

Wholesale call origination on the public telephone network provided at a fixed location

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

Response to Consultation C04/15

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Executive Summary

The communications regulatory framework requires the Gibraltar Regulatory Authority (GRA) 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 GRA is required to conduct an analysis of the relevant markets to decide whether or not they are effectively competitive and, having identified competition problems, propose appropriate regulatory measures.

On 10th June 2015, the Authority issued a national consultation on wholesale call origination on the public telephone network provided at a fixed location and wholesale call termination on individual public telephone networks provided at a fixed location, (public consultation C02/15). The consultation period ended on 10th July 2015.

The Authority received submissions from one operator listed below by close of the consultation period. The detailed responses to the consultation were provided by:

- Gibtelecom.

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

The Authority thanks the respondents for their submissions. Having considered the views of the respondents, the Authority sets out in this document its conclusions regarding the market review process including its SMP obligations and subsequent notification to the Commission, BEREC and other NRA's in accordance with Article 7 of the Framework Directive.

Market Definition

The Authority proposes to define the following wholesale fixed markets:

- Wholesale call origination on the public telephone network provided at a fixed location
- Wholesale call termination on public telephone networks provided at a fixed location

The wholesale call origination market did not fulfil the three criteria test and therefore the Authority proposes to withdraw all SMP obligations previously imposed. This market is no longer considered to be susceptible to *ex ante* regulation.

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.

Market Analysis

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

Article 16(4) of the Framework Directive states,

“Where a national regulatory authority determines that a relevant market is not effectively competitive, it shall identify undertakings which individually or jointly have a significant market power on that market in accordance with Article 14 and the national regulatory authority shall on such undertakings impose appropriate specific regulatory obligations referred to in paragraph 2 of this Article or maintain or amend such obligations where they already exist.”

Where there is a finding of SMP, the GRA is obliged to impose obligations to remedy competition problems. SMP obligations are outlined in Regulation 10 to 14 of the Communication (Access) Regulations 2006² (The Regulations).

Such obligations may include:

- Transparency
- Non-Discrimination
- Accounting Separation
- Access
- Price control and cost accounting.

In the analysis of markets, the Authority assessed that Gibtelecom had 100% market share in the wholesale fixed call termination market in terms of subscriber numbers.

The Authority therefore proposes to designate Gibtelecom as having SMP in the market for wholesale call termination on individual public telephone networks provided at a fixed location. The SMP obligations will range from transparency to price controls. In terms of the price controls, the GRA proposes to set the fixed termination rate using an EU benchmarking methodology.

These obligations are considered to be appropriate, proportionate and justified in light of the competition problems identified.

SMP Obligations

The Authority proposes to apply the following SMP obligations on **Gibtelecom** in the following market:

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

- Transparency
- Non-Discrimination

² Communications (Access) Regulations 2006, Communications Act 2006.

- Accounting Separation
- Access
- Price control and cost accounting.

The Authority has considered regulatory options in light of its overall objectives and in the context of the problems identified in the wholesale market. The application of SMP obligations on relatively small authorised operators in Gibraltar shall therefore take due account of the limited resources available to such operators to engage in detailed regulatory compliance arrangements.

The Authority believes the SMP obligations set out in this market review support the objectives outlined in the Communications Act 2006 as to how the Authority should exercise its functions. The SMP obligations imposed aim to address market failure, protect consumers against the exercise of market power and promote competition in the wholesale fixed call market.

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* regulation³. 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 call origination on the public telephone network provided at a fixed location
- Wholesale call termination on individual public telephone networks provided at a fixed location.

The wholesale call origination market is not included in the Recommendation⁴ as being susceptible to *ex ante* regulation. However, given that the GRA 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 wholesale call termination market is listed as market 1 in the Recommendation as being susceptible to *ex ante* regulation.

The European Commission has recently published a 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.

³ *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.

⁴ COMMISSION RECOMMENDATION of 9 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 communications 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 GRA's three criteria assessment of the wholesale call origination market is unchanged by the proposals in the Recommendation.

The wholesale call termination market on public telephone networks provided at a fixed location is included as Market 1 of the Recommendation.

1.2 Previous reviews

The market for wholesale fixed call origination was last reviewed in 2011⁵, and the GRA designated Gibtelecom with SMP, on the basis of its high market share. The GRA's assessment was that no other factors mitigated Gibtelecom's market power and a full suite of remedies was imposed.

The market for wholesale fixed call termination was last reviewed in 2011⁶, and the GRA designated Gibtelecom and CTS with SMP for call termination on their own network. Appropriate remedies were imposed on both SMP operators. It is important to note however that CTS exited the market in February 2013.

In the market for fixed call origination, Gibtelecom was subject to obligations on transparency, non-discrimination, access, accounting separation and price control and cost accounting. In terms of the price control, Gibtelecom was imposed with a glide path which concluded at the end of 2014.

In the market for fixed call termination, the GRA imposed obligations relating to transparency, non-discrimination, access, accounting separation and price control and cost accounting on Gibtelecom. The same price control was imposed on this market as for the call origination market.

In July 2014, the GRA commenced a review of the wholesale fixed call origination and termination market. Following a response to consultation which was sent to the Commission and requests for further information⁷, the GRA withdrew both markets following concerns expressed by the Commission on the methodology of the price controls. Consequently, the GRA adopted provisional measures under the provisions of Article 7(9) of Directive 2002/21/EC⁸.

⁵ GRA, Decision Notice 09/11, 30 November 2011.

⁶ GRA, Decision Notice 09/11, 30 November 2011.

⁷ Case GI/2014/1244 and GI/2014/1245.

⁸ As amended by Directive 2009/140/EC of 25 November 2009.

1.3 Market characteristics

In Gibraltar there are currently four authorised fixed network operators. These are:

Gibtelecom – The incumbent operator provides the whole spectrum of services from fixed and IP telephony, mobile services including data, broadband and leased lines. Gibtelecom’s network covers 99% of the population.

Sapphire Networks – This operator provides retail residential and corporate broadband and retail leased lines. They currently have an access agreement with Gibtelecom and also provide services via their own network. Their own network covers a specific area within Gibraltar.

U-Mee – This undertaking is owned by Sapphire Networks and has recently launched a FTTH product. U-Mee Networks will be taking over the retail residential broadband services from Sapphire Networks and also aim to provide IP telephony and IP-TV. Their fibre network covers a specific area of Gibraltar yet aims to cover more residential estates and reach 80% of households within the next three years.

Gibfibre speed – This operator recently launched a FTTH product with its main emphasis on retail broadband services. It has also announced it will be offering leased lines, IP telephony and IP-TV. Gibfibre speed’s network currently covers around 80% of households and has plans to expand.

The wholesale markets for fixed call origination and fixed call termination are linked to the retail markets for voice calls. The GRA recently consulted⁹ on its review of the markets for retail access and calls, and has characterised the retail markets as follows.

Retail markets

In Gibraltar, access to the public switched telephone network at a fixed location is currently provided by:

- Analogue exchange lines offering low capacity connections, where up to 2 calls can be made at the same time (PSTN analogue or ISDN basic rate access);
- High capacity connections where 3 or more calls can be made simultaneously (Digital ISDN exchange lines such as ISDN 30);
- DSL and fibre based broadband connections.

Fixed voice services in Gibraltar consist of:

- Standard narrowband call services, using the analogue lines (including calls to mobiles and ISDN calls);

⁹ Decision Notice 11/14.

- Managed voice over broadband (VoB) services¹⁰;
- Unmanaged Voice over IP (VoIP) services¹¹; and
- Carrier Selection IP (CSIP) voice services¹².

As of December 2014, there were a total of 23,712 exchange lines¹³.

Gibtelecom, the incumbent, is the only operator which currently offers fixed line services. However, U-Mee and Gibfibrespeed have also indicated they will be providing IP based telephony services in 2015.

The GRA published a decision notice on Carrier Pre-Selection (CPS) in 2005 which outlined the CPS procedures and how it should be implemented in Gibraltar. To date no operator has provided CPS based voice services.

Wholesale markets

The wholesale markets which are linked to the retail calls markets generally involve three parts: call origination; transit and call termination. Call origination services on the public telephone network provided at fixed locations include call set-up, switching and connection for the initial stage of the call. They incorporate conveyance from an end-user to the next stage in the call routing (either call termination or to the point of interconnection).

Transit services comprise the pure conveyance of calls between two operators across a third transit operator. This incorporates both national and international calls.

Call termination provides call completion and switching functionality at the terminating end of a call. It involves the conveyance of calls from the end of the previous stage (either call origination or to the point of interconnection), to the called end-user via the local loop.

The wholesale call origination and termination markets are currently comprised of Gibtelecom's own self-supply.

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 GRA's proposed

¹⁰ This is a voice service provided over a broadband connection, not requiring a conventional narrowband telephone line. This is typically a managed service with Quality of Service parameters similar to conventional PSTN services.

¹¹ This type of call refers to using the Internet for making calls, typically using a computer to make the calls. An example of this type of service is Skype.

¹² This type of access refers to a carrier select service which allows calls to be made over the internet using a VoIP gateway and which is managed by the operator via a third party and is dialled by using a three digit prefix. This service does not require a residential broadband connection. At present Gibtelecom's CSIP services are limited to the retail market and are only used for international calling only. To date no alternative operator has expressed an interest in requesting wholesale CSIP services from Gibtelecom and the GRA has no indication that this situation will change.

¹³ As per Gibtelecom data request.

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 designates undertakings with SMP. Chapter 6 describes competition problems and proposes obligations, should there be a finding of SMP. Annex A outlines the notification of draft measures pursuant to Article 7(3) of Directive 2002/21/EC and includes a summary notification form.

2. Regulatory Background

2.1 European regulatory background

The European regulatory framework for electronic communications networks and services is a set of five Directives¹⁴:

- Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (the Framework Directive)¹⁵
- Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (the Access Directive)¹⁶
- Directive 2002/20/EC on the authorisation of electronic communications networks and services (the Authorisation Directive)¹⁷
- Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (the Universal Service Directive)¹⁸
- Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (the Privacy Directive)¹⁹.

2.2 Gibraltar regulatory background

These five European Directives were implemented in Gibraltar as part of the Communications Act 2006²⁰ (the Act). The legislation enables the GRA to carry out reviews of competition in relevant electronic communications markets to ensure that regulation remains appropriate in the light of changing market conditions.

In conducting a market review the GRA must take account of the SMP procedures in the Act, sections 38-41, (the SMP procedures) as well as the provisions dealing with

¹⁴ As Amended in 2009.

¹⁵ See footnote 1 above.

¹⁶ 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.

¹⁷ 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.

¹⁸ 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.

¹⁹ 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.

²⁰ Communications Act 2006, Act No. 15, 2006. The latest regulatory reform package of 2009 was included in Communications Act 2006 (Amendment) Regulations 2011, 26 May 2011.

co-operation with the European Commission, BEREC²¹ and the regulatory authorities in the Member States, sections 22-24.

Section 39 of the Act requires the GRA 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 GRA 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 GRA 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 withdrawn²². Where markets are deemed to be uncompetitive, the GRA 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 GRA 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.

It should however be noted that Gibraltar does not have competition legislation. This is important because the 3 criteria test in the Commissions guidelines²³, which tests whether a market is susceptible to *ex ante* regulation, presumes the existence

²¹ Body of European Regulators of Electronic Communications.

²² Please note that regulation at retail level may depend on regulation at the wholesale level.

²³ See section 2.7 below.

of competition legislation. The GRA 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 regulation²⁴, except when that regulation is not in relation to an SMP obligation, or is related to another market.

The GRA 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 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 GRA's three criteria assessment of the wholesale call origination market is unchanged by the proposals in the Recommendation.

The wholesale call termination market on public telephone networks provided at a fixed location is included as Market 1 of the Recommendation.

²⁴ 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 Justice²⁵, 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 monopolist²⁶, 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 GRA to take due account of all applicable guidelines and recommendations which have been issued by the European Commission relating to market identification and analysis²⁷. 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 GRA's proposed definitions for the wholesale markets for fixed call origination and fixed call termination are set out in the next section.

²⁵ 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.

²⁶ 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.

²⁷ Section 39(1).

3 Criteria Test

In addition to identifying the boundaries of markets, the Commission's guidelines require that NRA's 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 GRA can only apply the first two criteria when determining which markets are susceptible to *ex ante* regulation.

3.2 Wholesale call origination on the public telephone network provided at a fixed location

Call origination services correspond, at the retail level, to the ability to make outgoing phone calls. At wholesale level, call origination is an input which is supplied and purchased in order for alternative operators, who do not acquire a direct access link to the end customer, to be able to provide fixed voice services to end customers.

The demand for call origination is derived from the demand for telephony services on the retail market. Currently, the Authority is not aware of any demand from authorised undertakings in Gibraltar for wholesale call origination.

The GRA will now assess the demand and supply substitution on the retail market for fixed (voice and subscriptions) telephone services.

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 small but significant price increase. In determining the existence of demand substitutability, NRA's should make use of any previous evidence of customers' behaviour.

Since 2012 to end of 2014, there has been an 8.1% decrease in the total number of fixed call origination minutes. This represents the incumbents own self supplied services.

There has also been a decline of 20.4% in total number of fixed call minutes during the same period from approximately 134 million to 109 million minutes.

In terms of revenue, Gibtelecom has not received any income from wholesale call origination since February 2013.

While fixed call origination, total call minutes and revenue have been declining, the average number of total mobile customers increased from 31,874 in 2011 to 38,759 in 2014. This represents an increase of 22%.

When analysing mobile 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%.

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 will decline further every year.

Given the above data, the GRA considers that mobile networks can in many instances provide the same functionalities as fixed narrowband access networks such as making and receiving calls. In addition they can also provide internet connectivity.

Given the decline in fixed call origination services and the increase in mobile subscribers, it is the GRA's understanding that fixed to mobile substitution in the retail market is certainly progressing and will continue to develop over the next few years. It therefore appears that even though there is no perfect substitution at present, consumers are willing to substitute fixed calls for mobile calls to the extent that this would likely influence the price setting behaviour of a fixed calls provider.

At the wholesale level, Gibtelecom owns and operates a widespread fixed voice network, but has not received any requests from other providers for a wholesale call origination product (Carrier Selection or Carrier pre-Selection), despite these services having been available for several years. Given the increasing substitution of fixed for mobile by retail customers, the Authority considers it very unlikely that a demand for carrier Selection or Carrier pre-Selection will develop.

Further, as Voice over Broadband and other IP voice platforms become more prevalent, it is likely that the volumes of fixed PSTN minutes will reduce even further over the coming years, making the probability of another provider seeking access to Carrier Selection or Carrier pre-Selection even lower.

Based on the above analysis, the Authority considers that the access to mobile networks and broadband connections are either full or partial substitutes for conventional PSTN-based Carrier Selection and Carrier pre-Selection.

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.

Competing telecoms operators have sufficient opportunities to provide (immediately or in the short time frame) retail services which are substitutes for fixed telephony. In fact two local operators have indicated that they will be providing IP based telephony services in 2015. It is the GRA's view, as stated in its review of the retail access and local and international calls markets, that these retail call services are

considered to be in the same market as traditional PSTN calls and therefore treated as substitutes.²⁸

Also, as mentioned above, mobile telephony can to a certain degree be considered a substitute to fixed services and with two mobile operators in the market it is clear that competition exists and is developing.

Preliminary Conclusion: Based on the substitutability test above, it is the GRA's view that the relevant wholesale market is the market for call origination on the public telephone network provided at a fixed location. This market definition has not 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

Wholesale call origination is demanded by alternative operators together with other services such as call transit and call termination, to provide retail calls services. If combined with wholesale access services it allows the alternative operators to construct retail offers consisting of access and calls.

A direct alternative to the purchase of wholesale call origination services is to acquire a direct connection to the end user premises, either through the roll out of an access network to end customers, or by leasing an already established access network (for example through LLU or bitstream combined with VoIP).

Barriers to entry into the wholesale call origination market are therefore, to a great extent dependent on the operators' ability to develop or acquire a direct access link to the end customer.

Given the emergence of new players, Gibraltar now has four authorised network operators in Gibraltar each covering a different geographical footprint. All networks

²⁸ Managed VoIP/VoB calls are considered to be in the same market as traditional PSTN calls. Unmanaged VoIP calls were not considered to be in the same market.

have included fibre technology, some with fibre to the home and others with fibre to the node. Given the number of operators having rolled out on the basis of their own infrastructure and with the potential of most operators covering the majority of the population within the next three years, it is the GRA's view that structural barriers have been overcome.

It is important to note that carrier selection/carrier pre-selection, local loop unbundling products and wholesale line rental have never been requested by alternative operators.

In terms of wholesale access products, a wholesale broadband access offer is available to all operators and therefore the GRA considers that from a prospective point of view, there is a possibility that some products within it may be contracted by players in the market in the near future.

When considering VoIP/VoB technology, two other operators have indicated that they will also be providing IP telephony and IP-TV during 2015.

Also, mobile networks can in many instances provide the same functionalities as fixed narrowband access such as making and receiving calls. Undertakings offering mobile communication services have already overcome their barriers to entry and are providing services which to a certain degree can be considered as substitutes and may be considered as perfect substitutes in the near future.

It is therefore the GRA's view that increased NGA roll-out, progression of managed VoIP and VoB, increased penetration of mobile telephony and fixed-mobile convergence, transition of traditional PSTN networks to all IP solutions and the availability of wholesale broadband access products are all indicators of a complete decline in barriers to entry.

Given the reasons above, it is the GRA's view that, especially from a forward looking perspective, there are no high and non-transitory barriers to entry into the wholesale call origination market.

Tendency towards effective competition within relevant time horizon

Wholesale call origination can be relatively easily self-supplied by operators who establish a direct connection to end-customers (either on the basis of their own infrastructure or through regulated wholesale products).

In addition to the incumbent, there are now three alternative operators each rolling out their own networks. It is therefore the GRA's view that there will be a growing importance of self-provided call origination especially on a forward looking basis as two of these alternative operators have provided information that they will be providing IP telephony very soon.

In addition, wholesale call origination is constrained competitively by mobile phone usage. This is because self-supplied mobile call origination exerts direct competitive pressure on wholesale call origination services on fixed networks. Even if fixed and mobile calls are not considered perfect substitutes, mobile services still exercise an important constraint on fixed call origination due to a certain degree of competition between fixed and mobile networks.

Given the current infrastructure roll out present in Gibraltar, prospective telephony and broadband products which will come to the market, the wholesale call origination market tends towards effective competition from a forward looking perspective.

Competition law

There is no competition legislation in Gibraltar, and so the GRA 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 GRA 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 GRA 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.

Having said this, the GRA will be closely monitoring developments in the call origination market with an aim to assess the market if any major changes occur.

3.3 Wholesale call termination on individual public telephone networks at a fixed location

When a call is made to a fixed 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 be separated into peak, off-peak and weekend rates. 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.

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 network. The GRA considers that, although there are no demand or supply side substitutes for wholesale call termination on an individual network, it may be that there are constraints arising from the retail level.

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

related retail markets, the GRA found that, at the retail level, a mobile call was not a perfect substitute for a fixed call, and this finding indicates that mobile call termination could not provide a sufficient constraint on the pricing of fixed call termination from a demand or supply-side perspective.

Preliminary Conclusion: It is the Authority's view that the relevant market is the market for wholesale fixed call termination on individual public telephone networks provided at a fixed location. This market definition has not changed since the last notification in 2012.

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 competition²⁹. The GRA believes that the geographic market for wholesale call origination is Gibraltar. There are no appreciable differences in the conditions of demand or supply within Gibraltar, and similar services are offered on the same terms and conditions throughout.

3.5 Summary of preliminary conclusions

The GRA's preliminary conclusions are as follows:

- There are separate markets for wholesale call origination and call termination on individual public telephone networks provided at a fixed location;
- The market for wholesale call origination is not susceptible to *ex ante* regulation;
- The market for wholesale call termination remains susceptible to *ex ante* regulation;
- The geographic 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.

Views of Respondents

Gibtelecom accepted the Authority's proposed definitions of the wholesale fixed call origination as not being susceptible to *ex ante* regulation and the call termination market as remaining susceptible to *ex-ante* regulation.

In terms of call termination, Gibtelecom expressed a view that regardless of whether an authorised operator is offering publicly available services or not, all fixed line operators have control over termination on their own network and should therefore be subject to the same SMP obligations. The company went on to say that Sapphire Networks and Gibfibrespeed are both publicly indicating that they aim to provide fixed line services in the near future.

²⁹ See also Draft review of the BEREC Common Position on geographical aspects of market analysis (definition and remedies), BEREC, 5 December 2013.

Gibtelecom also noted that Sapphire Networks has an interconnection agreement with them in place since 2010, for the exchange of traffic between both parties and that Gibtelecom has ported out some of the company's own fixed line numbers to Sapphire Networks.

Gibtelecom agreed with the Authority's reasons for withdrawing wholesale call origination services from having SMP obligations.

The Authority's position

The Authority acknowledges Gibtelecom's agreement with the proposed definitions of the markets in this review.

With reference to Gibtelecom's points regarding other operators, the Authority notes that although Sapphire Networks is authorised to do so, the GRA has received no information from the company with regards to providing public telephone services. What Sapphire Networks has provided, is an indication that they plan to provide IP telephony in 2015. At the time of writing this consultation, Sapphire Networks does not provide any public fixed voice services.

Gibfibre speed has also previously indicated that they also intend to provide IP telephony in 2015. However, to date, the Authority has received no information from Gibfibre speed with regards to providing public telephone services.

Given the information above, the Authority will be closely monitoring the market should any substantial changes occur.

Q2: Do you agree that the market for call origination on the public telephone network provided at a fixed location should not be subject to ex ante regulation and that all SMP obligations should be withdrawn?

Views of Respondents

Gibtelecom agreed with the Authority and provided no further comments.

The Authority's position

The Authority acknowledges Gibtelecom's agreement with regards to the proposal that the market for call origination on the public telephone network provided at a fixed location 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 GRA 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 law³⁰.

Having proposed preliminary market definitions, the GRA must now assess the current and prospective level of competition within each of these markets:

- wholesale fixed call termination on individual public telephone 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”³¹.

It is important to consider the changes to market shares over time, as this will indicate trends in the market and will contribute to an assessment of whether or not the market may tend towards effective competition over the period of this review. 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 GRA 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 power, where a purchaser buys enough of the operator’s services to be able to influence the pricing and market behaviour of the operator.

³⁰ Section 38(1) and (2).

³¹ At paragraph 75.

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

4.2 Competitor assessment: wholesale call termination on individual public telephone networks provided at a fixed location

Gibtelecom is the only provider of wholesale fixed call termination, and so the market consists of Gibtelecom's self-supply on its own network together with call termination services to mobile operators. Gibtelecom has a market share of 100%.

In terms of call termination minutes, these have declined from 2012 to 2014 by approximately 9.5%. It therefore follows that call termination revenue has also decreased by approximately 12.9% during the same period.

There has also been a decline of 20.4% in total number of call minutes during the same period from approximately 134 million to 109 million minutes.

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 and the ground being rock in many parts. In business terms this equals relatively high cost of network construction (which will be sunk cost once invested) and relatively low potential revenue potential for a new entrant. Gibtelecom has the advantage of existing infrastructure, which is not easily replicated.

The GRA notes that CTS (Gibraltar) exited the local access market recently.

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. Gibtelecom is likely to benefit from economies of scale and scope due to its ownership of an access network, and its ability to offer a range of products on that network. The GRA recognises that the level of this benefit is relative and is limited by the small size of the market.

Vertical integration

A vertically integrated supplier could achieve efficiencies due to its presence in the upstream and downstream markets. These efficiencies could be passed on to customers in the form of cheaper prices, saving on transaction or interconnection costs, or enhanced product quality. However, vertical integration can also constitute an entry barrier where the presence of a communications provider at multiple levels of the production or distribution chain raises the cost of new entry (for example, where new entrants perceive the need to enter multiple markets simultaneously) or where the vertically integrated communications provider is able to foreclose competition at one or more levels of the market.

Gibtelecom is vertically integrated, which may restrict market entry, and which would offer the incentive and ability to leverage market power from the wholesale market to the retail markets.

Countervailing buyer power

The GRA 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 fixed call origination or in the wholesale market for fixed call termination.

4.3 Preliminary conclusions and SMP designation if appropriate

Gibtelecom has 100% of the market for wholesale fixed call termination on individual public telephone networks at a fixed location. The GRA has assessed prospective competition and has evaluated 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.

The GRA proposes that Gibtelecom should be designated with SMP in the market for wholesale call termination.

Q3: Do you agree with the market analysis and proposed SMP designation of the wholesale fixed call termination market?

Please give reasons for your answer

Views of Respondents

Gibtelecom accepted the proposed SMP designation and referred to the answer provided under question 1 regarding the non-imposition of SMP status (and obligations) on other authorised fixed line operators who, by definition, control access to their own individual networks.

The Authority's position

The Authority notes Gibtelecom's acceptance of the market analysis and the proposed SMP designation in the wholesale markets for call termination at a fixed location.

The Authority has addressed Gibtelecom's point regarding the SMP status of other operators in the Authority's position under Question 1 above.

5. Designation of undertakings with SMP

Having regard to the sections above, particularly sections 2 and 3, the Authority is of the view that:

- Gibtelecom should be designated as having SMP in the wholesale market for call termination on its own public telephone network provided at a fixed location.

A reference in this section to any given undertaking shall be taken to include any and all undertakings which are affiliated with, or controlled by, the undertaking in question.

6. Proposed SMP Obligations

6.1 Competition problems

The GRA 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.³² This means that, in proposing *ex ante* remedies should there be a confirmed SMP finding, the GRA 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 affect competitive conditions in the related retail market.

The market analysis which has been carried out in Gibraltar concludes on a preliminary basis that Gibtelecom should be designated with SMP in the wholesale markets for fixed call origination and fixed call termination on an individual network. The GRA is therefore obliged to consider how best to prevent abuse of a dominant position.

6.2 Principles in determining SMP obligations

The Communications Act 2006 provides that, where the GRA 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.³³

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;*
- (c) objectively justified in the light of the objectives laid down in section 19 of the Act; and*

³² SMP Guidelines, Para 30.

³³ Section 38 (7).

(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 GRA, 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 GRA 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 GRA 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 may 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".³⁴

The GRA has considered regulatory options for SMP obligations in the areas of wholesale fixed call termination in light of its overall regulatory objectives. In the following two sections, the GRA sets out its proposals in this regard.

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

SMP obligations on the market for wholesale fixed call termination

Gibtelecom

The GRA proposes obligations associated with:

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

³⁴ Section 38 (8)d.

6.3 SMP obligations on wholesale fixed call termination

GIBTELECOM

Transparency

Regulation 10 of the Communications (Access) Regulations sets out the transparency obligations which the GRA 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 GRA'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 GRA 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 fixed 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 fixed call termination services may be subject to amendment and/or direction by the GRA.

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

The GRA further proposes that Gibtelecom should be obliged to notify the GRA 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 GRA proposes that Gibtelecom shall not unduly discriminate between wholesale customers.

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

The GRA 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 GRA 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 GRA 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 GRA's view, there must be visibility in 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 could compete in the market.

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

It should account separately for its wholesale call termination on the public telephone network at a fixed location in Gibraltar.

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

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.

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 product 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 GRA 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 GRA 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 GRA 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.

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 shall be required, if the GRA 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 GRA 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 regarding the reasonableness of the entity's request for access to wholesale voice call origination services, the GRA shall intervene if either party writes to the GRA seeking intervention. The GRA shall determine whether the request is reasonable within a period of 60 days following receipt of a written request for intervention. The GRA 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 GRA may impose obligations concerning the use of cost accounting systems. The GRA recently published a consolidated Decision Notice on an accounting framework³⁶, which sets out the GRA's principles and compliance requirements. In accordance with that Decision, the GRA 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 GRA from time to time
- b) it operates and maintains a cost accounting system suitable for ensuring compliance with Regulation 14 of the Access Regulations
- 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 his compliance with the cost accounting system he 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 review of the wholesale market for fixed call origination and termination (Decision Notice No. 09/11), the GRA decided that it was not sufficient to rely on a

³⁶ 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.

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.

general cost orientation obligation to address pricing, and that a glide path should be introduced to reduce prices to an efficient target price. Taking this into account, the target rate for 2014 for origination and termination was set at 0.31 pence per minute (€ cents 0.36).

In line with the Commission's 2009 Termination Rates Recommendation, the GRA has reviewed the fixed termination rates implemented by other NRAs who have adopted a cost-oriented BU-LRIC model, and now proposes to set the following rates³⁸ for wholesale fixed call termination:

Date	Wholesale fixed call termination rate (€cents/min)	Wholesale fixed call termination rate (p/min)
1 st September 2015 onwards ³⁹	0.0983 ⁴⁰	0.0718

Q4: Do you agree with the proposed SMP obligations in the wholesale fixed call termination market?

Please give reasons for your answer.

Views of Respondents

In terms of the Transparency SMP obligation, Gibtelecom sought clarification on whether the requirement to publish changes to terms and conditions and/or prices of wholesale call origination and termination services did not include a requirement to publish the changes more widely in the local press.

Gibtelecom reiterated its position regarding the Authority's Accounting Separation obligation. It objected to the requirement to submit annual externally audited accounting separation reports due to their burdensome nature and extensive data collection and requested the GRA to reconsider this proposal.

Gibtelecom sought clarification with regards to the proposed Access obligation, particularly point (d) where a reference to "...roaming on mobile networks" was

³⁸ 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.

³⁹ The fixed call termination rate will apply until further reviewed by the GRA. This period will probably be for three years depending on local market conditions.

⁴⁰ This figure has been calculated as the average termination rate between Member States which have implemented a BU-LRIC model. The Member States are Bulgaria, Czech Republic, Spain, France, Hungary, Ireland, Italy, Luxembourg, Malta, Romania, Slovenia, Slovakia and UK as stipulated by the BEREC FTR Benchmark Report (as of January 2015).

made and have asked for clarification in the context of providing wholesale services on fixed networks.

Gibtelecom also questioned the need for the expansion of the current Cost Accounting obligation, which, with the proposed changes, now requires that the company maintain cost accounting systems that produce appropriate information to demonstrate compliance with cost-orientation.

Furthermore, it was stated that the Authority is also proposing to continue to apply a price control obligation via a glide-path mechanism thus dictating wholesale rates.

With regards to the Price Control obligation, Gibtelecom did not agree with the Authority's proposal to exert a price control on wholesale [call origination] call termination rates. Gibtelecom went on to explain that cost oriented rates are obtained through the company's regulated accounts and it asked that they either be requested to derive these rates from the ASR or have a price control imposed, but not both.

The Authority's position

The Authority acknowledges the correction which Gibtelecom has pointed out in its submission regarding the reference to voice call origination services.

With regards to the point made by Gibtelecom on the Transparency obligation, the GRA can confirm that the requirement to publish changes to terms and conditions and/or prices of wholesale call origination and termination services does not include a requirement to publish the changes more widely in the local press

The Authority notes that Gibtelecom was subject to an obligation to submit an ASR once every three years. A three year cycle is not adequate to monitor change in a fast-moving market like the telecoms sector, and is not sufficient to allow the Authority to ensure that Gibtelecom is compliant with its regulatory obligations. This is why the Authority decided that Gibtelecom should be required to submit an audited ASR annually, starting 30 September 2014. The GRA therefore maintains its position with regards to the requirement to submit an annually audited ASR.

The Authority acknowledges Gibtelecom's comment that the access obligation is a continuation of the current obligation. The reference to mobile roaming is an example of a general point providing instances of what could possibly be included under the obligation. It is not specific to the markets under review.

In the Authority's view, the cost accounting obligations are not new. The cost accounting obligations are a continuation of existing obligations. The Authority has elaborated on how it intends that the obligations are to be implemented, and has referred to its Decision⁴¹, which provides a detailed explanation of the Authority's principles.

The Authority does not agree that it should impose cost accounting or a price control, but not both. A cost accounting obligation is not the same remedy as a price control. It addresses different competition problems. The Authority set the

⁴¹ 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.

termination rates with reference to European best practice and in particular taking account of those Member States which have published fixed termination rates based on their implementation of a pure BU-LRIC model.

The key objective for a Member State developing a BU-LRIC model is to calculate a termination rate which allows for the recovery of the level of costs that would be incurred by an efficient 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 termination rates.

Annex A - Notification of draft measures pursuant to Article 7(3) of Directive 2002/21/EC

Pursuant to Article 16 of Directive 2002/21/EC, the Authority has conducted an analysis of the markets for wholesale call origination and wholesale call termination on individual public telephone networks at a fixed location.

Under Article 6 of the Directive 2002/21/EC, the Authority has conducted a national consultation, contained in document no. C02/15. This consultation ran from 10th June 2015 and ended 10th July 2015. The responses to this consultation have been taken into consideration and the Authority has now reached decisions in market definition, designation of SMP and regulatory obligations, which are contained in this document.

The Gibraltar Regulatory Authority hereby notifies the Commission of its proposed SMP obligations consistent with Article 7(3) of Directive 2002/21/EC. These obligations are set out above. There is no Competition Authority in Gibraltar so therefore its views are not relevant here.

Summary Notification Form

Section 1 – Market Definition

Please state where applicable:

1.1 The affected relevant product/service market(s) – Pages 13 to 17

The Authority proposes to define two wholesale fixed markets:

Wholesale call origination on the public telephone network at a fixed location

Wholesale call termination on individual public telephone networks at a fixed location

Are these markets mentioned in the Recommendation on relevant markets?

Wholesale fixed call origination – No

Wholesale fixed call termination - Yes

1.2 The affected relevant geographic market – Page 18

The proposed geographical market is Gibraltar.

1.3 A brief summary of the opinion of the national competition authority were provided

There is no competition Authority in Gibraltar so therefore this section is not relevant.

1.4 A brief overview of the results of the public consultation to date on the proposed market definition (for example, how many comments were received, which respondents agreed with the proposed market definition, which respondents disagreed with it) – Pages 18 and 19

Detailed responses to the consultation were provided by:

- Gibtelecom

The respondent generally agreed with the proposed definition of the wholesale fixed call termination market.

1.5 Where the defined relevant market is different from those listed in the recommendation on relevant markets, a summary of the main reasons which justified the proposed market definition by reference to Section 2 of the Commission's Guidelines on the definition of the relevant market and the assessment of SMP, and the three main criteria mentioned in recitals 9 to 16 of the recommendation on relevant markets and Section 3.2 of the accompanying Explanatory Memorandum.

Explained in Pages 13 to 17

Section 2 – Designation of undertakings with SMP

Please state where applicable:

2.1 The name(s) of the undertaking(s) designated as having individually or jointly significant market power – Page 25

- Gibtelecom is designated as having SMP in the market for wholesale voice call termination on individual public telephone networks at a fixed location.

2.2 The criteria relied upon for deciding to designate or not an undertaking as having SMP individually or jointly with others– Pages 24 to 25

Market Share

Barriers to entry

Potential Competition

Vertical Integration

Countervailing Buyer Power.

2.3 The name of the main undertakings (competitors) present/active in the relevant market – Page 22

At present no competitors.

2.4 The market shares of the undertakings mentioned above and the basis of their calculation (e.g. turnover, number of subscribers) – Page 2, 6 & 7

Gibtelecom has 100% market share in the wholesale fixed call termination market.

2.5 Please provide a brief summary of the opinion of the national competition authority, where provided:

There is no competition Authority in Gibraltar so therefore this section is not relevant.

2.6 Please provide a brief summary of the results of the public consultation to date on the proposed designation(s) as undertaking(s) having significant market power (e.g. total number of comments received, numbers agreeing/disagreeing) – Pages 18, 19, 22, 30, 31 & 32

Detailed responses to the consultation were provided by:

- Gibtelecom

The respondent sought clarification on the Transparency and Access obligations. It also questioned the need for the expansion of the current Cost Accounting obligation and did not agree with the Price Control obligations. The respondent reiterated its position on the Accounting Separation SMP obligation.

Section 3 – Regulatory Obligations

Please state where applicable:

3.1 The legal basis for the obligations to be imposed, maintained, amended or withdrawn

The Communications (Access) Regulations 2006 transposing the Access Directive 2002/19/EC.

- Transparency – Regulation 10
- Non-Discrimination – Regulation 11
- Accounting Separation – Regulation 12
- Access – Regulation 13
- Price control and cost accounting – Regulation 14

3.2 The reasons for which the imposition, maintenance or amendment of obligations on undertakings is considered proportional and justified in the light of the objectives laid down in Article 8 of Directive 2002/21/EC (Framework Directive). Alternatively, indicate the paragraphs, sections or pages of the draft measure where such information is to be found – Pages 14, 22 & 26

This information can be found under section 3, 4 and 6 of this document.

3.3 If the remedies proposed are other than those set out in Articles 9 to 13 of Directive 2002/19/EC (Access Directive), please indicate which are the 'exceptional circumstances' within the meaning of Article 8(3) thereof which justify the imposition of such remedies. Alternatively, indicate the paragraphs, sections or pages of the draft measure where such information is to be found.

Not applicable.

Section 4 – Compliance with International Obligations

In relation to the third indent of the first subparagraph of Article 8(3) of Directive 2002/19/EC (Access Directive), please state where applicable:

4.1 Whether the proposed draft measure intends to impose, amend or withdraw obligations on market players as provided for in Article 8(5) of Directive 2002/19/EC (Access Directive)

Not applicable.

4.2 The name(s) of the undertaking(s) concerned

Not applicable.

4.3 Which are the international commitments entered by the Community and its Member States that need to be respected

Not applicable.