete and detailed enough to demonstrate that there is no discrimination, that there is no cross subsidy across the SMP operator's retail products and services, and that the difference between wholesale and retail prices is such that an equally efficient competitor can compete in the market.

The Authority recently published a consolidated Decision Notice on an accounting framework³⁵, which sets out in detail the Authority's principles and compliance requirements. In accordance with that Decision, the Authority proposes that Gibtelecom shall ensure that:

It should account separately for its wholesale mobile termination business.

In addition, Gibtelecom shall prepare and submit to the Authority an audited Accounting Separation Report every year on 30th September.

Access

An access obligation allows a wholesale purchaser to have certain types of wholesale access to the SMP operator's infrastructure. In some jurisdictions, Regulators have mandated specific types of wholesale products which are to be offered by the SMP operator, and often support this by specifying on what terms the products will be made available. The overall approach to access proposed by the Authority is that it should be based on a reasonable request. This is in accordance with Regulation 13(1) of the Communications (Access) Regulations. This approach is designed to allow operators the maximum flexibility to identify wholesale inputs which would help them to innovate in the market, and not just compete on price, but also recognises the investment undertaken by an SMP operator, and the constraints imposed by the size and scale of the market. This balances the rights of the SMP operator to develop, operate and make a reasonable return on its network, and the rights of the wholesale purchaser to request access on a reasonable basis.

It should be noted that an obligation to meet reasonable requests for access means that an SMP operator would be expected to meet *all* reasonable requests for access, unless it can demonstrate that it is not technically or economically feasible to do so.

The Authority proposes that Gibtelecom should be subject to the following access obligations:

Gibtelecom shall meet reasonable requests for access to, and use of, specific network elements and associated facilities in situations where the Authority considers that denial of such access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest.

³⁵ Accounting Separation, Cost Accounting Systems, Cost Orientation and Retail Price Notification – Consolidation of documents 13/14, 01/11 and 07/08, Decision Notice C01/15 – 4th June 2015.

Gibtelecom shall be required:

- a. to negotiate in good faith with undertakings requesting access;
- b. not to withdraw access to facilities already granted;
- c. to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services;
- d. to provide specified services needed to ensure interoperability of end-to-end services to users, including facilities for intelligent network services or roaming on mobile networks;
- e. to provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services; and
- f. to interconnect networks or network facilities.

Gibtelecom may be required, if the Authority is of the view this will promote effective competition, to provide co-location or other forms of facility sharing, including duct, building or mast sharing.

Regulation 13(2)(3) of the Access Regulations provides that the Authority may attach conditions to ensure that requests for access are made and responded to in a fair and reasonable manner, and that compliance is timely. In the event of a dispute between an entity and Gibtelecom or Eazitelecom regarding the reasonableness of the entity's request for access to wholesale voice call origination 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 and cost accounting

Cost accounting

Regulation 14(1) states that the Authority may impose obligations concerning the use of cost accounting systems. The Authority has recently consulted and published a Decision on Cost Accounting³⁶, which sets out the Authority's principles and compliance requirements. In accordance with that Decision, the Authority proposes that Gibtelecom shall ensure that:

- a) it operates and maintains a cost accounting system that complies with the specific requirements and guidelines issued by the Authority
- b) it operates and maintains a cost accounting system suitable for ensuring compliance with Regulation 14 of the Access Regulations

³⁶ Accounting Separation, Cost Accounting Systems, Cost Orientation and Retail Price Notification: Compliance under SMP Obligations, Response to Consultation and Decision, Document No. 13/14 - 17th September 2014.

c) it operates and maintains a cost accounting system which is annually verified by a qualified independent person

d) it publishes in its annual accounts a statement concerning its compliance with the cost accounting system it is required to operate

e) it maintains cost accounting systems which produce appropriate information to demonstrate compliance with cost-orientation.

Price controls

Price controls can be established in the retail and/or wholesale markets, and usually limit the price which the SMP operator can charge. Price controls are usually put in place to address the potential for the SMP operator to impose margin squeeze³⁷, or to cross-subsidise.

In the last reviews of the wholesale market for mobile call termination (Decision Notices No. 10/11 and 07/12), the Authority decided that it was not sufficient to rely on a general cost orientation obligation to address pricing, and that a glide path should be introduced to reduce prices to an efficient target price. The Authority notes that its use of a glide path over the last two years has reduced mobile termination rates in Gibraltar to be more in line with the EC's Termination Rates Recommendation³⁸.

The Authority set the target rate with reference to European best practice particularly taking account of those Member States which have published MTRs based on their implementation of a pure BU-LRIC model. Taking this into account, the rate for 2014 was set at 1.24 €cents (1 pence per minute).

The Authority notes that a key objective for a Member State developing a BU-LRIC model is to calculate a MTR which allows for the recovery of the level of costs that would be incurred by an *efficient* mobile network operator over the lifetime of the price control. While the development of a BU-LRIC model would typically take account of the reported actual costs incurred by operators, the eventual rate is set with reference to a hypothetical efficient operator. This is why most jurisdictions which have developed BU-LRIC models continue to expect operators to comply with cost-orientation obligations, and also set MTRs.

The Authority's preliminary view is that the target rate should be now be revised in order to update the MTR for 2015 onwards. Please note the Authority has currently adopted provisional MTRs³⁹ as of 1st January 2015 until this review is notified to the Commission and actual rates are set. The Authority has taken into account the data as contained in a BEREC MTR benchmark report as of January 2015 and has used the pure BU-LRIC data as published by some Member States.

³⁷ A margin (price) squeeze arises when a dominant operator, which provides a wholesale input on which other operators rely in order to compete at the retail level, prices its upstream (wholesale) services and downstream (retail) services in such a way as to prevent others from competing with it at the downstream level.

³⁸ COMMISSION RECOMMENDATION of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU, (2009/396/EC).

³⁹ Provisional measures have been set at 1.24€cents (1 pence per minute). This rate is equal to the 2014 rate.

The Authority has also taken into account the particular circumstances of Gibraltar. The very small size and limited resources of the jurisdiction means that it is not feasible to develop a BU-LRIC model. Therefore, the Authority proposes to set the following rates⁴⁰ for wholesale mobile call termination:

Date	Wholesale mobile call termination rate (€cents/m)	Wholesale mobile call termination rate (p/m)
1 st September 2015 onwards ⁴¹	0.9201 ⁴²	0.6721

Q4: Do you agree with the proposed SMP obligations on Gibtelecom in the wholesale mobile call termination market? Please give reasons for your answer.

Eazitelecom

Non discrimination

Regulation 11 of the Communications (Access) Regulations sets out the approach to non-discrimination. The non-discrimination obligation has two elements. First of all, it obliges an SMP operator to treat all wholesale purchasers in an equivalent manner – it cannot discriminate between them. Secondly, it obliges the SMP operator to treat wholesale purchasers in the same way as it treats its own downstream (or retail) arm. This means, for example, that where a wholesale purchaser is buying a wholesale input so that it can offer a retail service, it should not be disadvantaged compared with the SMP operator’s own retail operation. The onus is on the SMP operator to show that its behaviour is not discriminatory.

The Authority proposes that Eazitelecom should be subject to an obligation to not unduly discriminate between wholesale customers.

The Authority proposes that Eazitelecom shall apply equivalent conditions in equivalent circumstances to other persons providing equivalent services.

⁴⁰ Rates are set in €cent per minute, calculation of pence per minute (ppm) is at exchange rate (provided by oanda.com) at time of publication of this consultation.

⁴¹ The MTR will be in force until further reviewed by the Authority. This period will usually be three years depending on local market conditions.

⁴² This figure has been calculated as the average termination rate between Member States which have implemented a BU-LRIC model. The Member States are Austria, Belgium, Denmark, Greece, France, Croatia, Hungary, Italy, Poland, Portugal, Sweden and UK as stipulated by the BEREC MTR Benchmark Report (as of January 2015).

The Authority proposes that Eazitelecom should be obliged to provide services and information to others under the same conditions, and of the same quality, as it provides to itself, its subsidiaries and partners.

Access

An access obligation allows a wholesale purchaser to have certain types of wholesale access to the SMP operator's infrastructure. In some jurisdictions, Regulators have mandated specific types of wholesale products which are to be offered by the SMP operator, and often support this by specifying on what terms the products will be made available. The overall approach to access proposed by the Authority is that it should be based on a reasonable request. This is in accordance with Regulation 13(1) of the Communications (Access) Regulations. This approach is designed to allow operators the maximum flexibility to identify wholesale inputs which would help them to innovate in the market, and not just compete on price, but also recognises the investment undertaken by an SMP operator, and the constraints imposed by the size and scale of the market. This balances the rights of the SMP operator to develop, operate and make a reasonable return on its network, and the rights of the wholesale purchaser to request access on a reasonable basis.

It should be noted that an obligation to meet reasonable requests for access means that an SMP operator would be expected to meet *all* reasonable requests for access, unless it can demonstrate that it is not technically or economically feasible to do so.

The Authority proposes that Eazitelecom should be subject to the following access obligations:

Eazitelecom shall meet reasonable requests for access to, and use of, specific network elements and associated facilities in situations where the Authority considers that denial of such access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest.

Eazitelecom shall be required:

- a. to negotiate in good faith with undertakings requesting access;
- b. not to withdraw access to facilities already granted;
- c. to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services;
- d. to provide specified services needed to ensure interoperability of end-to-end services to users, including facilities for intelligent network services or roaming on mobile networks;
- e. to provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services; and
- f. to interconnect networks or network facilities.

Eazitelecom may be required, if the Authority is of the view this will promote effective competition, to provide co-location or other forms of facility sharing, including duct, building or mast sharing.

Regulation 13(2)(3) of the Access Regulations provides that the Authority may attach conditions to ensure that requests for access are made and responded to in a fair and reasonable manner, and that compliance is timely. In the event of a dispute between an entity and Gibtelecom or Eazitelecom regarding the reasonableness of the entity's request for access to wholesale voice call origination 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

Price controls can be established in the retail and/or wholesale markets, and usually limit the price which the SMP operator can charge. Price controls are usually put in place to address the potential for the SMP operator to impose margin squeeze⁴³, or to cross-subsidise.

In the last reviews of the wholesale market for mobile call termination (Decision Notices No. 10/11 and 07/12), the Authority decided that it was not sufficient to rely on a general cost orientation obligation to address pricing, and that a glide path should be introduced to reduce prices to an efficient target price. The Authority notes that its use of a glide path over the last two years has reduced mobile termination rates in Gibraltar to be more in line with the EC's Termination Rates Recommendation⁴⁴.

The Authority set the target rate with reference to European best practice particularly taking account of those Member States which have published MTRs based on their implementation of a pure BU-LRIC model. Taking this into account, the rate for 2014 was set at 1.24 €cents (1 pence per minute).

The Authority notes that a key objective for a Member State developing a BU-LRIC model is to calculate a MTR which allows for the recovery of the level of costs that would be incurred by an *efficient* mobile network operator over the lifetime of the price control. While the development of a BU-LRIC model would typically take account of the reported actual costs incurred by operators, the eventual rate is set with reference to a hypothetical efficient operator. This is why most jurisdictions which have developed BU-LRIC models continue to expect operators to comply with cost-orientation obligations, and also set MTRs.

⁴³ A margin (price) squeeze arises when a dominant operator, which provides a wholesale input on which other operators rely in order to compete at the retail level, prices its upstream (wholesale) services and downstream (retail) services in such a way as to prevent others from competing with it at the downstream level.

⁴⁴ COMMISSION RECOMMENDATION of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU, (2009/396/EC).

The Authority's preliminary view is that the target rate should be now be revised in order to update the MTR for 2015 onwards. Please note the Authority has currently adopted provisional MTRs⁴⁵ as of 1st January 2015 until this review is notified to the Commission and actual rates are set. The Authority has taken into account the data as contained in a BEREC MTR benchmark report as of January 2015 and has used the pure BU-LRIC data as published by some Member States.

The Authority has taken into account the particular circumstances of Gibraltar. The very small size and limited resources of the jurisdiction means that it is not feasible to develop a BU-LRIC model. Therefore, the Authority proposes to set the following rates⁴⁶ for wholesale mobile call termination:

Date	Wholesale mobile call termination rate (€cents/m)	Wholesale mobile call termination rate (p/m)
1 st September 2015 onwards ⁴⁷	0.9201 ⁴⁸	0.6721

Q5: Do you agree with the proposed SMP obligations on Eazitelecom in the wholesale mobile call termination market? Please give reasons for your answer.

⁴⁵ Provisional measures have been set at 1.24€cents (1 pence per minute). This rate is equal to the 2014 rate.

⁴⁶ Rates are set in €cent per minute, calculation of pence per minute (ppm) is at exchange rate (provided by oanda.com) at time of publication of this consultation.

⁴⁷ The MTR will be in force until further reviewed by the Authority. This period will usually be three years depending on local market conditions.

⁴⁸ This figure has been calculated as the average termination rate between Member States which have implemented a BU-LRIC model. The Member States are Austria, Belgium, Denmark, Greece, France, Croatia, Hungary, Italy, Poland, Portugal, Sweden and UK as stipulated by the BEREC MTR Benchmark Report (as of January 2015).

Annex A: Consultation Questions

Q1: Do you agree with the proposed definitions of markets susceptible to ex ante regulation? If not, why not? Please give reasons for your answer.

Q2: Do you agree that the market for termination of messaging services on mobile devices connected to the Internet should not be subject to ex ante regulation and that all SMP obligations should be withdrawn?

Q3: Do you agree with the market analysis of the wholesale voice call termination markets on mobile networks? Please give reasons for your answer.

Q4: Do you agree with the proposed SMP obligations on Gibtelecom in the wholesale voice call termination market on mobile networks? Please give reasons for your answer.

Q5: Do you agree with the proposed SMP obligations on Eazitelecom in the wholesale mobile call termination market? Please give reasons for your answer.