Review of the Methodology and Procedures for Determining Significant Market Power and Authorized Undertakings with Significant Market Power

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INTRODUCTION AND EXECUTIVE SUMMARY

Introduction

The purpose of this review is to assess the proposed methodology for determining significant market power (SMP) in Georgia's communications sector. The methodology was released by the Georgia National Communications Commission (hereafter "the Commission") on November 20 of this year for comments by interested parties under the title: "Methodology and Procedures for Determining Market Competitiveness and Authorized Undertakings with Significant Market Power [SMP]."

In developing its new SMP methodology, we presume the Commission assumed that its existing SMP approach needed to be amended due to (1) market changes in Georgia since its existing SMP regulation obligations were adopted in 2007[1] and (2) differences with the SMP determination framework of the EU. This second reason is based on Georgia's commitment to align its national legislation with the European legal and regulatory framework as part of the EU-Georgia Association Agreement signed in 2014—and on the fact that there are substantial differences between these two regulatory regimes and their approach to SMP determination.[2]

Accordingly, the review that follows examines ways in which the proposed methodology diverges from the EU regulatory framework as well as from existing Georgian law and regulations. At the same time, we address how it raises many questions about how it interprets SMP and the many ways SMP determinations could be made if the methodology were to be adopted as currently proposed. In the process we also note how the EU's application of SMP determination has narrowed over time—in distinct contrast to the very broad multi-faceted approach reflected in the Commission's proposed methodology.

The submission that follows includes a review and assessment of the Commission's proposed methodology (Part A), and an examination of how the Commission's proposed as well as existing SMP approaches differ from the EU regulatory framework (Part B). It also highlights the need for these differences to be addressed before the proposed methodology is finalized and implemented (also in Part B).

In conducting our review of the Commission's proposed SMP methodology, we have relied on our prior consulting experience as well as independent research with respect to telecommunications market competition in numerous countries, including several prior cases on competition policy and related regulation.[3] In the process, we note our work for a range of clients, among them operators as well as regulators and other government entities.[4] We have also contributed to a previous submission to a consultation of the Commission on its proposed mandatory MVNO policy.[5]

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[1] Regulation N5 dated 31 August 2007 of the Communications Commission on Approval of the Methodological Rules for Determining Relevant Segments of the Service Market and Competition Analysis (Georgian version).

[2] The Association Agreement calls for harmonizing Georgia's approach with the EU regulatory framework to ensure effective competition in the field of electronic communications, independence of regulatory bodies, and access to universal services for better consumer protection.

[3] The markets involved have included *Algeria*, Argentina, *Armenia*, Australia, Belgium, Brazil, *Canada*, Chile, China, Congo (DR), Cote d'Ivoire, Czech Republic, Egypt, Germany, Hong Kong, Hungary, *India*, *Israel*, Japan, *Jordan*, *Kenya*, Malaysia, *Malawi*, Mexico, *Mongolia*, Morocco, New Zealand, Philippines, Poland, *Rwanda*, Singapore, *Solomon Islands*, *Somalia*, South Korea, *Sweden*, Switzerland, *Tanzania*, Thailand, *Timor-Leste*, Turkey, Ukraine, UAE, United Kingdom, *United States*, Venezuela, Vietnam and Zambia.

[4] The countries in italics in footnote 1 are those in which the clients we served included regulators, ministries responsible for communications policy and/or antitrust entities. For example, we have worked for the Ministries of Justice in both Canada and the United States as well as for the European Commission. We also worked for the World Bank on regulatory and other cases more than 25 countries.

[5] BDO and Kalba International, "Policy report and expert opinion regarding introducing MVNOs in Georgia, issued on 28th May 2020." Among the findings in this report was that retail mobile service prices were higher in EU countries with mandatory MVNO policies than in those without them.

Principal Conclusion

In summarizing the key findings and conclusions of our assessment of the proposed methodology we note that the Commission does not appropriately recognize the need to align its proposed approach for determining the presence of SMP with existing Georgian law and regulation (notably Regulation N5). In other words, most notably, *Georgia's legislative framework should be adapted substantially to the EU regulatory framework before the proposed methodology is finalized and accorded regulatory status.*

We conclude overall that the Commission's proposed methodology underscores the need to introduce amendments to the Law on Electronic Communications. Otherwise, numerous questions and issues will remain about how the methodology—a very open-ended one—is to be implemented and what the effects of implementing it as it is currently formulated would be.

In short, the proposed SMP-determination rules imply many layers of existing and additional regulation. And the intricacies inherent in several of the Articles (among them Articles 6, 10, 14 and 15) will make the adoption of clear-cut regulations and SMP decisions that are consistent with the EU framework as well as existing Georgian laws extremely challenging. Accordingly, as a first step, Georgia's Electronic Communications Law as well as the Commission's Regulation N5 should be aligned with the EU Framework Directive and the European Commission's SMP Guidelines.[6]

Specifically, the terms and concepts elaborated in the draft methodology should first be specified in the Law on Electronic Communications. And this should be done in a manner that their practical implementation, regarding SMP determination and the intended effects of such determination, are clearcut. Without this step, the Commission's future regulatory interventions will only aggravate the competitive environment as well as the predictability and transparency of SMP-related regulations that may be imposed. This in turn could result in disregard of the competition objectives and policies that will ensure the positive development of the electronic communications sector.

EU Alignment Issues

Similarly, in aligning the proposed SMP procedures with the EU framework, a number of related issues should be considered as the proposed methodology is finalized.

1. Among these, is a key definitional and procedural difference (as highlighted in Part B) between the EU framework's focus on operator market shares exceeding 50% versus the Commission's 40% benchmark. *Inter alia*, this first level is more reflective of the original reason why competition measures were introduced into the electronic communications sector, namely to limit traditional telephone companies that held 90% or higher shares in the fixed service market.

Accordingly, the proposed methodology should consider adding an SMP assessment in situations where an operator has a market share in excess of 40% yet below 50%. Moreover, as EU guidelines suggest, NRAs (national regulatory agencies) should carry out a thorough structural evaluation of the economic characteristics of the relevant market before drawing any conclusions on the existence of SMP in such circumstances.[7]

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[6] See https://eur-lex.europa.eu/EN/legal-content/summary/european-electronic-communications-code.html, which includes the EU's previous Framework Directive 2002/21/EC; and https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018XC0507%2801%29 with respect to Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services (Text with EEA relevance), 2018/C 159/01.

[7] Specifically, Paragraph 57 of the EU's SMP Guidelines indicates the additional steps that should be undertaken in such cases.

2. There remains also the question of the degree to which SMP assessments should focus on wholesale markets and whether this should apply to Georgia. The EU initially focused on retail markets, determining incidents of SMP in 18 different segments. This focus over time has shifted to wholesale segments where SMP restrictions are now being applied to only two segments. Should Georgia, as a smaller market, undergo this same history (i.e. starting with a very wide retail-oriented set of SMP determinations followed by a contraction of these to a limited number of wholesale-focused determinations) or should it adopt a wholesale SMP orientation in the short term?

Overall, Georgia's context varies from that of most EU countries in that it has not had the ongoing dominance or at least leading presence of a traditional fixed service monopoly of the likes of France Telecom (Orange), Deutsche Telecom, Telecom Italia or Telefonica. At the same time, it is not clear that retail market SMP restrictions should be the focus of the Commission's SMP decisions and rulings.

3. We also note that the proposed methodology focuses heavily on only one of the three accepted criteria used to establish the presence of SMP. This is criterion two, which addresses factors over which it assumes operators have some control. The other two criteria (criteria one and three), which deal with the presence of market barriers and the sufficiency of competition law in responding to with market failures, are given limited attention by comparison, even as all three criteria are recognized in Article 11 of the Commission's proposal.

Yet, as the study of Georgia's market prepared under the Association Agreement between Georgia and the EU indicates, criteria one and three deal significantly with government shortcomings—both regulatory barriers to market entry and the presence and effective implementation (usually on *ex post* basis) of competition law.[8] The underlying assumption of the Commission's approach, on the other hand, appears to be that any competition limitations stem from the operators and not from government-side.

4. Last but not least, there is the issue of reconciling the proposed methodology, once finalized, with Georgia's legal and regulatory regime. The Commission has proposed to do this by simply superimposing its new methodology (notwithstanding its long "shopping list" of SMP indicators and other SMP determining procedures) on top of existing SMP-related regulations (i.e. Regulation N5). Yet, the proposed approach departs from—and in some cases directly contradicts—(1) the Commission's traditional SMP approach, (2) the provisions of the current Law on Electronic Communications, and (3) the legislative efficacy and logic of the Commission's existing rule-making process.

We conclude that the simple layering of the two approaches would allow both to be applied in the future, creating ambiguity in how SMP is determined and more bases for challenging such determinations as not consistent with the earlier (or the later, depending on the challenger's viewpoint) layer of this dual-level SMP framework. This is another reason why the Commission should align the Electronic Communications Law and Regulation N5 with the proposed methodology before adopting it. Otherwise, this could result in Regulation N5 being repealed altogether at a later point, as mentioned in the explanatory notes to the Commission's proposed regulations.[9]

[8] See "Relevant markets susceptible to ex-ante regulation in Georgia," Facility for the Implementation of the EU – Georgia Association Agreement-II, March 2023. Hereafter referred to as the Association Study or, simply, the Study.

[9] See "An Explanatory Note to the Commission proposed amendment of the Commission Regulation N5 Determining Relevant Segments of the Market and Competition Analysis," Commission Decision G-23-23/517 dated November 9, 2023, published on the public consultation webpage. We also note that a repeal of Regulation N5 would remove its annexes that contain widely used formulas for SMP-related market analysis (e.g. HHI, CRK, Lk, LE), even further confusing the basis for future SMP determinations.

Concluding Observations

Overall, we are concerned that the authors of the new proposed SMP methodology might not have recognized the relatively balanced nature of Georgia's electronic communications market. In this respect, we refer to the Commission's own Annual Report as well as the other sources we use in our analysis of market developments and related market growth in Georgia.

Moreover, as the Commission's Annual Report itself suggests, Georgia's market is vibrant and strong, especially when compared with peer countries. At the same time, the proposed methodology outlines numerous indicators on the basis of which SMP can be determined (see, in particular, our discussion of Article 15 in Part A). On this basis restrictions can be imposed on one or more operators, without even assessing whether these same restrictions could harm the same market that the Commission portrays as positive in its Annual Report. Overall, this is not an effective way to determine underlying SMP; a more integrated approach is required.

A key step in this regard will be to shorten the *shopping list* approach to SMP determination. The list of ways in which SMP can be determined under the proposed methodology (as reflected in our review of Articles 6, 10, 14 and 15) would create a highly arbitrary process. This would not be in the interest of the continued development of Georgia's electronic communications market nor in the Commission's interest, as it would likely lead to endless requests for clarifications and, ultimately, to multiple judicial appeals, especially if discrepancies remain between the new methodology, the existing Georgian law and the EU's regulatory framework.

All of this underscores the need to amend the Electronic Communications Law before formalizing the proposed methodology as a new regulation.

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PART A: THE PROPOSED METHODOLOGY

In this second part of our review, we examine the Commission's proposed methodology for determining the presence of SMP in Georgia's electronic communications market. In the process, we address both procedural aspects of the methodology and its applicability to the Georgian market context. In so doing, we focus on those articles where we believe the Commission should consider one or more changes.

Contexts of the Methodology

Under the Association Agreement between the EU and Georgia, as adopted in 2014, Georgia has agreed to transpose Directive 2002/21/EC of the European Parliament and of the Council of 7 to its regulatory framework for electronic communications networks and services on the basis of national legislation.[10] The Commission's proposed methodology, currently under review, is a part of this process. This was preceded by a comprehensive regulatory review in 2017-2019 with EBRD-funded expert support from other countries, as summarized in Part B.

As for the proposed methodology, specifically, the Commission published a draft regulation on November 20, 2023 calling for the approval of the SMP methodology following public administrative proceedings. It also announced a public hearing on December 28, 2023 to review the proposed methodology in accordance with Georgia's Administrative Code. In parallel, the Commission also introduced a draft regulation activating the new methodology as part of the its basis for determining SMP, namely Regulation N5, which was originally adopted on August 31, 2007.

The new proposed SMP methodology, which we review and assess below, mirrors in some respects the current applicable methodology (i.e. Regulation N5) but also differs from it in others, in some cases quite significantly—notably, with respect to its monopoly test definition, which is much broader than what is provided in Regulation N5. It also differs in some ways from current EU principles for SMP determination and regulation.

Accordingly, the challenges of harmonizing the new SMP rules with (1) the EU framework and (2) Georgia's Regulation N5 are not trivial, as we explain below as well as in Part B of this assessment. Even assuring that they not be in direct opposition (if not total harmony) with these frameworks remains demanding.

We turn now to reviewing and assessing the changes in SMP determination as reflected in the Commission's new proposed methodology and begin with the chapter addressing general provisions.

Chapter I - General Provisions

In this initial part of the proposed approach, the Commission specifies the objectives of SMP inquiries and control measures as well as indicates the terms that will be used and the conditions that underlie SMP determination.

Article 1. Aims of the Procedure

The objectives of the Commission are outlined here, include determining relevant market segments, establishing "transparent" procedures for SMP analysis, and determining specific obligations, all in the process of imposing ex ante SMP regulation. We note that the proposed methodology is to be used in

[10] Referred to as the Framework Directive, the Directive was originally adopted in March 2002.

addition to the Commission's Regulation N5 with this article envisaging the same principles and aims as Regulation N5 as well as covering all SMP situations, including mergers and acquisitions (M&A).

As indicated under several of the articles below, we are concerned that the proposed approaches may not be "transparent," particularly if this is to signify procedures that are objective, balanced and comprehensive in their approach, and that determine the existence of deleterious significant market power.

Article 2. Definitions

Here the document explains the terms that are used are based on the definitions provided in the Law of Georgia on Electronic Communications and its counterpart on Competition. Most of these terms and definitions are widely used, including retail and wholesale market segments, economies of scale and others. At the same time, a couple of the terms are relatively unusual in our experience or are defined in limited ways, as we suggest below.

Investment ladder

In relation to "investment ladder," Article 2 points to the key issue of "whether the duplication of the infrastructure used in the relevant service market segment is deemed possible." It adds, "If the infrastructure can be duplicated, the imposed obligations shall facilitate the ladder of investment principle, which implies access granted to new entrants to the network of the authorized undertaking with significant market power in order for them to be able to make investments to set up their own infrastructure gradually."

There is no consideration, however, of the implications of a second infrastructure not being financially sustainable for another operator nor of the remedies that would apply in this situation.

Hypothetical monopolist test

The illustration of this test that is featured is "a small but non-transitory price increase in general (as a rule, from 5 to 10%)." This can lead to the application of the Hypothetical Monopolist Test, the purpose of which is to "assess whether a Service price increase would lead to a critical loss in the sales, which results from a switch by suppliers/users to the use/supply of an alternative Service and overlaps the profit to be received by the authorized undertaking from the increased Service price". The definition is not entirely clear, however, as to what such a sales loss would represent. It would appear to indicate the working of a competitive market. Whereas no loss or little loss of customers could suggest the exercise of monopoly leverage.

Article 3. *Ex ante* regulation of competition study and analysis conditions

One of the points noted in this Article is the Commission's discretion in deciding whether to examine competition "in the entire service market or its individual or closely related segment". As we will note a number of times in addressing specific procedures below, this enables considerable leeway. A notable instance is in terms of the market share criteria provided in Article 14, where 40% is presented as potentially indicative of SMP.

In this respect, comparing the mobile internet segment with the mobile service segment, Magticom's subscriber shares vary from under 35% to over 41%. And while Magticom holds the leading subscriber share in one case, in the other it is in second place. Moreover, the overall orientation of the SMP approach the Commission proposes is that it can proceed with whichever definition of the market it chooses in

arriving at its SMP determination, without noting that using a closely related definition, the results could be quite different.

Chapter II - Relevant Market Segments

We proceed now to review the Commission's proposed approaches for determining the market segments underlying SMP analysis and decisions. We begin with its particularly challenging assumption about the uniformity of the supply and demand aspects of service provision.

Article 6. Supply and demand substitutability

In addressing the "interchangeability" of supply and demand, the Commission appears to be asserting the principle that under competition multiple service suppliers should be able to serve a given demand in the same way. If they cannot, then SMP may be present. At the same time, the interchangeability of the supply of service is what underlies a given market segment. As does a uniformity on the demand side. Specifically, uniformity of both subscribers (the "demand" side) and the service providers (the "supply" side), is what underlies competition.

Yet, in an actual market, the services offered by "competing" providers can differ considerably. Each operator offers multiple service plans that are often not identical to those offered by the other operators and that are provided on different networks with differences in coverage, capacity and signal quality in given areas, not to mention different types and levels of customer service and different brands or images of what their services signify.[11]

In reality, therefore, there are innumerable variations on the supply side of services, which is also the case on the demand side. No two subscribers are identical in the service they desire or require, given their different locations and the locations of those they are in contact with, their economic conditions, their different levels of digital literacy and use of the internet, and so on. That said, markets are often classified into segments, based on the grouping of demand and/or supply aspects—only, unlike the absolute *interchangeability* of supply and of demand would suggest, there is always an element of arbitrariness involved.

The Commission itself recognizes the process through which products are grouped together when it refers to "customer preferences regarding specific service/product features, prices, barriers to switching to other services, and costs." There is a grouping by categories—categories which, we would contend, are developed for different purposes by providers, users and others, with the Commission again giving itself substantial leeway in determining the definition of the market segments (and underlying grouping of related consumer and supplier aspects) to which it applies SMP analysis and, potentially, related restrictions.

In the end the Commission recognizes that significant differences can exist among operators providing similar services if they involve substantial variations (e.g. the cost of terminal equipment, a penalty for breach of contract, etc.) or if the costs of switching to another service are substantial, in which case such service "is not considered an interchangeable service." At the same time, the Commission notes that service *packages* can be the target of SMP analysis even if "services included in the package are not interchangeable" but where elements of each are interchangeable with a third service package.

[11] In established MVNO environments even the differences within a given operator (between branded services, those of affiliated MVNOs, and those of unaffiliated MVNO using the operator's network) can be substantial even as the services involved may be the same (re period of time, amount of mobile data, etc.) as may be the underlying network over which they are delivered.

Overall, the Commission's definition of interchangeability becomes increasingly looser as the Article 6 progresses. In the end, it even encompasses "different technological platforms…if the authorized users of [a] wholesale service, in the event of an increase in the tariff for a specific wholesale service, will be able to use another one without incurring significant costs." And even competitor use of another operator's network adds a basis of interchangeability and, therefore, "the Commission should take into account the possible restrictions" imposed by the other operator "regarding the access of competitors to [its] network, network coverage and market entry."

Article 6 with its 13 separate sub-points appears to have been written by a large committee with many individual views. In any case, it shows the intricacies of the SMP-focused procedures the Commission is seeking to implement—intricacies that ultimately allow certain choices to be made as to which procedure shall be applied (possibly arbitrarily rather than systematically as defined in the EU SMP Guidelines) in terms of defining an analysis or determining its results. Moreover, there is no countervailing depiction of how effective competition may involve non-interchangeable services. This, for instance, is what by definition service innovation involves.

Article 7. Establishing the geographic boundaries of the relevant market

As with the preceding one, Article 7 emphasizes that "Demand-side and supply-side substitutability are the two main factors of competitive constraint that must be taken into account when determining the geographic area where the provision of services constitutes a relevant segment of a geographically separated market." More specifically, these boundaries should be based on "the number of competitors and their capabilities, distribution of specific market shares, differentiated prices, service request conditions, different commercial terms or marketing strategies."

Yet, are these quantitative indicators definitive by themselves or do contextual factors play a role. For example, there are rural areas only served by one operator. This may technically constitute a monopoly situation, but does this indicate SMP even if the operator in question is the only one that has been willing to cover the area and may thereby have met its coverage obligations more than other operators have?

In Georgia, the current situation, according to one source, at least, is that Magticom covers the most area, Silknet the second most and Cellfie the least.[12] On this basis, Magticom could be accused of monopoly behavior even if the prices it charges in the areas where it is the sole provider of service are the same as those it charges in areas where all three operators operate.

Moreover, as suggested earlier, network coverage (including related capacity and quality of coverage) varies from one location to another based on the level of densification of the network in a given sub-area, the amount of spectrum that has been activated, the proximity of the towers and their angles of their transceivers, the stability of the power sources and other conditions. This is why, perhaps, the Commission calls for "the geographic segment of the market [being analyzed with respect to SMP] should be of appropriate size, i.e. small enough to avoid significant changes in competitive conditions in each unit, but large enough to avoid resource-intensive micro-analysis that can lead to market fragmentation.''

The assumption of this last statement appears to be that if a sufficiently large area is the focus of the SMP analysis, it will preclude the possibility of the kinds of network differences we refer to above. Yet these differences prevail even if the entire network, whether for a large urban area or the nation as a whole, is the unit of analysis. Quality of service (QoS) indicators can be compared for the areas in question but for these to be truly representative they themselves need to be based on micro-measurements across the territory in question that also take into account the number of users involved.

[12] See nperf.com site for indications of the reach of the operators' respective networks.

At the same time, effective competition involves a certain amount of discrepancy with respect to matters such as coverage and QoS as well as price, customer care, marketing and other service levers. An operator with very coverage is competing one way while another operator with narrow coverage but a denser network is competing another way. Each is deciding how to use their financial resources, trading off denser networks with higher transmission speeds and QoS versus wider networks that allow more people to connect and access the internet—and, yes, to do so in some remote areas without competitors who prefer to focus their resources on denser areas.

Meanwhile, the Commission adds to the intricacies of selecting geographic areas for SMP analysis by noting that two or more geographic segments can be combined where "the behavior of the providers of [the] services will be uniform" and/or "the market is subject to a common tariff constraint." There is no further explanation, however, what "behavior" is being referred to—service pricing, QoS, customer care, something other or all of these aspects?

As for tariff constraints specifically, we note that after imposing tariff limits and related cost accounting obligations on all three of the mobile operators in late 2020, the Commission repealed its decisions only six months later referring to the improved competitive environment.

Article 8. Identifying closely related market segments

In this article, a number of considerations are referenced as ones which would allow or call for the determination of "closely related market segments" and of, presumably, the exercise of SMP due to these related factors. These considerations include "vertical integration," "horizontal connections," "contractual relations," and "interdependence."

While the article mirrors Article 64 of the EU Directive on Electronic Communications[13], it sets a very open-ended number of possibilities. And if diligently followed by the Commission, it can result in an intricate regulatory framework. Correspondingly, it places the operators in a defensive position of checking themselves against all the possible steps (or interpretations thereof) that they may take resulting in a determination of SMP.

Chapter III - Level of Competition

In this chapter the Commission proposes how the degree of existing competition (or its absence) should be determined.

Article 9. Principles of assessing the competitiveness of relevant market segments

In this article the Commission suggests that the principle for determining the need for ex ante SMP regulation is whether a market has been and is likely to remain competitive without wholesale regulation. This calls for the Commission to examine the market segment on a "forward-looking basis, by assessing [its] likely development…and [taking] into consideration the end-user perspective…"

We simply note in this context that this proposed approach assumes that the market will remain stable in the "forward-looking" period in question. This may represent a contradictory requirement to the extent that competitive markets are in principle subject to change. Such change can come in the form of new technology, new service innovations or pricing strategies (of one or more of the operators) and even new regulatory steps, such as the release of additional spectrum.

[13] EU Directive 2018/1972 of the European Parliament and of the Council establishing the European Electronic Communications Code, December, 11, 2018.

On this last regulatory aspect, the Commission does add that it "shall also take into account the effect of the sector-specific regulation decisions operating in the retail and related wholesale market segment(s) during the relevant period." This, however, suggests that the regulatory decisions involved are ones that have already been undertaken or that the Commission already intends to undertake.

The Commission also notes it would follow the "Modified Greenfield Approach" in the process. This means, as we understand it, that the SMP regulation(s) it may impose, such as asymmetric application of ex ante wholesale restrictions, would not be assumed in the forward-looking projection of the market.

Article 10. Possible outcomes of the assessment of the competitiveness of relevant market segments

Article 10 outlines the implications of the assessment referred to in Article 9 depending on its results. These are: (1) no need for *ex ante* wholesale regulation if the market is likely to remain competitive; (2) where this is not the case, the need to assess "the risk of harm to users" and whether it could be prevented by the *ex ante* regulation, and (3) the need to specify the wholesale regulation(s) called for.

However, how this third step is to be implemented is to be subject to various conditions, including (a) assessing the regulation in terms of "the intersubstitutability of demand and supply (insofar as it is topical)," (b) taking into account "the ladder of investment principle" (see discussion of Article 2, and (c) considering that "some retail market segments could be related to more than one wholesale market segment." This variety of considerations suggests once more that the Commission would have considerable leeway in determining the applicable regulation(s) but also the possibility of its decision being subject to challenge on various grounds.

Chapter IV - Identifying Potential SMP

In this part of the proposed methodology, the focus is on the actual determination of whether a market segment may reflect underlying SMP. We highlight below those aspects of this determination methodology that raise concerns regarding their relevance, balance and/or overall adequacy given our understanding of mobile markets broadly and in Georgia specifically.

Article 11. The three-criteria test

The Commission introduces here a three-part test for determining whether a market segment should be subject to a priori regulation. If all three criteria are met, then "[t]he relevant market segment is a market segment susceptible to *ex ante* regulation."

Structural Barriers

The first criterion is whether the segment reflects structural barriers based on costs or demand that preclude new entrants from entering the segment. Such barriers may stem from "absolute costs, economies of scale and network effectiveness…entry [that] involve[s] high sunk costs… [or] high structural barriers…where the provision of service requires a network component that cannot be technically duplicated or its duplication is not economically feasible."

Looking at broadly, this criterion indicates a finding of SMP (against one or even three operators) might be imposed because a mobile market had, in effect, only three operators. This is an underlying implication of the Association Study, which assumes four operators—or at the very least three plus

multiple MVNOs—as a norm applicable to all markets, irrespective of the size or economic level of the country involved.[14]

Regulatory Barriers

At the same time, the Commission importantly recognizes that "Legal or regulatory barriers… may have a direct effect on the conditions of entry." More specifically, that "authorization procedures, territorial restrictions, safety and security standards, and other legal requirements may deter or delay entry." However, it combines this acknowledgement with a contravening statement that "The relevance of legal and regulatory barriers in electronic communications markets is decreasing," and adds that "Legal or regulatory barriers that are likely to be removed within the time period of 3 years shall not normally constitute a barrier to entry for the purposes of the first criterion."

(The Commission does not clarify how such "relevance" is decreasing. Presumably, it is not referring to the regulatory, licensing and other barriers that continue to affect operator mergers, trading of spectrum, extension of licensing rights, and so on.)

Improving Competition

Here again the Commission recognizes the possibility that even if evidence of SMP exists it may not indicate the continuity of SMP. The analysis undertaken may indicate that "the market will become effectively competitive absent *ex ante* regulation within the period of review, or will do so after that period." It is only if the lack of a competitive state is determined as continuing during and beyond the period of review that the second criterion will have been met.

Ex post Regulation

As for the third criterion, the Commission refers to "the sufficiency of competition law." And it adds that "Competition law-based interventions are likely to be insufficient where frequent and/or timely intervention is indispensable to redress persistent market failures.". Here the Commission is questioning the value of ex post regulatory remedies and asserting its own regulatory role vis-a-vis the traditional application of competition law. It does so, we would note, without referring back to its earlier points with respect to the first two criteria and how *a priori* regulation can also limit the competitive workings of the market.

Chapter V - Criteria for Applying SMP Regulation

In Chapter V the Commission outlines specific "criteria for identification of authorized undertakings with significant market power or…jointly significant market power in relevant and closely related market **segments."**

Article 13 - Assessing the significant market power of authorized undertakings on relevant market segments

In this article the Commission indicates the focus of SMP-related assessments ("on wholesale, retail and closely related market segments") and outlines the actions to be undertaken (or not undertaken) depending on the results of an assessment. Where the results indicate SMP, "the Commission shall impose

[14] See "Relevant markets susceptible to ex-ante regulation in Georgia," Facility for the Implementation of the EU – Georgia Association Agreement–II, March 2023 [hereafter referred to as "the Association Study" or "the Study"].

appropriate specific regulatory obligations on such undertakings, in accordance with the laws of Georgia and Chapter VI." [N.B. In the Magticom v. of Annex 3 (Methodology], this last reference appears as "Chapter XI"]

Article 14. Criteria for assessing the market power of authorized undertakings

As for Article 14, here the Commission asserts an operator can be "deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, namely a position of economic strength affording it the power to behave independently of customers and competitors." And it provides related benchmark levels, specifically, of "at least 40% of the relative market share in the relevant market segment."

At the same time, the Commission does not set any benchmarks regarding how long the stated level has been exceeded by an operator (e.g. one quarter of one year versus three or more years), thereby allowing considerable interpretation of what exceeding the benchmark may mean. Corresponding, it does not address the prospect of an operator exceeding its benchmark share level in one market segment (e.g. mobile subscribers) while not exceeding it—or even failing to hold the leading position—in another (e.g. mobile internet subscribers).

The Commission, however, does not address how such parallel market positions and trends are to be dealt with, other than implying that it can choose which segment to focus on, irrespective of what other market dynamics may be present. No related indication is provided, which suggests once more that excessive leeway is being allowed in determining the existence of SMP and ascribing it to a specific operator. Similarly, there is no indication of whether the focus in SMP analysis should be on subscribers or on revenues in a given segment of the market. This means that once again the share numbers would invariably change, depending on the focus that is adopted.

At the same time, we note that an operator's higher revenue share—as its subscriber share—can be due to a number of factors other than anticompetitive behavior. For example, its wider coverage compared to competing operators may allow its subscribers to make and receive calls from additional rural areas, generating higher overall revenues for the operator. Similarly, a high revenue share (along with a high subscriber share) can be based on shortcomings of the other operators—or on the evolution of a multi-SIM market—rather than on SMP being exercised by one or more operator.

Technology Advantages

Article 14 goes on to refer to 'access to innovative technologies and the possession of costly patents and licenses" as potential SMP indicators and proposes that these be addressed as "afford[ing] the authorized person the power to behave independently of competitors and customers of market dominance." Conversely, we note, such advantages could merely be signs of effective competition based on the willingness of an operator to take on investment risk (i.e. re early deployment of a given technology) or to innovate based on the use of technology.

This aspect of the article could even be applied to a situation where a regulatory obligation calls for the use of new technology (e.g. 5G related) and where one operator pursues the requirement in advance of the others, creating a "technological advantage or superiority." Taken to its extreme, this suggests that early mobile operators should have limited themselves to the use of pre-cellphone technology (i.e. mobile radio, as existed in the 1970s for use in official cars and in limousines), as being the first to implement the new cellular-based network technology and associated handsets risked SMP designation.

Access to Capital

The article also refers to potential operator advantages in access to capital and financial resources "due to their size, type of ownership or affiliation to any local or international group." Its applicability may be relevant in that both Geocell (now Silknet) and Veon/Beeline (now Cellfie) have undergone ownership changes in recent years as has to some degree Magticom.

Veon (formerly Vimpelcom) was part of a larger mobile operator that operated in as many as 20 countries, including Canada, Egypt and Italy as well as most of the former Republics of the Soviet Union (and still operates across the former Soviet Union as well as in Pakistan). Geocell, until 2018, was part of TeliaSonera, a large Scandinavian operator that also operated in the Baltic countries, at which time it became part of Silknet.[15]

In general, however, access to capital and the economic base of the relevant ownership group does not appear to be correlated with market or revenue share in Georgia's mobile service segment. The management of the capital, once it is accessed, is a separate factor and may have been or will be a more critical factor in this respect. Possibly, the ownership restructurings that Geocell underwent in 2018 and Veon in 2022 were in part related to financial management issues or they may undergo some issues as a result of the ownership changes.[16]

Bundling of Services

As the Commission suggest, an operator with multiple services that are bundled may have an advantage over one that can only provide the equivalent bundle through arrangements with outside entities. Should service bundles therefore not be allowed, even if they provide benefits to consumers? Presumably, they should be allowed, as not allowing them could affect consumers negatively, just as a monopoly on certain bundles could conceivably do. The Commission does not really suggest how to define the boundary between consumer-serving bundles and those that may simply foster SMP.

Economies of Scale and Scope

There are two types of economies contributing to lower unit costs that are highlighted here. The first of these is when the scale can be based on the number of subscribers being served. This number, however, can change—including due to *factors that SMP analysis does not always take into account* (e.g. Geocell's top position up to 2013 and Silknet's laggard one through 2018). Another version is based on the range of services provided, which is referred to as "economy of diversity." This presumably would apply most clearly to Silknet with its extensive horizontal integration. Magticom also has some elements of multi-service ownership as may, conceivably, Cellfie in the future under its new ownership, which involves cross-ownership with the utility sector.

At the same time, as we discuss in detail in Section 7.3, economies of scale can be calculated in different ways—based on subscriber numbers, revenues, infrastructure investment, and so on. In this last respect, Magticom has the largest network but Silknet controls more of the access to ducts. There are multiple points of leverage, in other words. Which, the Commission suggests can be equalized through the operation of multiple operator services on a "shared infrastructure." Moreover, this reduces average unit costs. However, we would argue that it also reduces competition, not to mention network redundancy and often quality.

[15] Its operations include mobile, cable and wireless internet, OTT streaming TV (Silk-TV Digital), wireless fixed telephony, cable fixed telephony.
[16] This is not to discount the possibility that Veon's and Geocell's larger parent groups may not have undergone some financial challenges at their parent level in this period, resulting in their leaving the Georgian market.

We have also learned of the limits of shared infrastructure initiatives during various investigations of **related** initiatives in several regions of the world.[17] Among the lessons we have learned in the process of preparing related assessments and case studies include the following:

1. Operators have widely (though by no means universally) adopted the sharing of passive infrastructure, mainly towers, for the purpose of delivering retail services, doing so on a negotiated voluntary basis and resulting over time in the emergence of independent as well as operator-affiliated tower companies;

2. Operators are generally more willing to share prior-generation infrastructure than that related to the next generation (e.g. 4G or 5G) even though the latter may involve higher costs, mainly because they are reluctant to enter sharing agreements that would explicitly or implicitly disclose their market plans and/or technology-related practices to other operators.

3. Operators have been less willing to share backhaul (or wholesale-level) facilities and when pushed to do so by governments or other third parties the results have often proven to be unproductive or, at a minimum, have taken extensive time to implement and/or extensive funding, with a key exception being the use of shared networks (involving two, not one) for the deployment of 5G in China.

The general take-away here is that cost reduction objectives and economies of scale need to be balanced with network risks, operator confidentiality concerns, and other considerations.

Vertical Integration

Article 14 also raises the issues that can be caused by the existence of vertically-integrated operators, when their competitors do not have the same advantage. This can give these operators "a competitive advantage over other[s]…as they can independently provide services to subscribers, can control to ensure the process of service delivery and to respond immediately to potential market changes."

We concur that these are reasonable concerns. At the same time, the option of separating wholesale and retail operations entirely, as quite a few governments have attempted to do, have more often than not had poor consequences. As we note above (footnote 17), we have examined such cases in numerous countries and have generally found retail operators unwilling to utilize separated wholesale operators and networks. (This did not apply in the case of Singapore where, nonetheless, there was an unexpected result—namely higher retail service prices.)

Potential Competition

The article also notes the possibility that potential competitors are being kept from operating in the market due to SMP behavior, including through prices being kept too low for them to be able to enter and compete in the market effectively. In short, the Commission appears to be entertaining the concept of increased prices being invoked to stimulate competition. This seems to be a reversal of the objectives of competition being lower prices (other than when these are being applied temporarily to undermine the survival of an existing competitor).

It also raises the issue of whether the Commission is suggesting price increases as a way of fostering new entrants into the market, even when cases with four operators competing in a market of Georgia size and economic level are virtually absent across the globe?

[17] Among related case studies we have prepared, usually for regulators and other government clients have been ones covering China, India, Malaysia, Mexico, Rwanda, Singapore and South Africa.

Other Criteria

The Commission adds that "if any individual criterion is not determinative of a finding of a significant market power…[a finding of SMP can be based] on a combination of the factors." This raises the question of how such combined assessments would be carried out and how related SMP based on a mix of two or more factors would be quantitatively determined. And to further add to the potential intricacies of its SMP determinations, the Commission adds that "other criteria may be applied jointly or individually in parallel with or as an alternative to the criteria defined [within this article]."

This open-endedness is hardly suggestive of an objective and balanced assessment, especially if, as the Commission suggests, confirmation of any one of the above factors being applicable would meet the requirement of SMP determination. This would presumably be the case even when assessments of several of the factors may suggest a competitive market. In other words, assessment of some of the factors could indicate the effective workings of competition, but there is no suggestion that this would need to be reported or even taken into account in addressing SMP within Article 14.

Article 15. Determining collective significant market power

This next article focuses on the possibilities of two operators or all three combining to exert SMP. The numerous ways in which this could happen is reflected in the long list of contributing market analyses that the Commission outlines for determining the presence of oligopolistic behavior, whether among three or between two operators. The targets of SMP analyses the Commission outlines include:

- "[W]hether market operators have a strong incentive to act in a coordinated manner and refrain from reliance on competitive conduct,"
- Whether there exist "sufficient incentives not to depart from the common policy,"
- Whether "the situation of tacit coordination [is]sustainable over time [as it must be], that is to say, there must be sufficient incentives not to depart from the common policy,"
- Whether "the situation of tacit coordination must be sustainable over time, that is to say, there must be sufficient incentives not to depart from the common policy,"
- Whether "market operators have a strong incentive to act in a coordinated manner and refrain from reliance on competitive conduct,"
- Whether "close alignment of prices [exists] over a long period, especially if they are above competitive level,"
- Whether the operator in question "often refuses to provide wholesale access services on reasonable terms,"
- Whether there exists "a mechanism of retaliation…for instance, a short-term price war between two or more companies,"
- Whether "[e]nd-user response to price changes expressed by portability and churn may be indicative of the existence of a retaliatory mechanism,"
- Whether "[e]xistence of regulatory restrictions, for instance, a policy implemented regarding frequency spectrum could limit the number of mobile communications operators, etc.

In sum, the list is a very long one. Yet based on the preceding article, it appears that if only one of these conditions is found to exist, conditions of SMP would be met, even if an overwhelming number of the conditions tested indicated no basis for doing so? Once again this reflects the highly open-ended and discretionary approach of the Commission to SMP.

For now, we simply note here the complexities inherent in a couple of the conditions raised by the Commission. We begin with the last one. Its inclusion is positive in that this recognizes that regulations can themselves foster some SMP-oriented conditions. However, the specific implication that by making spectrum available to more entities would foster competition needs to be qualified at the very least.

Among the possible consequences, as often reflected in countries where too many operators are licensed and allotted spectrum is that few go ahead with network deployments realizing (or being so informed by financing sources) that they could not sustain the investment called for. Another can be that more operators enter the market but limit their networks to dense urban areas, thereby competing in the "second SIM" segment but limiting competition in much of the country.

Similarly, the "portability and churn" that is referenced may also be a sign of arguably excessive competition in core urban areas combined with less competition overall. For example, in an assessment we conducted of OECD markets during a ten-year period, we found three-operator markets had higher subscriber penetrations than four-operator ones.[18] At the time this was a surprising finding until we recognized the kind of narrow competition that the presence of more operators can result in.

Finally, we note that in the EU context, the numerous mergers between mobile operators that have been approved (often reducing a four-operator market to three operators) invariably involved one or more of the SMP conditions being sought by means of the above tests. Yet, again, there is no attempt to indicate that SMP findings before resulting on prohibitions of specific mergers or specific market behavior need to be balanced against many considerations.

Chapter VI - SMP-Related Obligations

In this next-to-last chapter, the Commission's outlines the conditions underlying how SMP-related obligations are to be set.

Article 16. Principles of determining specific regulatory obligations

This article addresses general SMP-related principles while suggesting a focus on (1) wholesale obligations, and (2) geographic factors. The wholesale level is not further differentiated, however, with the implication being that the general SMP principles be applied to it.

With respect to the geographic dimension there is some evidence of conflicting intentions. At one point (sub-article 4) the Commission proposes that even where "the differences are not sufficient to warrant the identification of a separate geographic market segment or an authorized undertaking with significant market power in the given geographic area, the Commission may, impose different regulatory obligations in different geographic areas." This implies a degree of arbitrariness.

The article also notes with respect to geographic aspects, "A clear boundary…and the degree of its stability are the two major factors determining the difference between geographic segmentation of markets from segmentation of obligations." Does this mean that coverage differences in rural areas or different levels of network densification cannot be a basis for SMP determination—or, alternatively, only if the differences have prevailed for a period of time? (This coverage affects not only access for rural users but also the ability of urban ones to call their families or others in rural areas.)

Also, as we have previously found, if too many entrants are allowed into the market often their service coverage areas become more limited. This is a case where ostensibly pro-competitive steps can result in

[18] The study was prepared for Industry Canada and the Department of Justice in Canada with respect to a court proceeding addressing the number of mobile licenses that had been issued.

less competition in outlying areas.[19] At the same time, the coverage by one or two operators, usually the more established ones, may be more consistent with license obligations and access objectives. Would the Commission nonetheless consider imposing SMP obligations on the operators offering the greater coverage and access?

Article 17. Determining material conditions of specific regulatory obligations

Here the proposed rules assert that the resulting obligations "shall be preferably imposed on the relevant wholesale market segments." The article adds that the obligations should be imposed "on retail markets only where specific regulatory obligations imposed on wholesale markets fail to ensure effective competition on retail markets."

Overall, the emphasis on wholesaler aspects is not one that is evident throughout the proposed methodology for responding to SMP and this should perhaps be emphasized earlier on. At the same time, there is reference to multiple obligations being imposed (and the need to take their interdependence into account, which at least recognizes that more than limited wholesale interventions may be called for).

Finally, the article stresses that in imposing specific obligations on operators with SMP, the Commission is to "specify the timeframe within which the [operator in question] shall put the specific regulatory obligations in place. The timeframe shall reflect the balance between the time necessary to establish the competitive environment in the relevant market segment and that necessary for the [operator] to adopt [the] specific regulatory obligations."

The implication is that the situation of the operator is to be taken into account but no further guidance is provided on whether this means, for example, that implementing an SMP-related obligation should not impose a hardship on the operator that could affect its operations—possibly making that operator less competitive—nor how this would be determined. Nor is there any recognition of downward financial periods or other factors such as a military invasion that might legitimately forestall the implementation of the obligation.

[19] We add that in an earlier consulting case (conducted in 2011), we compared Georgia's and Armenia's mobile network coverage and found that coverage was much more extensive in Armenia, which only had three operators at the time compared to Georgia's four operators. Georgia's regulator had also allotted more spectrum per operator, which may also have encouraged the operators to focus on urban markets where such amounts of spectrum were needed more. The coverage differences between the two countries were eliminated over time.

PART B: ALIGNING THE SMP FRAMEWORKS

In this part of the review, we focus on issues raised by the alignment of the Commission's proposed SMP methodology with existing Georgian law and SMP rules as well as with EU competition policy and acquis.

In this context, we will suggest that Georgia's Electronic Communications Law and its related regulations (i.e. Regulation N5) will need to be revised to reflect the new methodology for determining SMP. Otherwise, if simply layered on top of the existing SMP approach, the methodology will not be consistent with the existing SMP framework in various respects.

In addition, this will complicate attempts to align Georgia's Law and regulations with the existing EU regulatory framework.

1. Alignment within Georgia's Framework

We begin with the alignments called for within Georgia. In principle, this first alignment needs to be addressed before alignment with the EU framework can be completed, as otherwise there will be gaps between (1) Georgia's existing laws and regulations and the EU framework, and (2) the new SMP determination approach and the EU framework. This will result in a three-sided framework that will be harder to harmonize than any gap between two of the three sides should be.

1.1 Limitations of Layering the SMP Approaches

In proposing to adopt its new SMP framework by simply adding it to Georgia's existing SMP regulatory regime (i.e. to Regulation N5), the Commission is making a major assumption. The assumption is that the new methodology can simply be layered on top of Regulation N5, as if it is a natural extension of the existing SMP framework. Yet, the proposed approach departs from—and in some cases directly contradicts—(1) the Commission's traditional SMP approach, (2) the provisions of the current Law on Electronic Communications, and (3) the legislative efficacy and logic of the Commission's existing rule-making process.

As a result, simply layering the two approaches would allow both of them to be applied in the future, creating even more ambiguity in how SMP is determined as well as more bases for challenging such determinations as not being consistent with the earlier (or the later, depending on the challenger's focus) layer of the new dual-layer SMP framework. This could result in confusion, if not outright collision, among the norms, terms and principles of Georgia's traditional SMP framework and the new proposed one. And it could end in Regulation N5 being repealed altogether, as mentioned in the explanatory notes to the Commission's proposed regulations.

At the same time, as we have implied in assessing the proposed methodology in Part A, we suggest that the Commission reduce the "leeway" and, effectively, the arbitrariness of its proposed approach to determining SMP, in particular with respect to Articles 6, 10, 14 and 15. This would be in the interest of positive market development as well as in the Commission's interest, as it would likely limit the many grounds for clarification and, ultimately, for judicial appeal that the proposed methodology, as formulated, would be subject to.

1.2 Revising the Electronic Communications Law

We turn now to the issue of reconciling the proposed methodology, once finalized, with Georgia's legal and regulatory regime. As noted above, simply superimposing the new methodology (with its long "shopping list" of SMP indicators and other SMP determining procedures) on top of existing SMP-related regulations (i.e. Regulation N5) is neither legally sound nor procedurally practical.

We provide examples in Section 2.2 of specific divergences of the proposed methodology, on the one hand, and, on the other, the Law on Electronic Communications and/or the Competition Law of Georgia, which underlie Regulation 5. These include, for example, differences between Article 22, Section 11 of the Law on Electronic Communications and the proposed market analysis methodology, which in addition is not consistent with either Georgia's Competition Law nor the EU Framework Directive and SMP Guidelines. In addition, Regulation N5 would need to be amended by introducing new terms, articles, and sections to ensure that the methodology covers any potential situation requiring a more rigid competition analysis.

In contrast, the simple layering of the two approaches would allow both to be applied in the future, creating ambiguity in how SMP is determined and more bases for challenging such determinations as not consistent with the earlier (or the later, depending on the challenger's viewpoint) layer of this dual-level SMP framework. This is another reason why the Electronic Communications Law and Regulation N5 should be adjusted to reflect the proposed methodology.

2. Alignment with the EU Framework

Besides the legal and procedural issues in Georgia that underlie the enactment of regulations reflecting the proposed SMP determination methodology, there are issues of alignment with the EU. This alignment, which was formally initiated with the signing of the Association Agreement between the EU and Georgia in June 2014 calls for Georgia to align its laws and regulations to those of the EU.[20]

Since that time a number of other alignment related initiatives have been undertaken, which we summarize next along with the details of the Association Agreement and how it has or has not been applied by Georgia to date.

2.1 The Association Agreement

In concluding the Association Agreement in 2014, Georgia agreed to a number of changes with respect to electronic communications. The changes called for were as follows:

(1) To strengthen the independence and administrative capacity of the national regulator in the field of electronic communications;

(2) To establish public consultation procedures for new regulatory measures;

(3) To establish effective mechanisms for appeal against the decisions of the national regulator in the field of electronic communications; and

(4) To define the relevant product and service markets in the electronic communications sector that are susceptible to ex-ante regulation.

In addition, Georgia agreed to analyze these relevant product and service markets to determine whether SMP exists.[21]

The objective was to implement these steps by 2019. However, of these steps, most have not been completed even now, four years later, which underscores the continued presence and active status of Georgia's original SMP determination methodology (2007).

[20] See *Official Journal of the European Union*, L 261/4, August 30, 2014; hereafter referred to as "the Association Agreement."

[21] Ibid., Chapter VI, subsection 5, Articles 104 to 113 dedicated to electronic communication services.

Here we would note that with regard to public consultations, the Commission has recently amended its consultation rules in line with the EU Framework Directive.[22] Also the Commission provides at this point a dedicated public consultation page on its website and has in the past made a number of regulatory decisions involving public consultations.[23] At the same time, while EBRD experts recommended the inclusion of the public consultation provisions regarding the publication of a list of relevant markets and guidelines for market analysis in Georgia's Law on Electronic Communications to ensure full compliance with the Framework Directive, this has not as yet materialized.

2.2 Specific Discrepancies

In addition to the above procedural and definitional challenges, some specific discrepancies also remain to be dealt with. We explain some of these below.

In doing so, again we do not suggest that there needs to be full consistency between Georgia and the EU. As pointed out in the Association Study's assessment of the Georgian regulatory framework, "Neither the EU Commission recommendations on markets susceptible to *ex-ante* regulation, nor the SMP guidelines are legally binding. It does therefore not seem that there would be any international law obligation resting upon Georgia to 'integrate' them into the national legal order."

However, as the authors add, "At the same time, the Association Agreement contains a clear commitment by Georgia to define markets *in accordance with the principles of competition law."* Therefore, provisions of the Commission recommendations explaining the principles of competition law, relevant for market definitions and SMP designations, should be 'integrated' in Georgian legislation or at least complied with.[24]

Accordingly, we proceed to outline some of the specific discrepancies that remain to be addressed. These include ones that the Association Study points to as well as some we have identified.

1. <u>The wholesale focus of the EU SMP framework</u>

Initially the European Commission had concluded that there were as many as 18 telecommunications markets segments that should be subjected to SMP restrictions. However, by 2020 the European Commission's recommendation refers to two wholesale connectivity markets only. Again, referring to the "Markets susceptible to ex ante…:" study, "Preference should be given to intervene in the most upstream market in order to minimize distorting investment incentives in the retail market."

"This objective," the authors add, "is reflected in the current EU Recommendation on Relevant Markets from 18 December 2020, as well as…in the previous Recommendation of 2014, which do not list retail markets as markets susceptible to *ex-ante* regulation for EU Member States." The EU's approach

[22] Commission Regulation N1 dated 27 June 2003 and its amendment dated 9 December 2021 introducing public consultation rules. https://matsne.gov.ge/ka/document/view/5304077?publication=0

[23] Some of the notable decisions of the Commission through the public consultation process are the Commission Decision G-20-9/156 dated 31 December 2019 summarizing the competition analysis of the wholesale mobile market segment; amendment of the Commission regulation N3 dated 6 July 2010 on number portability, as well as the methodology for competition analysis of SMPs currently under review.

[24] See Association Study," pp. 41-42.

to…competition deficiencies, even at the retail level, is to curb them upstream in terms of wholesale access. [25]

By the same token, the proposed methodology does not focus exclusively or even predominantly on wholesale markets in its rules for assessing markets for ex-ante regulation. There is no priority for considering assessments of wholesale markets, thereby leaving the option of addressing retail markets, unlike the above-mentioned European Commission's long-standing practice of considering the upstream markets first that should be subjected to SMP restrictions.

2. The application of the 50% benchmark

As previously indicated, the 50% market share benchmark appears not to have been taken on board as yet in the Proposed Methodology: the EU SMP Guidelines state in paragraph 57 "If the market share is high but *below the 50 % threshold*, NRAs should rely on other key structural market features to assess SMP. They should carry out a thorough structural evaluation of the economic characteristics of the relevant market before drawing any conclusions on the existence of SMP [emphasis added]."

We do not find this 50% threshold reflected in the Commission's proposed methodology. It is therefore recommended—in line with the EU acquis—that for undertakings with a high market share but below the 50% threshold, SMP assessment should be pursued on the basis of key structural market features.

3. SMP in related market segments

The Law on Electronic Communications (Article 22, Section 7) stipulates that an operator with significant market power in one relevant market shall also have SMP in a closely related relevant market. The same is replicated in Regulation N5 (Article 21, Section 3) but not in the proposed methodology.

Also, the EU Directive does not rule out the significant market power on the closely related market; however, it does not make a presumption *per se*.[26] Thus, the wording of Article 22, Section 7 of the Law is not compliant with the Directive. To avoid inconsistency between the EU directive, the Law, Regulation N5 and the proposed regulation, it is recommended that the relevant article of the Law change the presumption to a possibility per the Framework Directive.

4. The collective collusion standard

According to the EU-Georgia Association Study, "The Georgian law is setting the legal test at a lower level than in the EU, by considering any ability to collude ("*allow them to act in concert and obtain a joint non-competitive advantage*") as sufficient to conclude joint dominance.[27] Conversely, in the EU, *"three cumulative conditions are necessary for a finding of collective dominance,"*[28] which the Study goes on to explain while also noting that Georgia's Commission is planning to address this difference.[29]

[25] Ibid., p. 49. The two EU references they make can be found at https://digital-strategy.ec.europa.eu/en/news/commission-updated-recommendation-relevant-markets and https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003H0311 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32007H0879 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014H0710

[26] EU Directive 2002/21/EC, Article 14, Section 3.
[27] Page 45 of the EU-Georgia Association Study
[28] Paragraphs 65-67 of the EC Guidelines on SMP
[29] Ibid., page. 46.

We note that the Commission's proposed methodology does introduce the wording reflected in paragraph 67 of the EU SMP Guidelines, namely, the setting out of three cumulative conditions based on a General Court decision in the *Airtours* case.[30] (However, see also our remarks below regarding the quantitative test provided in Article 15 of the Commission's proposed methodology.)

In addition, the Association Study notes that the EU regulatory framework requires a forward-looking analysis in determining the presence of collusion, which is not required in Georgia's existing rules. Such forward-looking analysis *is* referenced in the proposed methodology, which references the EU SMP Guidelines in this respect. Moreover, the new methodology adds the concept of taking into account demand side and supply-side substitutability from the end-user's perspective over the next review period based on existing market conditions and their likely development (see Article 9 of the proposed methodology).

5. The three-year market period

The proposed methodology (Article 3, Section 2) contains provisions for conducting market analysis three years after the completion of the previous analysis. Similarly, the EU Directive (Art 16/6) indicates that market analysis procedures shall be carried out in regular time frames, no longer than three years apart.

In contrast, the Law on Electronic Communications and Regulation N5 do not stipulate intervals for the Commission to perform market analysis. Without relevant safeguards specifically stated in the Law, the Commission could remove or alter the "three-year period" rule unilaterally, without due justification. Accordingly, to avoid the risks of ambiguity in the application of this proposed provision, the time intervals for mandatory market analysis should be included in the Law on Electronic Communications.

6. The quantitative collusion test

Similarly, Article 15 (Section 3), which addresses collective SMP, refers to a *quantitative test* which we do not find reflected in the EU's SMP Guidelines or the Competition Law of Georgia.[31] Specifically, the article states: "The primary (necessary) criterion to identify any authorized undertakings as having joint significant market power in any study and analysis of competition in any relevant market segment is a *quantitative assessment* of the market share held by such undertakings in that market segment [emphasis added]."

The article adds: "According to the primary criterion to assess significant market power in the relevant market segment, authorized undertaking shall be identified as having collective significant market power if:

(a) The combined market share of two authorized undertakings reaches at least 60% provided, however, that the market share of each of them is at least 25%;

(b) The combined market share of three authorized undertakings reaches at least 80% provided, however, that the market share of each of them is at least 15%.[32]

This approach is largely reflected in Regulation N5 (Article 21, 2a and 2b). However, Regulation N5 specifically refers to the HHI index), unlike the proposed Article 15 (Section 3). At the same time, as we have indicated in Part A, the proposed methodology leaves substantial leeway to the Commission in

[30] Case T-342/99, Airtours plc v Comission EU:T:2002:146, paragraph 61.
[31] The Competition Law of Georgia (article 3, section "i") defines joint dominance as follows: "[…] each of two or more economic agents is considered to be in a dominant position if they do not face significant competition from other economic agents operating in the relevant market within and outside the group in question, taking into account the limited availability of raw material sources and key markets, entry barriers to the relevant market and other factors determining market power, and at the same time the joint share of no more than 3 economic agents exceeds 50 per cent, and at the same time, the market share of each is not less than 15 per cent; […]"
[32] See also, Article 22, Section 11 "a" and "b".

determining which market segments to use in such SMP tests and, correspondingly, great leeway in challenging the way in which the tests may be formulated by the Commission.

In addition, if one accepts the primary level of 50% in determining an individual operator's SMP, the specific levels set in Article 15 would need to revised considerably. For example, the 60% standard for collusion between two operators would no longer hold with its proviso that both had to have minimum shares of 25%. In fact, the minimum share of the second operator, if the first was also capable of SMP would need to drop below 10%. Otherwise, the second operator's potential collusion with the first would not meet the test the moment this operator's share fell below 10% (or the dominant operator's share rose above 50%).

7. The "comparable table" approach

Based on Georgia's Law on Normative Acts, the Commission is obligated to compile a "comparable table" for the regulations it adopts in the context of Georgia's Association agenda. Yet no such table appears in the proposed methodology, even as it would allow for a clear analysis of the status quo and the need for new regulation following the wording and meaning of the EECC relevant articles (for SMP determination in this case). Instead, the new methodology is being proposed without any analysis vis-a-vis the EECC relevant provisions and without adequate substantiation of such regulatory decisions.

8. The withdrawal of remedies

The Law on Electronic Communications does not contain provisions regarding withdrawal remedies. Yet the proposed methodology does. As for the EU Framework Directive, it states (Article 16, Section 3): "[w]here a national regulatory authority concludes that the market is effectively competitive, it shall not impose or maintain any of the specific regulatory obligations referred […]. In cases where sector-specific regulatory obligations already exist, it shall withdraw such obligations placed on undertakings in that relevant market. An appropriate period of notice shall be given to parties affected by such a withdrawal of obligations.

Considering the importance of the withdrawal remedies, they should first and foremost be covered by the Law on Electronic Communications to entrust the Commission with such specific powers. Relevant provisions in the proposed methodology once it is fully adopted, will not be sufficient to remedy noncompliance with the EU Directive. Therefore, the withdrawal of remedies should be introduced in the Law to ensure legislative efficacy and transparency of the regulator.

2.3 Other Alignment Initiatives

In addition to the Association study and other alignment initiatives mentioned above, there have been several others, including EBRD- and World Bank-sponsored ones as well as the EU Twining Project that should be noted in seeking to resolve EU-Georgia alignment with respect to electronic communications and related competition policies and actions.

EBRD-Sponsored Proposals

During 2017-2018, the European Bank for Reconstruction and Development (EBRD) sponsored an effort to amend the Law on Electronic Communications in line with the Association Agreement. In the process, the following regulations and legal provisions were drafted and proposed for adoption with the help of Grant Thornton, Analysys Mason and Pierstone.[33]

[33] See https://www.ebrd.com/work-with-us/projects/tcpsd/ict-harmonisation-of-laws-regulation-of-next-generation-access-and-regulatory-development.html

- Provisions for the law of Electronic Communications dealing with effective competition regulation, public consultations, and general authorization (permission)
  - and provisions regarding universal services and the improved use of radio frequencies and numbering resources, among others;
- Regulations for the provision of electronic communications services and protection of consumer interests; and
- Methodology for approval of ex-ante and ex-post regulations based on the Framework Directive.

Related amendments to the Law on Electronic Communications were submitted to Parliament but were not adopted. However, public consultation procedures recommended under the EBRD project were partially incorporated in 2021 into the regulatory rules of the Commission.

Concurrently, Grant Thornton proposed substantive review of Regulation N5, which were to include quantitative and qualitative assessment criteria for the SMP methodology. However, those recommendations were not implemented as Regulation N5 was never amended accordingly.

In addition, under World Bank auspices, a legislative framework for passive infrastructure sharing was drafted. The framework was based on the "Broadband Cost Reduction Directive" (2014/61/EU), an initiative incorporated into Georgia's Strategy for the Development of Broadband Networks, 2020-2025, as approved by the government on 9, 2020. This led to the drafting of the law on passive infrastructure sharing, including operational guidelines for related dispute resolution by the Commission. The resulting Law on Sharing Telecommunications Infrastructure and Infrastructure Usable for Communications Purposes was adopted by the Parliament in 2022.

3. Continuing Alignment Challenges

As indicated in Part A of this submission, the intricacies inherent in several of the Articles of the proposed methodology (among them Articles 6, 10, 14 and 15) will make the adoption of clear-cut regulations and SMP decisions very difficult. Accordingly, this calls for modifying and aligning the proposed methodology with both Georgian Competition law, the Law on Electronic Communications and regulations (as outlined in Section 1 of Part B) and with the EU competition approach (as addressed in Section 2).

This means multiple changes will need to be made in order to adapt the proposed methodology to both these contexts, as we have indicated above. We conclude this assessment of the alignment issues involved by highlighting three of them in particular—namely, the 50% vs. 40% benchmark, the focus on retail or wholesale markets, and the definition and balancing of the three criteria of SMP determination. Each of these is addressed below.

The 50% vs. 40% Benchmark

A key definitional and procedural issue is the difference between the EU framework's focus on operator shares exceeding 50% versus the Commission's 40% benchmark. We would suggest this first level is reflective of the original reason why competition measures were introduced into the electronic communications sector namely to limit traditional telephone companies that held 90% or higher shares in the fixed service market. Also, its adoption should reduce the ambiguities that the 40% level present in Georgia, where as we have shown an operator can have a share just above 40% in terms of the mobile subscriber market yet well under 40% in terms of the mobile internet segment.

Accordingly, the proposed methodology should consider adding an SMP assessment in situations where an operator has a market share in excess of 40% yet below 50%. Moreover, as EU guidelines suggest, NRAs (national regulatory agencies) should carry out a thorough structural evaluation of the economic characteristics of the relevant market before drawing any conclusions on the existence of SMP in such circumstances.

Wholesale vs. Retail Focus

There remains also the question of the degree to which SMP assessments should focus on wholesale markets and whether this should apply to Georgia. The EU, initially focused on retail markets, determining incidents of SMP in 18 different segments. This focus over time has shifted to wholesale segments where SMP restrictions are now being applied to only two segments.[34]

Should Georgia, with its small market compared to EU countries, undergo this same history (i.e. starting with a very wide retail-oriented set of SMP determinations followed by a contraction of these to a limited number of wholesale-focused determinations) or should it focus primarily on wholesale SMP determination? A key contextual consideration is that Georgia's market varies from that of most EU countries in that it has not had the ongoing dominance or at least leading presence of a traditional fixed service monopoly of the likes of France Telecom (Orange), Deutsche Telecom or Telefonica.

Balancing the SMP Criteria

In addition, as we have noted, the proposed methodology focuses heavily on only one of the three accepted criteria used to establish the presence of SMP. This is Criterion Two, which addresses factors over which it assumes operators have some control. The other two criteria, which deal with the presence of market barriers and the sufficiency of competition law in responding to with market failures, are given limited attention by comparison, even as all three criteria are recognized in Article 11 of the Commission's proposal.

Yet, as the EU-related Association Study indicates, criteria one and three deal significantly with government shortcomings—both regulatory barriers to market entry and the presence and effective implementation (usually on *ex post* basis) of competition law. The underlying assumption of the Commission's approach, on the other hand, appears to be that any competition limitations stem from the operators and not from government-side. In this context, provisos such as "assuming existing regulations are not causing or contributing to the occurrence of the SMP" should be considered as an integral part of the SMP regulations adopted in Georgia.

[34] For a review of the EU's earlier retail focus on numerous retail segments and subsequent shift to the wholesale level, see Martin Cave et al., "The European Framework for Regulating Telecommunications: A 25- year Appraisal," Review of Industrial Organization (2019), no. 55, p. 50.

ASSUMPTIONS AND LIMITATIONS

The general assumptions and limiting conditions pertaining to assessment stated in this document are summarized below:

- The information presented in the report will be used by the Company for managerial decision-making purposes and the Company also may submit the report to Georgian authorities and to the Commission.
- This report is based on the latest information made available to us as at the completion of our work on 19 December 2023 and we accept no responsibility to update it for events that take place after the date of its issue.
- Our findings should be considered as valid for a certain time interval and may be subject to updates. We are not in position to guarantee the realization of any estimates shown in the report, although they have been prepared with an utmost care and on the basis of the information presented to us by various sources during the research phase.
- To the best of our knowledge, the statements of facts contained in this document, upon which the analysis and conclusions are based, are true and correct. Information, estimates and opinions furnished to us and contained in this document or utilized in the formation of the conclusions were obtained from sources considered reliable and believed to be true and correct.
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