

**Access to the public telephone network at a fixed location for residential and non-residential customers**

**Publicly available local telephone services provided at a fixed location for residential and non-residential customers**

**Publicly available international telephone services provided at a fixed location for residential and non-residential customers**

**Response to Consultation 06/14**  
(Response to Public Consultation 01/14)

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## **Executive Summary**

The communications regulatory framework requires the Gibraltar Regulatory Authority (GRA or 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 Directive<sup>1</sup>. 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.

On 22<sup>nd</sup> January 2014, the Authority issued a national consultation on retail access to the public telephone network, retail local calls and retail international calls provided at a fixed location (Public Consultation No. 01/14).

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

- Gibtelecom
- Sapphire Networks.

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 retail fixed markets:

- Retail access to the public telephone network at a fixed location
- Retail local calls from a fixed location
- Retail international calls from a fixed location.

### **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 countervailing buyer power and potential competition.

Article 16(4)<sup>2</sup> of the Framework Directive<sup>3</sup> states,

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<sup>1</sup> 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.

<sup>2</sup> Directive 2009/140/EC "Better Regulation Directive" outlines amendments to Article 16(4) of Directive 2002/21/EC on a "Common Regulatory Framework".

“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.”

Under the provisions of Regulation 14, “[The Authority] shall impose such regulatory obligations as it considers appropriate to achieve those objectives on persons whom it has determined under section 40 of the Act as having significant market power in the specific retail market”.

Such obligations may include:

- Obligation of transparency
- Obligation of non-discrimination
- Obligation of accounting separation and cost accounting
- Price controls.

In the analysis of the markets, the Authority assessed that Gibtelecom has a 100% market share in all three markets.

The Authority therefore proposes to designate Gibtelecom as having SMP. The SMP obligations will range from transparency to price controls. In terms of the price controls, the GRA proposes a system of pre-notification of prices, per-second billing and cost orientation.

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 retail fixed markets:

Retail access to the public telephone network at a fixed location:

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

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3 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.

Publicly available local telephone services provided at a fixed location:

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

Publicly available international telephone services provided at a fixed location:

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

The Authority has considered regulatory options in light of its overall objectives and in the context of the problems identified in the relevant wholesale markets. 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. SMP obligations imposed aim to address market failure, to protect consumers against the exercise of market power and to promote competition in the retail fixed markets.

# 1. Introduction

## 1.1 Background

The European regulatory framework for electronic communications networks and services is a set of five Directives<sup>4</sup>:

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

These five Directives were implemented as part of the Communications Act 2006<sup>10</sup> (the Act). The legislation enables the Authority to carry out reviews of competition in relevant electronic communications markets to ensure that regulation remains appropriate in the light of changing market conditions, otherwise known as market reviews.

### *Market review methodology*

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

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<sup>4</sup> As Amended in 2009.

<sup>5</sup> See footnote 1 above.

<sup>6</sup> 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.

<sup>7</sup> 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.

<sup>8</sup> 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.

<sup>9</sup> 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.

<sup>10</sup> Communications Act 2006, Act No. 15, 2006. Please note this legislation implemented the latest regulatory reform package of 2009.

dealing with co-operation with the European Commission, BEREC<sup>11</sup> 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 European Commission Recommendation of 17 December 2007 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 withdrawn<sup>12</sup>. Where markets are deemed to be uncompetitive, the Authority must consider appropriate regulatory obligations on any undertaking which has significant market power.

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

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

A market review has three main components:

- Definition of the relevant market 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 NRAs.

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 European Commission's guidelines<sup>13</sup>, which tests whether a market is susceptible to ex-ante regulation,

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<sup>11</sup> Body of European Regulators of Electronic Communications.

<sup>12</sup> Please note that regulation at retail level may depend on regulation at the wholesale level.

<sup>13</sup> See section 2.7 below.

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 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<sup>14</sup>, except when that regulation is not in relation to an SMP obligation, or is related to another market.

## **1.2 Scope of the review**

As indicated directly below, this review considers narrowband retail public telephone services at a fixed location including retail access, local telephone services and international telephone services. Please note this review is only concerned with fixed narrowband services.

### **The current review**

This review contains an assessment of the following three markets:

The first concerns **retail access** to the public telephone network provided at a fixed location in Gibraltar (Market 1 of the Recommendation).

The second concerns **retail local telephone services** provided at a fixed location in Gibraltar (Markets 3 and 5 of the old Recommendation<sup>15</sup>).

The third concerns **retail international telephone services** provided at a fixed location in Gibraltar (Markets 4 and 6 of the old Recommendation<sup>16</sup>).

Although not all of these markets are included in the current Recommendation, the specific market circumstances in Gibraltar make it necessary for the Authority to review all of the three markets. This is explained in the relevant parts of this document.

### **The previous review**

In the first round of market reviews, Gibtelecom was designated with SMP in all three markets above. The main reasons justifying this decision were based on an

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<sup>14</sup> At the retail level, any existing regulation at the wholesale level will be included in the analysis.

<sup>15</sup> COMMISSION RECOMMENDATION of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services.

<sup>16</sup> See footnote 16 above.



analysis of a number of criteria namely market shares, vertical integration, barriers to entry and countervailing buyer power.

The review concluded there was a need for regulatory intervention in the aforementioned markets through obligations of transparency, non-discrimination as well as price control and cost accounting.

*Structure of this document*

Chapter 2 sets out the Authority's analysis to define relevant markets susceptible to ex-ante regulation. Chapter 3 analyses the markets defined to identify whether any undertaking(s) enjoys a position of SMP. Chapter 4 describes competition problems and proposes SMP obligations. Annex A summarises the consultation questions.

## **2. Market Definition**

### **2.1 Methodology**

The market definition procedures are designed to identify in a systematic way the competitive constraints encountered by providers of electronic communications networks and services. They do so in a way which also facilitates subsequent market analysis procedures. According to the European Court of Justice<sup>17</sup>, 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.

In ex-ante market reviews, the market definition process is about identifying the boundaries of a market for the purpose of correctly applying ex-ante regulation. The process involves considering constraints arising on both the demand and supply sides of a market (and their interaction). The constraints are those which would apply to a so-called hypothetical monopolist<sup>18</sup>, 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.

As per the European Commission's guidelines on market analysis and the assessment of significant market power (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.

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

The European 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.

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<sup>17</sup> 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.

<sup>18</sup> 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.

### *3 Criteria Test*

In addition to identifying the boundaries of markets, the European Commission's guidelines require that NRAs 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?

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.

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

- Are fixed access and fixed calls in the same market?
- Are retail fixed services in the same market as retail mobile services?
- Are all forms of access in the same market?
- Are all types of voice calls in the same market?

## **2.2 Background to the sector**

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

- Analogue exchange lines offering low capacity connection, 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)
- ADSL/VDSL based broadband connections.

Fixed voice services in Gibraltar consist of:

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

- Voice over broadband connections<sup>19</sup>
- Voice over IP (VoIP) connections<sup>20</sup>; and
- Carrier Selection IP voice services<sup>21</sup>.

As of June 2013, there were a total of 23,282 exchange lines<sup>22</sup>.

### **2.3 Description of the fixed narrowband markets in Gibraltar**

Fixed telephony services in Gibraltar have largely been provided by the incumbent, Gibtelecom, which offers a range of retail access and calls products to residential and business customers. Until recently, a second fixed network operator, CTS (Gibraltar) Ltd, provided fixed line services within certain limited areas of Gibraltar. However, it has since exited the market.

A third operator, Sapphire Networks, was licensed in late 2004. It currently has an agreement with Gibtelecom which enables it to access its customers for the provision of ADSL/VDSL services, or direct Ethernet connection to Sapphire's own network, where the customers are within physical reach. At the time of writing this consultation, Sapphire Networks does not provide any public fixed voice services.

In addition to the traditional narrowband calls services, Gibtelecom provides voice services using a Carrier Select (CS) code, routing the traffic via its own VoIP gateway to a third party for onward conveyance via the Internet<sup>23</sup>. Although Gibtelecom markets this service as VoIP, it differs from standard VoIP services as it does not require an internet connection. It is accessed by dialling in a three digit prefix prior to the telephone number a customer wishes to call. At present, Gibtelecom's Carrier Selection IP (CSIP) services are used for international calling only.

In the retail calls market, the Authority 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.

### **2.4 Delineation of the markets**

*Are fixed access and fixed calls in the same market?*

One of the considerations made by the Authority in its market definition process is to assess whether retail fixed line access and fixed line calls can be substitutable for

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<sup>19</sup> 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.

<sup>20</sup> 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.

<sup>21</sup> 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.

<sup>22</sup> As per Gibtelecom data request.

<sup>23</sup> This service is described as Carrier Select IP service (CSIP) in this document.

each other. In this respect, the Authority has established that, at present, customers purchase fixed access and calls as a combination of services. However, this does not necessarily entail that these two services fall within the same relevant market.

Even though the cost for access and the cost for calls (usage) are generally sent to customers on the same bill, they usually fall under different itemisation as is the case for Gibtelecom customers. Therefore, customers can distinguish between the costs of the two services.

### **Demand side substitution**

Access and call services are functionally different services. The cost of access is paid on a regular basis in equal instalments irrespective of the number of calls made by a customer and the cost of voice services is totally dependent on usage.

In essence, customers will only be capable of making calls over the fixed line network once they have acquired retail access to the public fixed telephone network. Although customers may prefer to purchase both access and calls from the same operator, with CS and CPS customers have the option of contracting one service from one undertaking (access) and the other service (calls) from another.

In this sense, the Authority concludes that rather than being substitutable, retail fixed access and fixed line calls are complementary in nature. Therefore, in the event of a small but significant non-transitory increase in the price of retail fixed access customers cannot substitute fixed access to fixed calls since the latter are dependent on the former.

The Authority therefore proposes that fixed access and fixed calls are complements and therefore not part of the same market.

### **Supply side substitution**

On the supply side, while an access provider may be able to enter the calls market, a calls provider would not easily be able to enter the access market speedily. This is due to the fact that significant economies of scale and sunk costs are involved in the construction of access networks and the process to build a fixed network may take longer than the timeframe of this review.

Conversely, an operator providing retail access may be willing to enter the retail calls market in the event of a small but significant non-transitory increase in the price (SSNIP) of local and/or international calls.

Nevertheless, this one way substitution is not considered enough to pose a realistic constraint on a hypothetical increase in the price of retail access.

This indicates the potential availability of alternative calls products, but not the availability of alternative access products.

The Authority therefore suggests that, from a supply-side perspective, the provision of retail fixed line access and the provision of fixed line calls belong to separate markets.

## **Proposal: Retail fixed narrowband access and retail fixed calls are in separate markets**

*Is retail fixed narrowband access in the same market as retail mobile access?*

With the steady increase in number of mobile subscribers in recent years, it is the Authority's view that it should assess if mobile access falls within the scope of the market definition. The Authority has considered whether a customer would switch between fixed line access and mobile access, and whether supply-side substitution between the two forms of access infrastructures is a possibility.

### ***Demand-side substitution***

In terms of functionality, the most obvious difference between fixed and mobile access is the location dependency. For mobile users, location is not generally an issue (apart from signal coverage issues), whereas a fixed user is dependent upon where the line is connected. In this regard, substitutability is likely to be uni-directional only as customers would consider replacing fixed access by a mobile access service but not vice versa.

Also, fixed line access and mobile access provide users with a variety of related services that help distinguish both services. Fixed access, for example, facilitates services such as fax and dial-up internet<sup>24</sup>.

Mobile access, on the other hand, facilitates data services and access to the internet, which is increasing due to its popularity amongst younger users.

Reliability is also a factor to consider when comparing the two forms of access. In terms of the fixed line, access reliability is very good whereas a variety of factors may affect mobile access such as your network operator, surrounding physical infrastructure in densely built up areas and weather conditions.

In terms of pricing, the two forms of access are charged differently. For example, on the mobile side customers either subscribe to the pre-paid or post-paid service, both of which charge for access and usage combined. Conversely, the cost of fixed line access is generally identifiable as you are billed a monthly rental charge in addition to a one-off connection fee and call charges for the period under consideration. This difference of how mobile and fixed line tariffs are calculated makes it difficult to compare the pricing of the two services.

The Authority has also observed that the number of fixed access lines is relatively stable in Gibraltar (when accounting for the move from dial-up internet access to broadband), while the number of mobile subscriptions has increased. This suggests that the two forms of communication are complements rather than substitutes.

Therefore, in the event of a small but significant increase in price (SSNIP) test of fixed access, the Authority considers it unlikely that a sufficient number of customers would move to mobile access only to make the SSNIP unprofitable.

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<sup>24</sup> Although the use of dial-up internet access is rapidly decreasing.

### ***Supply side substitution***

For supply side substitution to occur a mobile operator would have to switch production and offer access that would match the quality and price of a fixed line in response to a price increase in fixed access. In order to achieve this, the undertaking would either have to roll out a fixed access network or develop a similar product, possibly via a wireless solution. Both scenarios would consequently involve substantial sunk costs and a timeframe which would in most cases be lengthier than the lifetime of this market review.

It is therefore very unlikely that a SSNIP would entice switching in these circumstances. The Authority believes that the high costs involved in developing fixed access infrastructure render supply-side substitution between mobile access and fixed line access unlikely.

### **Proposal: Retail fixed access and retail mobile access are in separate markets**

*Are all types of retail fixed voice calls in the same market?*

There are two main considerations to be examined here. First of all, does the destination of the call indicate that it should be in a separate market – for example, should local calls be considered as part of the same market as international calls? Secondly, does the form of access matter - are calls made over broadband lines substitutes for calls made over narrowband access, and are VoIP calls and PSTN calls interchangeable?

*Local and international calls*

### ***Demand-side substitution***

For obvious reasons, there is clearly no demand side substitution between local and international calls. One involves a telephone call to a person or company based in Gibraltar and the other involves a call to a person or company in another country. Furthermore, international rates differ according to the destination and are in most cases more expensive than local calls.

### ***Supply side substitution***

On the supply side, could a supplier of local calls switch to supply international calls in response to a small but significant price increase? The supplier of local calls could obtain an international gateway and negotiate agreements with international operators. However, a supplier of international calls responding to an increase in the price of local calls would not have the local infrastructure (i.e. local access network) necessary to terminate local calls, so would have to rely on wholesale call origination and call termination, which is unlikely to present an attractive business opportunity.

### **Proposal: local and international calls are in separate markets.**

### *Internet based calls*

The Authority considers Internet based calls to encompass VoB calls, CSIP calls and VoIP calls as explained above.

### *Voice over broadband (VoB) calls*

These are calls made using an IP telephone device using IP technology and provided over the higher frequency (broadband) part of a line (DSL on copper lines for example). The calls are a managed service using IP technology on proprietary IP networks, as opposed to VoIP calls which are not managed and are made using the internet for conveyance on a 'best effort' principle.

It is unlikely that VoB calls would differ significantly from PSTN calls in quality. An IP-phone would be required, but is sometimes provided by the supplier of the service.

Providers of VoB services also often provide PSTN services and it is therefore typical that emergency services are available from that provider.

It would seem that VoB calls are very comparable to PSTN calls and that enough customers would substitute from PSTN calls to VoB calls in response to a SSNIP, to make the SSNIP unprofitable.

The Authority therefore concludes that VoB and PSTN voice calls are in the same market.

**Proposal: VoB calls and traditional PSTN calls are in the same relevant market.**

### *Carrier Selection IP calls*

CSIP calling is a CS service which allows calls to be made over the internet using a VoIP gateway. It is managed by the operator via a third party and is dialled by using a three digit prefix. Only international calls can be made using the CSIP system.

In terms of functionality, both CSIP and PSTN calls are very similar save for the fact that for CSIP calls customers have to dial a 3 digit prefix and the quality of the call may be slightly lower. Apart from these two attributes, both calls are identical and therefore are considered as being sufficiently interchangeable and should be examined under the same relevant market.

Additionally, as the CSIP service is accessed via the PSTN network and requires a PSTN connection there is also access to emergency services.

In the period 2011-2012, the overall international PSTN call traffic volume decreased very slightly from 12.9m minutes to 12.7m minutes. Approximately 23% of total international call volume was CSIP<sup>25</sup>.

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<sup>25</sup> Gibtelecom data request.



**Proposal: CSIP calls and traditional PSTN calls are in the same relevant market.**

#### *VoIP calls*

VoIP calls are routed via the internet on a 'best effort' basis. The quality is therefore unpredictable and often inferior to PSTN calls. Additionally, VoIP calls cannot typically be made from standard fixed phones, but require the use of a computer.

As VoIP services are typically provided by non-domestic over the top (OTT) providers with no PSTN service, emergency services are typically not available from a VoIP service provider.

On the basis of quality, the lack of emergency services, and product characteristics it is the Authority's view that VoIP calls are not sufficiently substitutable with PSTN calls to make an SSNIP in PSTN calls unprofitable. The Authority therefore concludes that VoIP calls do not fall in the same market as traditional PSTN calls.

**Proposal: VoIP calls and traditional PSTN calls are not in the same relevant market.**

## **2.5 Geographical market**

According to established case law, the relevant geographic market comprises an area in which the conditions of competition are similar across the area, and which can be distinguished from neighbouring areas where the conditions of competition are different. The Authority believes that the geographic market for all retail fixed communications access and calls services is Gibraltar. There are no appreciable differences in the conditions of demand or supply within Gibraltar, and similar services are offered on the same terms and conditions throughout.

**Proposal: the geographical boundary for all markets defined above is all of Gibraltar.**

## **2.6 Preliminary markets to be defined**

#### *Summary of preliminary conclusions*

The Authority's preliminary conclusions are as follows:

- Retail fixed access and retail fixed calls are in separate markets,
- Retail fixed access and retail mobile access are in separate markets,
- Local and international calls are in separate markets,
- VoB calls are in the same market as PSTN calls,
- CSIP calls are in the same market as PSTN calls,
- VoIP calls and traditional PSTN calls are not in the same relevant market,
- the geographical scope of all markets is Gibraltar.

## **2.7 Application of the 3 Criteria Test**

Having defined the markets, it is now necessary to ascertain whether these markets are susceptible to ex-ante regulation. As explained above, this is done using the 3 criteria test. However, noting that as there is no competition legislation in Gibraltar, the Authority will only apply the first two criteria, i.e.

- Is there a presence of high and non-transitory barriers to entry? and
- Does the market structure not tend towards effective competition within the relevant time horizon?

### **Retail fixed access to the public telephone network at a fixed location**

Gibraltar is a very small jurisdiction, very heavily populated. The cost and time to build a competing local access network, even if wireless, may be disproportionate to the potential returns on that investment given the small market size<sup>26</sup>.

The Authority therefore considers that the answer to both questions for this market is yes – that is, there are high and non-transitory barrier to entry and the market does not tend towards effective competition within the period of this review.

The Authority therefore concludes that the market for retail access to the public telephone network at a fixed location is susceptible to ex-ante regulation.

### **Retail local calls provided at a fixed location**

As there is no competition in the access market, competition in the retail local calls market would rely on the use of Gibtelecom's access network. CS and CPS exist as options for competitors yet no providers have decided to use these methods to compete in the local calls market.

The small size of Gibraltar is likely to be the cause of the lack of competitive entry and the Authority considers that this represents a high and non-transitory barrier to entry<sup>27</sup>. This is because the investment required to offer local calls (including switching equipment and local staff) would be substantial compared with the margin available to a provider of local calls who would have to pay cost-oriented charges to Gibtelecom for call origination and call termination of calls. The Authority also considers that this barrier to entry means that the market will not tend towards effective competition within the period of this review.

The Authority therefore concludes that the market for retail local calls is susceptible to ex-ante regulation.

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<sup>26</sup> CTS (Gibraltar) Ltd., which recently exited the Gibraltar market, commenced the construction of a second access network but was unsuccessful in making this a viable business.

<sup>27</sup> CTS (Gibraltar) Ltd also entered this market, using its own access network, but exited last year.

## **Retail international calls provided at a fixed location**

As for local calls, there is currently no competitor offering traditional PSTN international call services or international CSIP services. CTS (Gibraltar) Ltd offered both of these services, but exited the market in 2012. Furthermore, no competitive provider of international calls has ever decided to use CS or CPS to offer competing PSTN international call services.

The Authority considers that the small size of the market represents a high and non-transitory barrier to entry and that there are no indications that a new provider of international calls will enter the market during the period covered by this review.

The Authority therefore concludes that the market for retail international calls is susceptible to ex-ante regulation.

**The Authority therefore proposes to define the following relevant markets susceptible to ex-ante regulation:**

- **Retail access to the public telephone network at a fixed location**
- **Retail local calls provided at a fixed location**
- **Retail international calls provided at a fixed location.**

***Q1: Do you agree with the proposed definitions of markets susceptible to ex-ante regulation?***

***Please give reasons for your answer***

### **Views of respondents**

Gibtelecom agreed with the Authority's proposed definitions of the retail fixed markets susceptible to ex-ante regulation and stated that they were largely in line with those put forward during the first round of market reviews starting in 2007. The Company noted that the Authority had included markets from the old 2003 EU Recommendation<sup>28</sup> on relevant markets based on the grounds of Gibraltar's distinctive market circumstances.

Sapphire Networks agreed with the proposed definitions of markets susceptible to ex-ante regulation.

### **The Authority's position**

The Authority acknowledges Gibtelecom's agreement with the proposed definitions of markets susceptible to ex-ante regulation as stipulated in public consultation 01/14. As stated by the operator, the Authority has indeed included markets from the old 2003 EU Recommendation<sup>29</sup> on relevant markets based on the fact that SMP

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<sup>28</sup> COMMISSION RECOMMENDATION of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services.

<sup>29</sup> See footnote 1 above.

operators still exist in these markets due to the current local market conditions in Gibraltar.

### **3. Market Analysis**

#### **3.1 Methodology**

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

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

- Retail fixed access
- Retail fixed local calls
- Retail fixed international calls.

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"<sup>30</sup>.

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

As large market shares are not in themselves always sufficient to find SMP, the market analysis must also consider whether there are other factors which may contribute to, or offset, SMP. Therefore, the Authority will consider other factors such as barriers to entry, vertical integration, potential competition and countervailing buyer power. Each of these is described briefly below:

#### *Barriers to entry*

According to the Explanatory Memorandum accompanying the Relevant Markets Recommendation,

"...high structural barriers may be found to exist when the market is characterised by absolute cost advantages, substantial economies of scale and/or economies of scope,

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<sup>30</sup> At paragraph 75.

capacity constraints, and high sunk cost. Such barriers can still be identified with respect to the widespread deployment and/or provision of local access networks to fixed locations<sup>31</sup>”.

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

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

#### *Vertical integration*

An undertaking which is dominant at the wholesale level of a market may have the opportunity to leverage market power into downstream markets. In the case of the retail fixed access market, the relevant upstream markets would be those associated with obtaining wholesale inputs, that is, wholesale unbundled access and interconnection.

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

#### *Potential competition*

Potential competition could be detected by entities seeking authorisation in the market or by existing undertakings communicating plans to enter new product or service markets. Potential competition could also arise through new technological developments, although these should be backed by demonstrable interest or activities by undertakings to deploy these technologies to compete in the relevant market.

#### *Countervailing buyer power*

Countervailing buyer power exists when a customer or a group of customers possess sufficient power to be able to negotiate prices and other purchase terms with the provider to achieve more favourable terms.

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<sup>31</sup> Section 2.2(i) of the Explanatory Note of the Commission Staff Working Document Public Consultation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services (second edition). Brussels, 13 November 2007 C (2007)5406.

## **3.2 Market analysis: retail fixed access**

### *Current situation*

The number of narrowband access lines has declined slightly from approximately 23,500 to just over 23,200 in June 2013<sup>32</sup>. ISDN access accounts for a very small proportion of access lines – around 0.01% of overall access and around 0.03% of business access lines<sup>33</sup>. The number of ISDN access lines has remained fairly stable since 2010. Gibtelecom is the only provider of retail fixed access, and currently has 100% share of the retail fixed access market.

### *Barriers to entry*

As described in respect of the 3 criteria test, 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, whereas Gibtelecom has existing infrastructure and therefore enjoys economies of scale, relative to a new market entrant, even in this small market.

The Authority considers that these characteristics represent high barriers to entry for the fixed narrowband access market.

### *Vertical integration*

Gibtelecom is a vertically integrated company and any new entrant would be dependent on Gibtelecom's wholesale access services. In this context, it is important to note that Gibtelecom presently offers no narrowband wholesale access services, such as for example Wholesale Line Rental (WLR), so a new entrant would either have to request that this service is developed, use Local Loop Unbundling (LLU), or build its own access infrastructure. The Authority has received no enquiries or requests regarding a WLR product.

LLU is available in Gibraltar, but this service would typically be used by entrants wanting to compete in the broadband market rather than the narrowband market alone.

### *Potential competition*

A second operator, Sapphire Networks, provides public electronic communications networks and services in Gibraltar. To date, its service offering includes only provision of broadband DSL to residential customers via Gibtelecom's network and related services and direct connection by Ethernet to customers within a very limited network footprint.

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<sup>32</sup> Gibtelecom answers to data request.

<sup>33</sup> Note this assumes that all ISDN lines are for business use – data received from Gibtelecom does not differentiate between residential and business use of ISDN.

The other potential means of introducing competition is LLU which allows alternative operators to take over the incumbent's local loop, and to assume control of the customer relationship and the customer's line. LLU is however primarily used for the provision of broadband services. To date, no alternative operator has connected to the local loop even though this option has been available for a number of years. The Authority therefore does not consider that LLU-based access will appreciably impact the level of competition in the market within the timeframe of this review.

The Authority believes that the retail fixed access market is unlikely to become competitive within the lifetime of this review.

#### *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.

### **3.3 Preliminary conclusions and SMP designation if appropriate**

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

**The Authority proposes that Gibtelecom should be designated with SMP in the market for retail fixed access.**

***Q2: Do you agree with the market analysis and proposed SMP designation of the retail fixed access market?  
Please give reasons for your answer***

#### **Views of respondents**

Sapphire Networks accepted the market analysis and proposed SMP designation of the retail fixed access market.

Gibtelecom accepted the positions outlined by the Authority in its market analysis and proposed SMP designation for the retail fixed access market. In relation to the lifetime of the review, the operator believed that consideration should be given to changing market conditions in the light of possible entrants to the market.

#### **The Authority's position**

In terms of the market analysis and the proposed SMP designation of the retail fixed access market, the Authority notes Gibtelecom's acceptance of the general principles outlined in the consultation<sup>34</sup>. The Authority is fully aware that there are currently two other authorised operators with the ability to potentially offer retail fixed access to the public telephone network. At present the Authority has no indication that these operators will be providing these services within the next three years, however the Authority will be closely monitoring the market should any new product or service be offered by an alternative operator.

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<sup>34</sup> Public Consultation 01/14.

### **3.4 Market analysis: retail fixed local calls**

#### *Current situation*

Analysis of the data suggests a decrease of around 8.5% in overall call volumes over the last two years. When we look specifically at retail fixed local calls, the share of the total calls market accounted for by local calls remained stable at around 65% over the same period<sup>35</sup>. Retail fixed to mobile calls also decreased slightly in volume by around 3%.

The overall decrease in call volume indicates that customers are making fewer or shorter calls, or it may be that customers are making different types of call. Furthermore, the data indicates a shift from dial-up internet access to broadband. The number of dial-up internet access subscribers fell by 7% from 2011 to 2012, while the number of ADSL/VDSL subscribers increased by 11%<sup>36</sup>. As dial-up calls to the internet are counted as fixed local calls, and ADSL access is not, this would bring about a reduction in associated calls. It is also possible that there has been a small level of substitution of fixed for mobile calls.

In calculating the market shares in the local calls market, it can be noted that, following the market definition discussed earlier, local calls made on mobile phones are not part of the local fixed calls market, and so are not included in the market share analysis. Calls from fixed phones to mobiles are however included.

Gibtelecom is the only operator offering local calls in Gibraltar and has 100% market share.

#### *Barriers to entry*

Barriers to entry in the fixed local calls market are largely associated with the high and non-transitory barriers discussed above in relation to the fixed access network.

An operator could decide to enter the retail local calls market either directly, via direct access to customers, or indirectly, by purchasing wholesale inputs. Should an operator decide to enter the market via direct access, it would require significant investment in an electronic communications network. Most of this will be sunk costs, as such costs will not be recoverable if the entrant decides to, or is forced to, exit the market. A potential entrant would need to consider whether prices would be high enough to recover such sunk costs.

Indirect entry would involve an alternative operator offering a voice calls service over the incumbent's access network. CS and CPS are available from Gibtelecom, but there are still substantial costs relating to switching equipment and staff which a new entrant would face if using one of these wholesale products. The Authority concludes that there are substantial barriers to entry to the market for fixed local calls in Gibraltar.

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<sup>35</sup> Gibtelecom data request (excludes VoIP calls).

<sup>36</sup> GRA Annual Report 2012/2013.



### *Vertical integration*

As discussed above, Gibtelecom is a vertically integrated business. A new entrant in the calls market would only depend on Gibtelecom wholesale access, and unless the entrant had its own access infrastructure, it would have to purchase both call origination and call termination from Gibtelecom. This would leave a very low margin and is unlikely to be a viable business proposition.

### *Potential competition*

As discussed above, it is unlikely that a new entrant would enter the local fixed calls market via direct access. As described under the vertical integration section, it is also unlikely that a new entrant could create a viable business in local calls, if using call origination and call termination services from Gibtelecom.

### *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.

## **3.5 Preliminary conclusions and SMP designation if appropriate**

Gibtelecom has 100% of the market for retail fixed local calls. 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 is likely to remain dominant in this market for the lifetime of this review.

**The Authority proposes that Gibtelecom should be designated with SMP in the market for retail fixed local calls.**

***Q3: Do you agree with the market analysis and proposed SMP designation of the fixed local calls market?***

***Please give reasons for your answer***

### **Views of respondents**

Gibtelecom agreed with the Authority's proposed market analysis and SMP designation in the retail fixed local calls market. It added that consideration should be given to other operators entering the market within the lifetime of the review.

Sapphire Networks agreed with the market analysis and proposed SMP designation of the fixed local calls market.

### **The Authority's position**

The Authority acknowledges the respondents agreement with the market analysis and proposed SMP designation of the retail fixed local calls market. In line with the Authority's position under question 2, the situation will be closely monitored in terms of alternative operators providing fixed local calls to retail customers.

### **3.6 Market analysis: retail fixed international calls**

#### *Current situation*

In the period 2011-2012, the overall international call traffic volume decreased very slightly from 12.9m minutes to 12.7m minutes. Approximately 23% of international calls were CSIP calls<sup>37</sup>.

Gibtelecom's share of the CSIP market has increased over the last three years, and it now accounts for 100% of all CSIP minutes. Gibtelecom also has 100% of PSTN fixed international calls, so its overall share of the international calls market is 100% at the beginning of 2013. This represents a drastic increase from a 35% market share calculated in the first market review due in 2007 to the fact that all other CSIP operators have ceased to trade.

#### *Barriers to entry*

Barriers to entry in the fixed international calls market are largely associated with the high and non-transitory barriers discussed above in relation to the fixed access network.

An operator could decide to enter the fixed retail international calls market either directly, using its own access infrastructure, or indirectly, by purchasing wholesale inputs. Should an operator decide to enter the market via direct access, it would require significant investment in an electronic communications network. Most of this would be sunk costs, as such costs will not be recoverable if the entrant decides to, or is forced to, exit the market. A potential entrant has to consider whether the margin on international calls would be high enough to recover such sunk costs.

Indirect entry would involve an alternative operator being able to offer a voice calls service over the incumbent's access network.

This could be achieved using CS or CPS, using either PSTN for onwards conveyance or deploying an IP gateway to use IP for onward conveyance. As set out earlier in this document, previous competitive providers of international calls in Gibraltar have exited the market.

#### *Vertical integration*

The assessment of the impact of vertical integration for fixed international calls is effectively the same as for local calls. The slight difference being that there would be higher margins for a provider offering international calls, than for local calls. The Authority still considers the impact of vertical integration in the very small market to be significant.

#### *Potential competition*

As discussed above, it is unlikely that a new entrant would enter the international fixed calls market via direct access.

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<sup>37</sup> Gibtelecom data request.

In the Authority's view, there are two possible indirect routes to offering international calls. Gibtelecom currently offers a CSIP product and, in principle, other entrants could enter the market in this way. Secondly, a new entrant could develop a CPS offering (either IP or PSTN). CPS has been available in Gibraltar for a number of years, yet no local operator has ever used this service.

The Authority has considered whether the presence of new market players as alternative CSIP service providers is likely to constrain Gibtelecom's behaviour over the next two to three years. Current trends show the opposite as all CSIP providers except Gibtelecom have ceased to trade within the last few years.

Additionally, a provider of broadband services in Gibraltar could offer international calls as a voice over broadband (VoB) service. However, in the absence of alternative access infrastructure, broadband providers depend on Gibtelecom's wholesale broadband services. To the Authority's knowledge, Gibtelecom's wholesale broadband services do not enable the provision of VoB.

Consequently, Gibtelecom has 100% market share of the international calls market for both PSTN and IP.

The provision of fixed international calls is not competitive and the Authority does not believe that the market is tending towards competition.

#### *Countervailing Buyer Power*

The Authority has no evidence to suggest that any customer or group of customers in Gibraltar is in a position to exercise countervailing buyer power.

### **3.7 Preliminary conclusions and SMP designation if appropriate**

Gibtelecom has 100% of the market for retail fixed international calls at the end of Q1 2013<sup>38</sup>. This represents an increase from the past few years.

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

**The Authority proposes that Gibtelecom should be designated with SMP in the market for retail fixed international calls.**

***Q4: Do you agree with the market analysis and proposed SMP designation of the fixed international calls market?***

***Please give reasons for your answer***

#### **Views of respondents**

Gibtelecom agreed with the Authority's proposed market analysis and SMP designation in the retail fixed international calls market. The comments on

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<sup>38</sup> Response to data request, Gibtelecom.

considering a prospective view of the market were also mentioned under this section.

Sapphire Networks agreed with the market analysis and proposed SMP designation of the fixed international calls market.

### **The Authority's position**

The Authority acknowledges the operator's agreement with the market analysis and proposed SMP designation of the retail fixed international calls market. The Authority is fully aware of the potential entry of alternative operators into this market and will be following developments closely.

#### **4. Designation of undertakings with SMP**

Having regard to the sections above, particularly sections 2 and 3 the Authority is of the view that, in accordance with the Universal Service and Users' Rights Regulations:

- Gibtelecom should be designated as having SMP in the market for retail fixed narrowband access.
- Gibtelecom should be designated as having SMP in the market for retail local calls at a fixed location.
- Gibtelecom should be designated as having SMP in the market for retail international calls 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.

## **5. Proposed SMP Obligations**

### **5.1 Competition problems in the retail markets**

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

"dominance is a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers"<sup>39</sup>.

It should be noted that the market review process is not concerned with whether or not there has been a demonstrable abuse of a dominant position. The forward-looking approach recommended by the EC examines the dynamic characteristics of a market, and considers remedying problems that could give rise to, sustain, or worsen ineffective competition.

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

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

The market analysis which has been carried out in Gibraltar concludes that Gibtelecom should be designated with SMP in the retail markets for fixed access, fixed local calls and fixed international calls. The Authority is therefore obliged to consider how best to prevent abuse of a dominant position.

### **5.2 Principles in determining SMP obligations**

Where an NRA has made an SMP designation, it is obliged to impose an SMP obligation on the undertaking which has been found dominant. All NRAs have a suite of regulatory tools at their disposal. These are set out in the Access and

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<sup>39</sup> DG Competition Discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, Brussels, Dec 2005.

Universal Service and Users' Rights Directives which have been implemented in Gibraltar through the Act.

Article 8 of the Framework Directive sets out the NRA's basic objectives.

The NRA is required to:

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

The NRA must ensure that the proposed obligation best addresses the problem(s) it has identified in terms of market failure and must ensure that any SMP obligation is proportionate to the competition problem 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.

Where there is a finding of SMP, the Authority is obliged to impose obligations to remedy competition problems. SMP obligations are outlined in Regulation 14 of the Communications (Universal Service and Users' Rights) Regulations 2006<sup>40</sup>.

Under the provisions of Regulation 14, "...[The Authority] shall impose such regulatory obligations as it considers appropriate to achieve those objectives on persons whom it has determined under section 40 of the Act as having significant market power in the specific retail market".

Such obligations may include:

- Obligation of transparency,
- Obligation of non-discrimination,
- Obligation of accounting separation and cost accounting,
- Price controls.

The Authority has considered regulatory options in light of its overall regulatory objectives, and in the context of the problems identified in the retail fixed markets.

In considering each of the regulatory options, the Authority's proposals are as follows:

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<sup>40</sup> Communications (Access) Regulations 2006, Communications Act 2006.

### **5.3 Retail Fixed Access**

#### *Transparency*

The Authority proposes that Gibtelecom should remain obliged to notify the Authority 60 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 remain 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. In terms of a decrease in tariffs, Gibtelecom shall be obliged to publish this information at least 14 days in advance.

Publication should be by prominent notice in the local press and on the company website.

#### *Non-discrimination*

The Authority proposes that Gibtelecom should remain subject to an obligation to not unduly discriminate between customers. This does not prevent Gibtelecom from offering different terms and tariffs to different customer groups, but such differences must be objectively justifiable.

#### *Accounting separation and Cost Accounting*

The Authority proposes that Gibtelecom should remain subject to an obligation to account separately for its retail fixed access to the public telephone network at a fixed location in Gibraltar.

In addition, Gibtelecom shall prepare and submit to the Authority an audited Accounting Separation Report every year starting 30th September 2014.

Furthermore, 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 Universal Service and Users' Rights 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 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 Control*

With regards to the pre-notification of new prices, price increases and price reductions (whether permanent or temporary, for special offers, trials or promotions) referred to under the Transparency obligations, Gibtelecom shall provide sufficient cost data and analyses to demonstrate that the proposed prices are not anti-competitive, unduly discriminatory and that they comply with the principle of cost orientation.

Gibtelecom shall continue to ensure that its prices are cost oriented.

#### ***Q5: Do you agree with the proposed SMP obligations in the retail fixed access market?***

***Please give reasons for your answer***

#### **Views of respondents**

Sapphire Networks agreed with the proposed SMP obligations in the retail fixed access market.

Gibtelecom broadly accepted the SMP obligations proposed by the Authority in the retail fixed access market. The Company however, sought clarification and had some reservations on some aspects of the obligations.

In terms of the Transparency obligation, Gibtelecom argued for shorter notification times for the requirement of changes to terms and conditions and price increases. A period of 45 days was requested as opposed to the 60 days proposed by the Authority. A reduction for the notification of prices for new services was also requested. A period of 30 days was suggested instead of 60 days. Furthermore, a reduction for the publication of information for new services was also requested at 14 days instead of 30 days.

Gibtelecom agreed with all the other notification and publication periods.

In relation to the Accounting Separation and Cost Accounting obligations, the respondent objected to the re-introduction of the requirement to submit an annual audited accounting separation report. Due to the invasive, costly and onerous nature of having to produce such reports on an annual basis, Gibtelecom requested that the requirement remain at every three years. It argued that the Authority had accepted this request when the annual submission requirement was in place stating that the process involved in analysing and presenting the data was quite lengthy.

In addition, the respondent requested that the submission deadline of nine months after the year end be extended to a period of twelve to eighteen months as this would reduce the burden imposed on a small to medium sized entity such as Gibtelecom.

Gibtelecom noted that the Authority proposes that the SMP operator maintain cost accounting systems which produce appropriate information to demonstrate

compliance with cost orientation and that this requirement had only been previously imposed on wholesale markets. The Company therefore asked for clarification on the imposition of cost orientation and also enquired whether this would form part of any requirement to have separated accounts and not as a separate exercise.

Under the Price Control obligation, this respondent was concerned about the level and quanta of information that the Authority would require when the operator would need to provide sufficient cost data and analyses each time there is a price change. The Company stressed the importance of the need to minimise regulatory compliance costs and that the new proposals should not interfere with the efficient running of the business. More specific information was requested on this obligation.

Gibtelecom also requested clarity on the last SMP obligation under the Price Control section which states that, "Gibtelecom shall continue to ensure its prices are cost-oriented".

### **The Authority's position**

The Authority has considered Gibtelecom's request to reduce certain notification and publication time periods under the Transparency obligations. The request to reduce the notification time for changes to terms and conditions and price increases will therefore be granted to 45 days instead of the proposed 60 days. In terms of the notification period for the introduction of prices for new services, the Authority is also willing to reduce this period to 45 days instead of the requested 30 days. The request to publish the prices for new services at least 14 days in advance is unacceptable to the Authority due to the reduced timescale. The publication time of 30 days will therefore remain as originally proposed.

The ability to frequently examine and review Accounting Separation Reports (ASRs) is an essential ingredient of an effective regulatory framework. Within such reports, revenues, capital employed and profit levels can be analysed in order to get a better understanding of the operator's business. Furthermore, without this accounting data operators will not be able to accurately determine pricing information for their products and services together with the exact costs of their provision.

During the period when Gibtelecom has only had to submit its audited ASR once every three years, the Authority has encountered delays when requesting accounting information due to the fact that this data has not been available. Even though Gibtelecom is a local operator with limited resources, the Authority is still of the view that an audited ASR should be submitted annually with an aim to providing greater transparency to the regulator and the data within it should also be available at the Authority's request.

In terms of the deadline for producing the ASR, the Authority's position is that it should revert back to its original date of nine months after the year end and not to twelve or eighteen months as suggested by Gibtelecom. The period proposed by the operator is very extensive and would not enable an effective and up to date data information exchange with the regulator. In relation to the specific detail of information that the SMP operator would have to produce every time there is a price change, the Authority will produce guidelines on this topic. These guidelines will be issued for consultation in the near future.

With respect to the following SMP obligation, "Gibtelecom shall continue to ensure its prices are cost-oriented", the Authority would like to clarify that this should have stated, "Gibtelecom shall ensure its prices are cost-oriented".

#### **5.4 Retail Fixed Local Calls**

##### *Transparency*

The Authority proposes that Gibtelecom should remain obliged to notify the Authority 60 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 remain 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. In terms of a decrease in tariffs, Gibtelecom shall be obliged to publish this information at least 14 days in advance.

Publication should be by prominent notice in the local press and on the company website.

##### *Non discrimination*

The Authority proposes that Gibtelecom should remain subject to an obligation to not unduly discriminate between customers. This does not prevent Gibtelecom from offering different terms and tariffs to different customer groups, but such differences must be objectively justifiable.

##### *Accounting separation and Cost Accounting*

The Authority proposes that Gibtelecom should remain subject to an obligation to account separately for its retail fixed local calls to the public telephone network at a fixed location in Gibraltar.

In addition, Gibtelecom shall prepare and submit to the Authority an audited Accounting Separation Report every year starting 30th September 2014.

Furthermore, 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 Universal Service and Users' Rights 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 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 Control*

With regards to the pre-notification of new prices, price increases and price reductions (whether permanent or temporary, for special offers, trials or promotions) referred to under the Transparency obligations, Gibtelecom shall provide sufficient cost data and analyses to demonstrate that the proposed prices are not anti-competitive, unduly discriminatory and that they comply with the principle of cost orientation.

As per its previous obligations, Gibtelecom shall continue charging its retail customers using a per-second billing format. The format shall require per-second billing to apply to all calls lasting more than one minute. Calls less than one minute are not subject to this obligation.

Gibtelecom shall continue to ensure that its prices are cost oriented.

***Q6: Do you agree with the proposed SMP obligations in the retail fixed local calls market?***

***Please give reasons for your answer***

### **Views of respondents**

Sapphire Networks agreed with the proposed SMP obligations in the retail fixed local calls market.

Gibtelecom responded in the same way as it did for question 5 above. Please refer to question 5 for full answer.

### **The Authority's position**

Please see the Authority's position under question 5.

## **5.5 Retail Fixed International Calls**

### *Transparency*

The Authority proposes that Gibtelecom should remain obliged to notify the Authority 60 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 remain 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. In terms of a decrease in tariffs, Gibtelecom shall be obliged to publish this information at least 14 days in advance.

Publication should be by prominent notice in the local press and on the company website.

#### *Non discrimination*

The Authority proposes that Gibtelecom should remain subject to an obligation to not unduly discriminate between customers. This does not prevent Gibtelecom from offering different terms and tariffs to different customer groups, but such differences must be objectively justifiable.

#### *Accounting separation and Cost Accounting*

The Authority proposes that Gibtelecom should remain subject to an obligation to account separately for its retail fixed international calls to the public telephone network at a fixed location in Gibraltar.

In addition, Gibtelecom shall prepare and submit to the Authority an audited Accounting Separation Report every year starting 30th September 2014.

Furthermore, 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 Universal Service and Users' Rights 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 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 Control*

With regards to the pre-notification of new prices, price increases and price reductions (whether permanent or temporary, for special offers, trials or promotions) referred to under the Transparency obligations, Gibtelecom shall provide sufficient cost data and analyses to demonstrate that the proposed prices are not anti-competitive, unduly discriminatory and that they comply with the principle of cost orientation.

As per its previous obligations, Gibtelecom shall continue charging its retail customers using a per-second billing format. The format shall require per-second

billing to apply to all calls lasting more than one minute. Calls less than one minute are not subject to this obligation.

Gibtelecom shall continue to ensure that its prices are cost oriented.

***Q7: Do you agree with the proposed SMP obligations in the retail fixed international calls market?***

***Please give reasons for your answer***

### **Views of respondents**

Gibtelecom responded in the same way as it did for question 5 above. Please refer to question 5 for full answer.

Sapphire Networks agreed with the proposed SMP obligations in the retail fixed international calls market.

### **The Authority's position**

Please see the Authority's position under question 5.

## **Annex A – Notification of Draft Measures Pursuant to Article 7(3) of Directive 2002/21/EC**

Under the obligation in Article 16 of the Directive 2002/21/EC, the Authority, has conducted an analysis of the markets for retail access at a fixed location and retail local and retail international calls.

Under Article 6 of the Directive 2002/21/EC, the Authority has conducted a national consultation, contained in document no. 01/14. This consultation ran from 22<sup>nd</sup> January 2014 and ended 24<sup>th</sup> February 2014. 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 16 to 17

The Authority proposes to define three retail fixed markets:

- Access to the public telephone network at a fixed location
- Publicly available local telephone services provided at a fixed location
- Publicly available international telephone services provided at a fixed location.

Are these markets mentioned in the Recommendation on relevant markets?

Yes. 2003 and 2007 Recommendation.

#### 1.2 The affected relevant geographic market – Page 15

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 16 to 17

Detailed responses to the consultation were provided by:

- Gibtelecom
- Sapphire Networks.

There was overall agreement among respondents on the proposed market definitions. Overall, the proposed conclusions remained unchanged after the consultation.

#### 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 significant market power, 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

Not applicable.



## Section 2 – Designation of undertakings with significant market power

Please state where applicable:

2.1 The name(s) of the undertaking(s) designated as having individually or jointly significant market power – Page 27

- Gibtelecom is designated as having SMP in the market for retail fixed access at a fixed location.
- Gibtelecom is designated as having SMP in the market for retail local calls provided at a fixed location.
- Gibtelecom is designated as having SMP in the market for retail international calls provided at a fixed location.

2.2 The criteria relied upon for deciding to designate or not an undertaking as having individually or jointly with others significant market power – Pages 18 to 26

- 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 10

- Gibtelecom.

2.4 The market shares of the undertakings mentioned above and the basis of their calculation (e.g. turnover, number of subscribers) – Pages 21, 23, 25

Gibtelecom has 100% market share in the retail access, retail local calls and retail international calls market. Gibtelecom is the only player in all three markets.

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 17 to 36

Detailed responses to the consultation were provided by:

- Gibtelecom
- Sapphire Networks.

There was overall agreement among respondents on the market analysis and proposed SMP obligations. One respondent sought clarification on some of the SMP

obligations, requested alterations to the notification periods under the Transparency obligations and also suggested changes to the current Accounting Separation and Cost Accounting obligations.

### 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 (Universal Service and Users' Rights Directive) Regulations transposing Article 17 of Directive 2002/22/EC:

- Regulatory controls on retail markets – 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 28 to 36

This information can be found under section 5 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.

The Communications (Universal Service and Users' Rights Directive) Regulations transposing Article 17 of Directive 2002/22/EC:

- Regulatory controls on retail markets – Regulation 14

### 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.