15 July 2024

Response to GNCC on Fixed Market Review

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Executive Summary

We have been asked by Magticom to review the Georgian National Communications Commission (GNCC, or ComCom)'s November 2023 consultation entitled "Market review of the Fixed broadband market" ('Fixed Market Review'), and the associated June 2024 decision document.

We believe that it does not adequately reflect several important aspects of the Georgian fixed broadband market, has misinterpreted other aspects, and in many key areas appears to rely on subjective assumptions rather than specific evidence or analysis. As a result, we think changes to the analysis are necessary to fully reflect the forward-looking competitive conditions in Georgia and more appropriately assess the necessity and proportionality of remedies.

In summary, we entirely disagree with ComCom's conclusions. Far from being uncompetitive, we see a market which is performing well. Consumers get excellent connectivity (fibre penetration is materially better than the EU average) while overall prices are low, and there is no evidence of excessive profitability. We cannot identify any credible theory of harm which would require any remedies. In this context, the remedies represent a dangerous precedent which is likely to irreparably damage market investment in the future, and so steps need to be taken to address the errors and limitations in the report.

ComCom's approach fails to adequately reflect competitive conditions and consumer outcomes across Georgia

By standard metrics, the fixed broadband market in Georgia appears to be working well overall, and in comparison to elsewhere in the EU.

- **Roll-out of FTTX networks is extensive, including by competing networks, and the expanded law on physical infrastructure sharing will facilitate further roll-out** – coverage stood at 85% of households in January 2023, with 69% of households in settlements with more than one active FTTX network.[1] We understand requests for physical infrastructure sharing have already started.

- **Take-up of FTTX services is already high, and higher than elsewhere in the EU** – in 2022 around 90% of fixed broadband subscribers in Georgia were connected to an FTTX network, compared to just 30% in the EU in 2021. Magticom has played a leading role in driving take-up of fibre services.

- **Pricing is generally competitive, with prices for the most popular services below EU comparators** – in most cases, prices are significantly below EU equivalents, and we understand that Magticom has made further reductions for the most popular services (from 15 July 2024 speeds have been increased while prices remain flat). The main prices that ComCom expressed concern about, for >100Mbps services, have already been reduced by Magticom as of 1 July 2024. We also understand that Silknet has a promotion on its 100Mbps service. Further price movements will be driven by competitive effects – Magticom competes actively on price with other service providers.

[1] P94 and Figure 4, ComCom Fixed Market Review

- **Retail competition is developing** – although ComCom comments that market shares have been stable, this in and of itself is not indicative of competitive conditions. Looking at wider market indicators there are reasons to consider that the dynamics of competition are changing, with Magticom gaining a much lower (and declining) share of adds over time, which will affect its market position in the future. The prospects for further network roll-out using physical infrastructure sharing are also likely to change these competitive dynamics going forward.

As a result, the concerns underpinning ComCom's Fixed Market Review appear to be more theoretical than reflective of market conditions on a forward-looking basis. Indeed, the main area of concern highlighted by ComCom appears to be specifically about price and take-up of >100Mbps services.

However, ComCom has not presented any evidence to support a view that consumers are unhappy with their existing services and/or that it is price which is preventing them from buying these higher bandwidth services (we also understand that Magticom has already reduced its pricing). Instead, these concerns appear to be based solely on comparisons with Europe, on the implicit assumption that Georgian demand must be the same, without any consideration of local factors which could be driving the comparatively lower take-up. For example, the high penetration of IPTV in Georgia means TV streaming does not affect the speed of the fixed broadband service. As a result, lower speeds are more likely to be sufficient to support common internet browsing/download use cases compared to elsewhere where over-the-top (OTT) services are used extensively and rely on the bandwidth of the fixed broadband connection. It is critical that non-price factors are properly and holistically assessed in order to understand if the existing take-up rate is cause for concern.

The assessment of Magticom's position is flawed, and fails to appropriately reflect market conditions

Taking ComCom's market definition as a given, we think there are several limitations to its SMP assessment, most notably in terms of its consideration of Magticom's ability to act independently of its customers and competitors on a forward-looking basis. Magticom has invested heavily in its network since 2016 to deliver widespread FTTX services – in the absence of any incumbency advantages – and in doing so has triggered a competitive response by other network operators to also invest in their own networks. In particular, the presence of rival networks across settlements with 60% of households, and the prospects for further roll-out (enabled by physical infrastructure sharing), will significantly constrain Magticom's behaviour.

In addition, in carrying out a market review it is critical that material variations in competitive conditions are adequately reflected to ensure the SMP findings are robust, and remedies are well-targeted and proportionate. It is clear from the data presented in ComCom's Fixed Market Review that there are potentially significant variations in competitive conditions across Georgia. For example, the number of competing FTTX networks varies from zero to five, and Magticom's share of subscribers varies significantly across settlements – so much so that it is not even the market leader in some areas. ComCom even identifies some settlements as being contestable, and there are prospects for further changes as a result of additional competitive roll-out in the future.

Despite this, ComCom has defined a national geographic market, where it concludes Magticom has SMP. We consider this to be highly questionable.

There are also significant limitations to ComCom's approach to differentiating remedies to reflect geographic variations in competitive conditions. These have the effect of setting a very high bar for a settlement to be considered as contestable for the purposes of this review period. As a result, detailed access regulations are likely to be imposed where it is not justified (e.g. on clearly contestable or prospectively contestable areas), and even in areas where Magticom is not the market leader. Not only is this disproportionate, it will also materially undermine competition and future investment incentives in the future.

As a result, the proposed remedies are disproportionate and ill-targeted, and also at odds with the EC's current approach to telecoms regulations

Given network-based competition is developing in Georgia, aided by existing upstream (physical infrastructure) remedies, we do not think additional access-based regulation is currently justified. This is particularly true given ComCom's retail concerns appear to be limited to a small part of the market (i.e. take-up and pricing of >100Mbps services). In fact, such wide reaching regulation could be counter-productive and undermine future investments by all network providers which could otherwise strengthen network-based competition.

Nonetheless, if you consider promoting access-based competition through regulation is necessary, the package of remedies proposed in the Fixed Market Review is inappropriate and goes far beyond what is necessary to achieve this. For example:

- The difference between remedies for Clusters 1 and 2 are minimal, despite one capturing areas ComCom defines as non-contestable and the other areas which are tending towards contestability. It simply cannot be proportionate that virtually the same package of remedies is necessary for each cluster. This is particularly true given the high threshold for contestability in ComCom's assessment, which means it is likely that some areas in Cluster 1 are in reality prospectively contestable.

- Although the obligations for Cluster 3 are minimal, the fact that ComCom has identified them as contestable would suggest that in fact, no regulation is proportionate.

- Introducing both WCA and WLA (in addition to existing physical infrastructure remedies) means there will be detailed regulation across the value chain, without any justification or evidence (e.g. from network operators) that all these measures are necessary to address the competition concerns ComCom considers exists. Indeed, across the EU regulators have moved away from detailed WCA regulation in favour of more upstream remedies.

- As well as significantly changing the commercial environment compared to when Magticom began its investment, the use of cost-based LRIC+ price controls across all regulated access products significantly restricts its flexibility to respond to changing market conditions and poses unacceptable risks to cost recovery. This is particularly problematic when an industry is investing heavily in a new technology where demand can be uncertain, and so will fundamentally undermine Magticom's future investment incentives as well as those of other network operators.

- It is also critical that both ComCom and external stakeholders scrutinise and sense-check any model intended to set prices, including its inputs and outputs, to ensure it is robust and delivers on the regulatory objectives. We have not been able to review ComCom's detailed model in the time available. Magticom has told us that there are significant differences between the inputs it sent to ComCom and those in the model, and without explanation of those changes from ComCom it cannot review the detailed analysis. However, we understand that Magticom has carried out its own analysis of tariffs proposed by ComCom, which shows that the proposed regulated prices would not be sufficient to recover its costs, and actually result in a negative return on capital employed at the wholesale level. We would expect this to raise significant concerns for any regulator.

Introducing such a highly intrusive and expansive access-based regulatory regime on a new entrant which has no incumbency advantages, but instead has undertaken substantial (and risky) capital investment to build its own network – at a time when others are also investing in and expanding their networks – risks irreparably undermining investment incentives and harming network-based competition in the future.

In this regard, we note that ComCom’s proposals appear to be contrary to the direction of travel elsewhere in Europe. The EC has been encouraging Member States to roll back existing intrusive regulation in order to create a better regulatory environment for investors and encourage operators to compete more deeply, as this will deliver better outcomes for consumers over the longer term.

The proposed remedies will undermine prospective competition and incentives to invest

Fixed fibre networks require significant levels of capital investment, and a stable regulatory environment – which allows a reasonable expectation of a commercial return – is needed to incentivise this investment. In the context of allowing reasonable returns on investment, we refer ComCom to the analysis conducted in our response to the mobile market review. That analysis shows that Magticom’s consolidated returns (on a post-tax ROCE basis) have been below an appropriate benchmark return for the Georgian market over recent years.

As such, regulators should seek to remove regulatory uncertainty, and ensure any intervention is well-targeted, justified and proportionate to give the industry greater confidence in committing substantial ongoing investment. However, for all of the reasons set out above, the approach in the Fixed Market Review undermines this environment. The Fixed Market Review represents a shift in regulatory approach in Georgia, and the extent of intrusive wholesale access remedies imposed on Magticom (including in relation to IPTV and VoD) create significant unexpected – and in our view, insufficiently justified – costs. This is particularly so given the main retail outcomes highlighted by ComCom as a concern appear to be specifically about prices for >100Mbps services, yet its remedies are significantly more wide reaching and intrusive. The implications for investment by all operators going forward cannot be understated.

There is no evidence of a problem in the retail fixed broadband market which justifies regulation

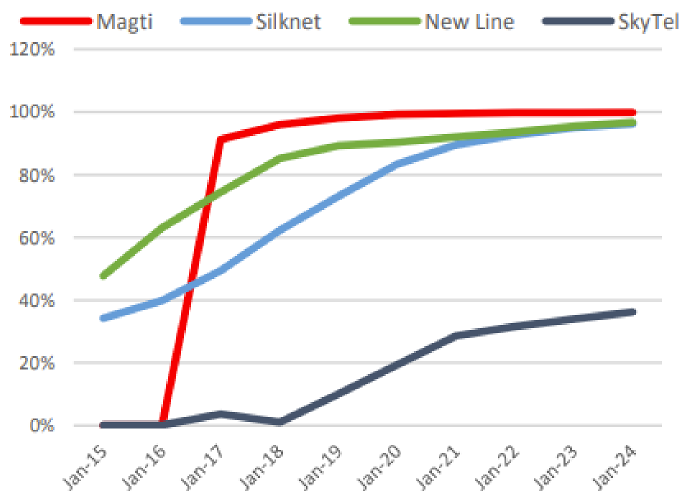
The objective of SMP regulation is to improve consumer outcomes both in the short term and in the longer term, when measured in terms of price, quality and choice. It is therefore vital that ComCom has a clear and well evidenced articulation of the consumer problems it is seeking to address, to make sure that any remedies are objectively justified, well targeted, and proportionate, while minimising the risk of unintended consequences. While ComCom refers to concerns about the speed of FTTX roll-out, take-up, pricing, and retail competition, it has not sufficiently made the case that there is a market failure that needs to be remedied.

Roll-out of FTTX is extensive, including by competing network providers

Based on ComCom's data collected January 2023, FTTX coverage is high in Georgia at around 85% of households. This is significantly above the EU average as of September 2022, which stood at 62% of households for EU39 and just 55% for EU27+UK.[2]

Importantly, this roll-out is being driven by competing networks, with 69% of households covered by more than one FTTX network, and 60% covered by more than three.[3] This reflects the significant technological evolution which has occurred in the fixed broadband market in Georgia. Magticom's focus on building fibre networks since 2016 has stimulated competitors to also invest in their networks, and where necessary upgrade from outdated, low-speed DSL services in order to remain competitive. As a result, fibre penetration within each operator's subscriber base has increased significantly, with three network operators now at or close to 100% (up from below 50% in 2015).

Figure 1: Fibre penetration within operators' subscriber bases



Source: Magticom

[2] https://www.ispreview.co.uk/index.php/2023/04/2023-full-fibre-country-ranking-sees-uk-coverage-accelerate-vs-eu39.html, accessed 15 July 2024.
[3] Figure 4, ComCom Fixed Market Review.

Looking forward, we note the law on physical infrastructure sharing (which has been broadened effective from 1 July) is specifically designed to promote the roll-out of high-speed network infrastructure. By allowing access to telecommunications infrastructure and other physical infrastructure applicable for telecommunication purposes, it can be expected to significantly reduce costs for network roll-out, and we understand Magticom is already providing access to its infrastructure. Given this, and the absence of any evidence in the report to suggest other operators intend to reduce their network investments, we would expect to see further roll-out by operators across this market review period and beyond.

It is notable that ComCom states that "the real challenge that remains for Georgia is how to provide broadband connectivity in small, rural settlements for which there remains no economic incentive to build fixed broadband access networks."[4] However, wholesale access regulation does not address this issue – you cannot mandate access to a network which doesn't exist – and in fact as discussed below there is a risk that it can act to disincentivise further expansion even where it might otherwise be economically viable.

Take up of FTTX services has been growing quickly and is now high, particularly compared to elsewhere in Europe

ComCom's report states that 82% of households at the end of 2022 had fixed broadband access (up from 72% in 2019), which is higher than the EU average of 78%. The vast majority of these fixed broadband subscribers in Georgia are connected to a FTTX network (around 90%[5]), which is a notable increase from just over 50% in 2016[6] and is significantly higher than the equivalent figure in the EU in 2021 (around 30%).[7] Even allowing for the lower roll-out of FTTX networks across Europe, we note that FTTX take-up as a proportion of homes passed stood at just 50% for EU39 and 53% for EU27+UK (in September 2022).[8]

Customers in Georgia are also increasing the speed of service they are buying over time. In 2019 10-30Mbps was the most popular fixed broadband service (63% of total connections), but by 2022 this had declined to 32% with take-up of 30-100Mbps increasing to become the most popular (from 21% in 2019 to 59%).[9]

Pricing is generally competitive to EU comparators and no evidence is presented to suggest operators are earning excessive returns

ComCom's international price benchmarking report shows that Georgia sits well below the European average for the two lowest speed baskets of fixed broadband services (up to 25Mbps), and are comparable for the >=25Mbps basket, which together account for the vast majority of residential connections (99%). We also understand from Magticom that it has effectively implemented a further price decrease on these baskets from 15 July 2024, by increasing speeds

[4] Page 44, ComCom Fixed Market Review.
[5] We note ComCom report refers to FTTX accounting for 88% of subscriptions and 91% in different places.
[6] Data received from Magticom.
[7] Figure 22, ComCom Fixed Market Review.
[8] https://www.ispreview.co.uk/index.php/2023/04/2023-full-fibre-country-ranking-sees-uk-coverage-accelerate-vs-eu39.html, accessed 15 July 2024.
[9] Figure 25, ComCom Fixed Market Review.

available for a given price level (i.e. customers will be able to receive a 50Mbps service for the same price as the existing 30Mbps package, or 80Mbps service for the same price as 50Mbps).

We understand ComCom has concerns that the >100Mbps basket is too expensive compared to the European average, and that this is driving the low take up of these high-speed services. We make a number of observations on this point.

Firstly, pricing levels and structures are not static, they can – and do – change over time in response to market conditions including competition and demand changes. This is normal in a well-functioning market. Indeed, we understand that Magticom has reduced prices of >100Mbps speed services from 1 July 2024, and will keep its pricing under review with a view to further price movements in coming months. We also understand that Silknet has a promotion where a 100Mbps Internet package is available at a 25% discount.

Secondly, we note that pricing structure which allows lower bandwidth services to be much cheaper while higher bandwidth services are comparatively more expensive could be an efficient bandwidth gradient if this reflects the willingness to pay (so called 'Ramsey pricing').

Thirdly, there could be non-price reasons for why take-up of >100Mbps services is comparatively lower. For example, we note IPTV penetration in Georgia is high (67% for Magticom and 74% for Silknet specifically[10]), and potentially higher than other countries in Europe.[11] Unlike OTT video services, TV streaming via IPTV does not affect the internet browsing/download speeds of your fixed broadband service. In this context, fixed broadband with speeds below 100Mbps could be sufficient for many customers' needs, as they may not be using it to watch video content as much as European comparators.[12]

This view that non-price factors are likely to be driving the comparatively lower take-up of >100Mbps services is supported by available data, for example:

- The >=25Mbps basket covers a range of higher speeds (for example, we understand from Magticom that it has a promotion whereby its 30Mbps customers can increase the speed by 10Mbps for 3 GEL and by 20 Mbps for 5 GEL), and all of which are capable of carrying out a wide variety of online tasks including browsing and even streaming HD content.

- It is possible that customers derive little additional value from the difference between >100Mbps and >=25Mbps (e.g. due to IPTV penetration), and so may be happy with the speed they already have at a price which we note is lower than the European average. To illustrate, we understand from Magticom that 90% of its retail segment is on the minimal package – 30Mbps – and despite the promotions described above, only 19% of these customers have activated it (with the majority selecting the smaller increase). As such, it is not clear that customers have high demand for additional speeds.

[10] Data from Magticom.
[11] For example, in Germany, IPTV accounted for just 12% of TV households in 2023 (source: https://www.broadbandtvnews.com/2023/10/25/satellite-and-cable-tv-remain-on-top-in-germany/, accessed 15 July 2024).
[12] We understand from Magticom that OTT services are less popular in Georgia than elsewhere in Europe due to a lack of Georgian-language content.

- Relatedly, we note that investigating whether Silknet's promotional price for 100Mbps services has materially increased user take-up could help inform the degree to which price or non-price factors are affecting it.

Finally, the fact that take-up for >100Mbps services appears to be lower than the EU average is not automatically cause for concern and could reflect how the fixed broadband markets have evolved. For example, the availability of services between 30 and 100Mbps may differ between countries, reflecting the varying degree of xDSL and approach to incentivising fibre (and therefore higher speed) conversions adopted. Looking ahead, although >100Mbps services account for a very small proportion of connections now, the continuing increases in data traffic in Georgia mean past trends are expected to continue with customers moving towards speeds higher than 30 Mbps and the use of speeds above 100 Mbps can also be expected to grow. We would expect pricing structures to evolve over time as demand evolves.

It is therefore critical to understand what is driving the comparatively lower take-up of >100Mbps in Georgia (looking beyond price levels), before reaching a conclusion that it is indicative of a problem.

Notwithstanding the above, we have also considered Magticom's returns, as we would expect that if it was able to charge 'excessive' prices, it would be reflected in its profitability. However, our analysis shows that Magticom's consolidated returns (on a post-tax ROCE basis) have been below an appropriate benchmark return for the Georgian market over recent years (we refer ComCom to the analysis conducted in our response to the mobile market review). As such, there is no evidence that it has earned excessive returns.

In light of the above, we do not consider there to be evidence that retail prices are too high on a forward-looking basis.

Retail competition is still developing

In recent years, there has been a significant shift in the fixed broadband market in Georgia, and it is apparent that it is still developing.

Prior to 2016, Silknet (the incumbent) was offering low speed fixed broadband services predominantly using DSL technologies, with some new entrants also investing in their own competing networks. At this time, fixed broadband take-up stood at less than 50%, and only around 50% of this was fibre-based.

In 2016, Magticom bought two of the new networks, and since then has made substantial investments in rapidly rolling out a large scale, full-fibre network predominantly in greenfield areas, driving substantial growth in fibre penetration.[13] This forced Silknet and other network operators to respond in order to compete, increasing their own roll-out of FTTX networks. As a result, FTTX coverage expanded to around 85% of households by 2023[14], with the majority of households in settlements with more than one network operator.

[13] Figure 52, ComCom Fixed Market Review.
[14] Figure 4, ComCom Fixed Market Review.

This network-based competition in the market has already delivered a significant increase in fixed broadband take-up (to almost 90%[15]), the vast majority of which (90%[16]) are high quality fibre-based services, with prices comparable or below European comparators (as discussed above).

Although ComCom raises concerns that market shares have been relatively stable more recently, there are some indicators that suggest the dynamics of competition are still developing. For example:

- While Magticom has been key to driving fibre take-up, its share of fibre subscribers peaked in 2019, and has been declining in recent years as its share of the net growth in higher-speed broadband subscriptions has fallen from 61% in 2018 to 32% in 2022. Silknet has broadly doubled its share of market growth from 20% to 41% over the same period; and together, all other operators have increased their share of growth from 2.4% in 2018 to 23% in 2022.[17]

- We understand this trend has continued, with other network operators (particularly those outside of the top two) gaining an even greater share at the expense of Magticom. Between 2023 and 2024, the fixed broadband market grew by 42,000 subscribers, with Silknet accounting for 40% of the total growth, Magticom at 27% and SkyTel 18%.[18]

- The availability of physical infrastructure sharing is likely to facilitate increased roll-out by all network operators.

- Even in areas which do not currently have FTTX connectivity, we understand the Open Net project will deliver highspeed broadband infrastructure in such ‘white zones’, providing open access to operators to facilitate competition in those areas.

These types of indicators, which focus on the dynamics of market developments, are more relevant for the forward-looking assessment of retail competition than static market shares.

[15] Data from Magticom.
[16] Data from Magticom.
[17] Page 111, ComCom Fixed Market Review.
[18] Data received from Magticom.

ComCom's approach does not adequately reflect the specifics of the Georgian market, leading to flawed findings and remedies

Notwithstanding our view above that it is premature to conclude that ex ante regulation is necessary, ComCom's analysis of the market is fundamentally flawed and fails to adequately reflect competitive conditions. As a result, the market power findings and case for remedies which build on this are not robust.

Firstly, it is notable that Magticom is not an incumbent national network operator (which is often the case for an SMP provider). Instead, it is an entrant which has undertaken significant (and risky) capital investment in order to challenge the status quo, and in turn triggered a competitive response from the incumbent and other network operators (as described above). This has driven FTTX roll-out and penetration, with increasing network-based competition.

This provides important context for the market we currently observe, and for assessing how it will develop in the forward look of the review period and beyond. Competition is not a theoretical prospect in Georgia – we have already seen a competitive response among network operators, and we are not aware of evidence which suggests these other network operators have finished with their roll-out plans (particularly given physical infrastructure sharing).

Secondly, notwithstanding this national-level picture, it is evident that competitive conditions vary between settlements within Georgia:

- The number of competing FTTX networks varies across settlements, ranging from zero to five, with 60% of households in settlements with three or more networks. Given the initial cost of establishing a presence at a settlement is high, but once established it is much easier to extend coverage, it cannot be reasonable to effectively say competitive conditions will be similar regardless of the number of networks present.

- Even between settlements with multiple FTTX networks, the competitive conditions can still vary. For example, Magticom's share of customers in the 45 settlements with three or more networks varies from 0% to more than 99%[19], and so the constraints it faces are highly unlikely to be uniform.

- There is not even a consistent picture of who is the market leader on a national basis. According to 2024 data, Magticom is not leading market share in major cities including Batumi, Kutaisi, Rustavi, and Zugdidi.[20] Indeed, nearly 17% of the population live in settlements where Magticom's share of FTTX broadband access users is less than 40% (the majority of which are in areas with three or more networks).

Despite this, ComCom defines a national geographic market, which it then uses to assess SMP.

The purpose of geographic market definition is to define the geographic areas in which the conditions of competition are sufficiently homogeneous for the effects of the conduct or concentration under investigation to be able to assessed, and which can be distinguished from

[19] Page 140, ComCom Fixed Market Review.
[20] Data received from Magticom.

other geographic areas, in particular because conditions of competition are appreciably different in those areas.[21] ComCom's basis for defining a national market for higher-speed fixed broadband (despite the evidence variations) is cursory and wholly unconvincing:

- There are the same legal and regulatory conditions all over Georgia, and prices are generally set on a national basis – these are not indicative of sufficiently similar competitive conditions, given incentives to invest in networks (and therefore compete) will vary significantly by geography, reflecting e.g. variations in costs and revenues.

- Although there is different coverage by different operators, there is at least one provider in the higher-speed broadband access market (Magticom) covering most households – not only is there no operator which has fully national coverage, this tells you nothing about the competitive conditions within Magticom's network footprint as in some areas it may face competition from multiple networks and in others none at all (indeed, this is the case in Georgia). This issue is particularly acute given there are areas where Magticom is not even the market leader.

The failure to reflect clear variations in competitive conditions in the geographic market definition and then conclude that Magticom has SMP on a national basis is highly questionable. We outline additional concerns with the SMP assessment in the next section.

We recognise that it may not matter substantively if geographic variations in competitive conditions are not reflected in the market definition and SMP assessment, as long as the regulator appropriately targets regulation only where it is justified and differentiates remedies accordingly (indeed, there can be practical reasons why this is preferable). However, while ComCom has sought to do this, there are significant limitations to its approach, which we discuss further in the subsequent section.

[21] European Commission Notice on the definition of the relevant market for the purposes of Union competition law, para. 12(b), citing the General Court's judgments of 30 September 2003, Cableuropa and Others v Commission, T-346/02 and T-347/02, EU:T:2003:256, para. 115 and 7 May 2009, NVV and Others v Commission, T-151/05, EU:T:2009:144, para. 52, as well as the judgment of the Court of Justice of 14 February 1978, United Brands v Commission, C-27/76, EU:C:1978:22, para. 11.

The SMP assessment fails to sufficiently capture constraints faced by Magticom

Notwithstanding our concerns about the failure to reflect the reality of competitive conditions in Georgia, ComCom's SMP assessment in the national market is also insufficient.

The European Electronic Communications Code (EECC) states that "An undertaking shall 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 to an appreciable extent independently of competitors, customers and ultimately consumers."[22] We consider ComCom has not sufficiently assessed competitive conditions with reference to this 'test'. Further, we think there are reasons to believe that Magticom is not able to act independently and will not be able to do so in the forward-looking review period, which ComCom does not appear to have sufficiently considered:

- Where Magticom faces competition from rival networks (across more than 60% of households), its customers could switch to an alternative provider if it tried to increase prices and/or reduce quality. Indeed, evidence suggests that customers are willing and able to choose alternative providers. For example, based on ComCom's own data, Magticom's subscriber base as a share of premises it passes is 43% (also similar to that of Silknet), which suggests a significant proportion of customers are choosing an alternative where Magticom is available.[23] Similarly, Magticom's share of net growth has declined in higher-speed broadband subscriptions (from 61% in 2018 to 32% in 2022), and is now less than its overall market share and behind that of Silknet.[24] As such, even if Magticom has a high market share today, this suggests its position will evolve going forward, and could change further or faster still if it sought to act independently of its customers or competitors.

- Magticom generally sets the same prices across Georgia, including in regional cities where it is the only network. Although ComCom appears to use this as a reason why Magticom should be regulated even where it is not the market leader, the fact that these prices are low for the most popular packages compared to European prices (and there is no evidence of excessive returns overall) could suggest that the constraints it faces where there is network competition are also constraining prices in areas where it is the only network.

- Magticom is a relatively new entrant so it doesn't have the cohort of inert legacy customers which incumbents in Europe have which could contribute to market power. By comparison, Silknet has its own incumbency advantages making it challenging for competitors (including Magticom) to attract its customers e.g. its 58% of the landline subscriber market share.

- There is a strong opportunity for further network roll-out by rival networks, increasing the areas where Magticom faces network competition. Despite stating that it is "expected that the coverage of FTTX networks will keep increasing", ComCom does not reflect this in its SMP assessment. Evidence of past network roll-out by other network operators suggests any barriers

[22] Art. 63(2) EECC.
[23] Figure 53, ComCom Fixed Market Review
[24] Figure 51, ComCom Fixed Market Review

to entry and expansion are low (or at the very least, not prohibitive), and will reduce further with the physical infrastructure sharing law.[25]

- Even if not perfect substitutes for all customers, the significant overlap in technologies across large parts of Georgia (e.g. 64% of households have FTTX, xDSL and FWA, and 17% have FTTX and FWA) means Magticom will likely face some degree of (out of market) constraints from these other services.

In addition to these gaps in the analysis, we note that Magticom's comparatively higher share is not in itself sign of SMP, as it depends on what is underlying this position. For example:

- If it is because of some unassailable advantage that means its rivals can't compete, that could be indicative of a position of market power. While there are some unevidenced assertions around duplication of infrastructure and economies of scale and scope, the presence of rival networks covering the majority of households across Georgia suggests to the extent they exist they are not prohibitive. We also note that there are signs other network operators are increasing their share of market growth and there are increased opportunities for further roll-out as described above.

- If instead Magticom is doing a good job and providing a service that is attractive to consumers and/or superior to the offering of its competitors (where present), it will not be able to act independently of its competitors or customers as its rivals will be well-placed to improve their own services and/or attract its customers if it attempts to do so. Further, the fact that other networks need to respond to competitive pressures and improve their own networks to attract customers will give greater long-term benefits to consumers than giving rivals regulated wholesale access to Magticom's (superior) network.

- If there are barriers to switching at the retail level, this could prevent its rivals from winning customers and give Magticom a degree of market power. However, no evidence has been presented to suggest this is the case, and it is unlikely that a wholesale access regime would address this type of issue.

ComCom does not appear to have investigated what is underlying Magticom's market share (e.g. through consumer surveys, or engagement with its competitors), instead asserting it is a result of SMP. However, without a more thorough assessment, drawing on evidence from rivals and consumers and addressing the limitations to the SMP assessment above, it is not possible to robustly identify SMP or determine the right policy response.

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[25] For example, we understand that Magticom's advantage in some districts of Tbilisi stemmed from its exclusive right to use the City Hall's poles (as a result of its purchase of Deltacom), but the physical infrastructure sharing law means we can now expect other operators to be able to expand their networks using the same poles where necessary. Note that Silknet is the incumbent operator with a large inherited copper network.

ComCom's approach to differentiating remedies is flawed

Notwithstanding the above concerns with the analytical approach and conclusions reached by ComCom, they could have been substantively addressed by the appropriate application of differentiated remedies to reflect variations in competitive conditions. ComCom states that it intends to group settlements based on the level of contestability, with the aim that it will vary regulations according to the minimum necessary for each group. However, its approach to this is significantly flawed.

The assessment to identify contestable areas is limited, raising concerns that the boundaries between the clusters are unreasonable

ComCom defines 'contestable' as an area where rival networks could significantly increase their share of users in a settlement in the review period and therefore become an effective competitor to the larger player(s) already present. However, the criteria ComCom uses to identify such areas have a number of significant limitations, which have the effect of setting a very high bar for a settlement to be considered contestable. We discuss some of these limitations below.

Thresholds are overly mechanistic

The use of multiple criteria with hard thresholds lacks the nuance needed to assess competitive conditions and fails to capture what it is intending to test, i.e. the contestability of an area. For example, an area where there are at least three networks which have market shares above 10% can still be considered non-contestable under ComCom's framework (and therefore subject to full regulation) if Magticom's share is not expected to tend below 40% in the three years of the review period based on past trends. Not only are there significant limitations to extrapolation without any consideration of how future trends may change (e.g. due to new roll-out), the fact that there are (at least) two competitors with already sizeable shares suggests there will be at least some constraints on Magticom in this review period even if its share remains over the specific threshold. This does not appear to have been considered in the Fixed Market Review.

Thresholds are based on assertions and lack evidence

For example, ComCom claims areas with over 100k inhabitants are too large to be contestable, even if they meet the main cumulative criteria. This appears to be on the basis in part that larger settlements cannot be covered from one optical distribution frame. In the absence of more granular data on network penetration within these areas, ComCom simply claims that because of this, not all operators will cover the entire geographic area of a large settlement, and for an operator to cover new locations within the city it is more similar to setting up a whole new network in a settlement not previously covered (and therefore requires significant investment). However, there is no evidence provided to support this position, how prevalent it is, or how this could change moving forward, for example drawing on roll-out plans from operators or consideration of the overall business case for expansion in large cities (e.g. the prospective customer volume and density is likely to be greater in larger cities, providing potential revenue upside).

The assessment fails to reflect the actual constraints on Magticom and its ability to act independently of its customers and competitors

For example, ComCom asserts that in settlements where Magticom is present, it is relatively easy for it to expand its coverage since it has already established much of the infrastructure and equipment required, and so it considers there is no reason to exempt Magticom from ex-ante regulation even where its share of subscribers is less than 40%. However, in identifying variations in contestability the relevant test is whether Magticom can act independently of its customers and competitors – not whether it can expand its network – yet there is no consideration of this. While Magticom may be able to expand its network in such areas, that does not mean it is not constrained by its competitors when it does so, and as described above there are good reasons to believe Magticom faces such constraints (particularly where it is not the market leader).

Assumes largely static market conditions

This appears to be based on an unevidenced expectation that there won't be material change in the next three years (despite a significant new infrastructure sharing remedy). As such, it does not fully assess whether contestability in settlements (and therefore which cluster they are assigned to) could change within the review period or beyond. For example, the analysis fails to reflect the impact of the infrastructure remedy on roll-out and doesn't appear to include any evidence of any operators' future plans around roll-out, both of which could affect the competitive constraints.

Assessed over an insufficient time period

As ComCom recognises, it can take time to build fixed networks. However, the incentives to build – and continue to build – exist over a much longer time frame, and the proposed regulations will affect incentives not just in this review period but also beyond it. As a result, assessing whether areas will be competitive within three years and not considering the potential beyond this review period risks imposing regulations in areas which could become contestable in the next review period. Further, the act of imposing that regulation could distort and undermine the incentives to invest. This would be to the longer-term detriment of consumers and competition. We note in this regard that telecoms market reviews are generally longer than three years elsewhere in the EU (typically five), in part to provide the regulatory certainty needed for operators to commit to the necessary longer-term investments.

Implications for the clusters identified

The limitations of the criteria – and the high threshold they set for contestability – are demonstrated by the fact that despite significant coverage of competing networks (60% of households are in settlements with three or more existing networks), just 0.68% of the population are in 'contestable' settlements and 0.55% are tending to contestability.[26] While number of networks is not always sufficient to demonstrate competition alone, the scale of this disparity raises significant questions about the extent to which the analysis reflects the reality of market conditions.

For example, to conclude that cities such as Kutaisi and Rustavi – where there are at least four networks, Magticom is not even the market leader, and there are two additional networks with sizeable shares – are not contestable and therefore require ex ante regulation simply because they have a population of 100k is counterintuitive. While we understand that the presence of more than three networks in large settlements doesn't mean they all cover the entire geographic area, the market characteristics justify further consideration of the competitive conditions and prospects for further network roll-out (even in the absence of more granular data).

Similar issues arise outside of the largest cities, where settlements with at least three networks with sizeable market shares are not already considered contestable purely on the basis that

[26] Page 149, ComCom Fixed Market Review.

ComCom assumes Magticom's share will not tend below 40% in the review period. It reaches this view without even attempting to assess the longer-term trend, or competitive conditions and the constraints it faces going forward.

This means that ComCom are likely to be proposing to impose detailed access regulations on clearly contestable (or tending to contestable) areas, which will materially undermine competition and future investment incentives (as discussed further below). At a minimum, we would expect significantly more settlements with three or more FTTX networks to be treated as tending towards contestable and therefore subject to 'lighter' regulation as per Cluster II.

The obligations imposed on Clusters 2 and 3 are overly onerous even on the basis of ComCom's own assessment of the underlying competitive conditions

The only difference between ComCom's 'full set' of remedies for those areas that are not contestable (Cluster 1) and the 'lighter set' of remedies for areas that tend towards contestability (Cluster 2) is that there is no maximum price for local access tariffs, although even then there is a margin squeeze test which could be applied ex-post as part of the non-discrimination obligation. As such, the remedies imposed for Cluster 2 can in no way be considered 'lighter touch', or appropriate for prospectively contestable areas.

This is particularly concerning in the larger (greater than 100k) settlements, where ComCom recognises that there is a risk that "the application of a single regulatory remedy could have a differentiated impact in different parts of the city" reflecting variations in competitive conditions. Given ComCom states it is not possible to be able to apply differentiated ex-ante remedies without a greater level of detail within each large settlement, we would expect it to adopt a cautious approach to remedies given the adverse impact and risks of unintended consequences from over-regulation as discussed further below. Applying almost identical remedies to those areas which are not contestable is not appropriate or proportionate in this context.

We would also question the need for any regulation of contestable areas (Cluster 3), even if it is considered very light, given the cost of any regulation and impact it can have on investment incentives.

We understand geographic analysis of competitive conditions is complex and requires significant amount of information (some of which we understand ComCom does not have available), but given the costs and risks of regulatory intervention, we would urge ComCom to address these significant limitations in its approach in order to ensure its remedies are proportionate and well-targeted.

The proposed remedies are disproportionate and ill-targeted, posing material risks to investment going forward

Even if you accept ComCom's market analysis and view on the inadequacy of existing regulations to address its concerns, we do not believe the highly intrusive package of remedies would be considered proportionate.

The EECC sets out a number of factors that should be considered when deciding on the specific remedy/remedies to be imposed. This includes a cost-benefit analysis which aims to ensure that only the most appropriate and least intrusive measures necessary to effectively address any problems identified in the retail market are imposed, in line with the proportionality principle.[27]

The EECC states that, "In accordance with the principle of proportionality, a national regulatory authority shall choose the least intrusive way of addressing the problems identified in the market analysis".[28] ComCom's proposed set of remedies cannot be considered consistent with this principle.

Model of competition and choice of appropriate remedies

Regulation of SMP operators in telecoms markets tend to focus on identifying upstream competitive 'bottlenecks' in the value chain, and then regulating access to the bottleneck(s).

Starting at the most upstream level of the value chain, ComCom appears to support the idea of network-based competition, which will be further enhanced by the physical infrastructure remedy. Ultimately vigorous network competition can deliver greater availability and take up of higher bandwidth services than access competition. We would expect competition between networks to be more intense for customers, as it exposes more of the value chain to competition, and indeed the approach in EU has increasingly recognised these benefits.

If network-based competition can address the competition concerns identified, there is no need to introduce any additional regulation. However, sometimes additional access-based regulation is also introduced, for example to protect customers as network-based competition develops, or as part of the 'ladder of investment' to facilitate roll-out by smaller network operators once they reach a critical mass of subscribers. Even then, it is critical that any (downstream) access-based regulation still adheres to the least intrusive test. This is particularly true since introducing additional regulation adds complexity, risks of unintended consequences, and could undermine the more upstream model of (network) competition you are ultimately looking to encourage.

As such, there is an important trade-off involved in designing regulatory remedies, as facilitating access-based competition may deliver shorter term customer benefits but could also undermine longer term network-based competition where it may otherwise have been viable. This is reflected in the EECC which states "The imposition by national regulatory authorities of mandated access that increases competition in the short term should not reduce incentives for competitors to invest

[27] Recital 171 EECC says that: "When deciding on the specific remedy to be imposed, national regulatory authorities should assess its technical feasibility and carry out a cost-benefit analysis, having regard to its degree of suitability to address the identified competition problems at retail level, and enabling competition based on differentiation and technology neutrality."
[28] Art. 68(2) EECC.

in alternative facilities that will secure more sustainable competition or higher performance and end-user benefits in the long term."[29]

It is therefore critical that regulators identify the model of competition they are looking to encourage, and properly assess how all elements of their proposed remedies will affect this in the short and long term. Part of this involves properly understanding the plans of network operators for future investment to understand how competition could develop, and therefore assessing the need for – and impact of – different potential remedies for competition.

Network-based competition is developing in Georgia, aided by existing upstream remedies - it is unclear that additional access-based regulation is justified at this point

There is no evidence offered that a network-based model of competition is not viable in Georgia, nor that access-based regulation is necessary everywhere to facilitate it:

- Other network operators have shown willingness and ability to roll-out their own networks – 60% of households are in settlements with three or more existing networks.
- They have done this without using regulated access products – even where copper-based access products were available, competitors demonstrated a preference for self-build.
- No evidence presented from network operators to suggest they have no further roll-out plans.
- Demand for higher bandwidth services is increasing, which will in turn increase incentives for roll-out given higher ARPUs.
- Physical infrastructure sharing will further lower costs of roll-out (and any potential barriers to entry).
- Retail competition based on rivals to Magticom is developing (see Section 2).

Further, there is a risk that introducing intrusive active access regulation in this context can undermine network competition by encouraging "free riders". Further, unexpected changes to the regulatory framework after significant investment has already occurred – and in a way which materially affects the expected commercial outcomes from those investments – will also undermine future investments in roll-out that would otherwise strengthen network competition. In particular:

- Magticom wants to invest further, including where it does not have network. However, having previously adopted an aggressive strategy to expand fibre-based internet access particularly targeting underserved areas (in line with ComCom's objectives), the intrusiveness of the proposed access regulations will seriously undermine these incentives (e.g. the extent and design of price controls – see below).
- Magticom and other operators who have already invested heavily in networks will likely face a more challenging commercial environment than expected by virtue of low-cost access-based regulation, undermining their existing investments and affecting their future investment and expansion plans. ComCom recognises that regulatory obligations applied to small local

[29] EECC recital 191.

operator 'could act as a disincentive to their further expansion of their networks and services' but does not acknowledge the same effect on Magticom.

- Other network operators will face reduced incentives to continue to buildout their own networks, as they are able to rely on Magticom's network where it is available and on below-cost terms (given LRIC price controls). In addition, regulating access at multiple layers of the value chain and using averages in setting cost-based charge controls mean they can also cherry-pick according to artificial regulatory – rather than commercial – incentives. The precedent set by the Fixed Market Review could also mean other network operators are concerned about being regulated themselves if they invest in areas not covered by Magticom's network. This includes in areas where the Open Net project will establish a fibre-based backhaul connection, as operators are unlikely to want to incur significant capital expenditure to expand their national presence by deploying FTTX networks within these settlements when there is a risk of highly intrusive access regulation to follow.

- Proposing remedies for IPTV and VoD which do not appear to be captured in the market definition is highly unusual, and poses additional risks to future investment incentives as a result.

Given these risks, the prevalence of rival network roll-out and the ability for physical infrastructure sharing, we consider introducing access-based regulation to be premature at this stage.

Even if you accept ComCom's position that regulation is necessary to promote access-based competition, its proposed remedies go far beyond what is necessary to achieve this

ComCom is proposing to introduce both WCA and WLA remedies (on top of the existing physical infrastructure remedies), meaning there will be access-based regulation across multiple levels of the value chain.

The EECC is clear that:

"*At each stage of the assessment, before the national regulatory authority determines whether any additional, more burdensome, remedy should be imposed on the undertaking designated as having significant market power, it should seek to determine whether the retail market concerned would be effectively competitive, also taking into account any relevant commercial arrangements or other wholesale market circumstances, including other types of regulation already in force, such as for example general access obligations to non-replicable assets or obligations imposed pursuant to Directive 2014/61/EU, and of any regulation already considered to be appropriate by the national regulatory authority for an undertaking designated as having significant market power.*"[30]

Yet no such consideration is carried out. This appears to be driven by the decision to include WLA and WCA in the same product market. However, as recognised across the EU and in the latest EC guidance, these are normally treated as two separate and distinct markets given the different considerations which apply to both – indeed, WCA is no longer on the EC list of markets susceptible to ex ante regulation, and latest EU practice has moved away from regulating WCA.

This conflation of the two products is not only analytically flawed (and suggests a market defined based on preferred remedies rather than specific product characteristics) but it also leads to a

[30] EECC recital 172.

number of problems with the analysis – and therefore – conclusions that are built on this.[31] In particular, ComCom proposes remedies for WLA and WCA, without considering whether remedies in relation to WLA are sufficient to address the competition concerns it identifies before proposing additional (downstream) WCA remedies. For example, even when there is not effective network-based competition, SMP is typically not found at the WCA level of the value chain elsewhere in Europe due to the availability of upstream (physical infrastructure and/or WLA) access. ComCom's approach therefore risks unnecessarily (and inappropriately) regulating multiple levels of the value chain.

Without assessing the effectiveness of WLA or WCA remedies alone, there is no way to determine if all the proposed remedies are the least intrusive way of addressing the competition concerns. Given EU regulators have moved away from WCA in favour of more upstream remedies (and consider these sufficient), as well as the lack of evidence from stakeholders that there is demand and a need for multiple points of access in order to compete effectively, ComCom's justification for requiring the full package of remedies is severely lacking. Not only does this raise fundamental proportionality concerns, but asymmetric regulation of multiple levels of the value chain can also create perverse incentives and further undermine the competition it is seeking to promote.

Detailed remedy design is disproportionate

Requiring wholesale access to Magticom's network on regulated price and non-price terms, if not set appropriately/on a commercial basis, would undermine the business case for future network investments by Magticom and potentially create a free-rider issue where rival networks reduce their own investment. Intervention which reduced operators' incentives to invest in their networks and deliver a very high quality of service across rural and urban areas would be counterproductive.

In addition to concerns about the range of remedies being imposed, we are concerned that certain aspects of the specific design are also disproportionate and could undermine investment incentives. For example:

- **Use of theoretically efficient operator LRIC+ in price controls** – As well as significantly changing the commercial environment compared to when Magticom began its investment, the use of averaged cost-based price controls for <u>all</u> regulated access products (covering multiple levels of the value chain) significantly restricts its pricing flexibility to respond to changing market conditions. It also poses material risks to Magticom's ability to recover its fixed and common costs, as it is heavily reliant on ComCom setting each and every price at the 'right' level. For example, cost recovery is at risk if the levels of charges are not set to appropriately reflect Magticom's efficiently incurred costs including a reasonable rate of return (which reflects the associated risks), and/or to manage potential risks from cherry-picking by access seekers. We would therefore expect that any model intended to set prices would be scrutinised – and its inputs and outputs sense-checked (e.g. against observed market prices) – by both ComCom and external stakeholders, to ensure robustness. We have not been able to review ComCom's detailed model in the time available.[32] Magticom has told us that there are significant differences between the inputs it sent to ComCom and those in the model, and without

[31] This approach to product market definition also means the assessment of the three criteria test is not appropriate – it considers WLA and WCA together, rather than specifically assessing WCA and the need for regulation of WCA in addition to WLA (which is on the EC's list of recommended markets).
[32] ComCom's model is complex and would require further detailed analysis to comment on further. In the limited time since the model was made available, we have not been able to perform this detailed analysis, but we would be happy to do so if sufficient time was available.

explanation by ComCom of those changes it cannot review the detailed analysis. However, we understand that Magticom has carried out its own analysis on proposed tariffs, which shows that the proposed regulated prices would not be sufficient to recover its costs, and actually result in a negative return on capital employed at the wholesale level. We would expect this to raise significant concerns for any regulator due to the negative impact on market-wide investment incentives, but especially when an industry has been investing heavily in a new technology and ongoing investment is vital.

- **Ambiguity in remedies and how they will work in practice** – this also poses a risk to investment given importance of stable and predictable regulatory regime. For example, in relation to margin squeeze test it is unclear how ComCom expects Magticom to assess the costs of an access-seeker are in order to ensure compliance, nor what type of costs should be included.

As a result, ComCom's proposed remedies will lead to an uncertain environment for investment

Fixed fibre networks require significant levels of capital investment, and so a reasonable expectation of a commercial return is needed to incentivise this investment. A stable regulatory environment is a key component in determining these expectations. In particular, removing regulatory uncertainty, and ensuring any intervention is well-targeted, justified and proportionate gives the industry greater confidence in committing substantial ongoing investment. In this regard, we note the EC has been encouraging Member States to roll back existing intrusive regulation in order to create a better regulatory environment for investors and encourage operators to compete more deeply, as this will deliver better outcomes for consumers over the longer term.

However, ComCom's approach undermines this environment, and appears to be contrary to the direction of travel elsewhere in Europe. The Fixed Market Review represents a significant shift in regulatory approach in Georgia, and the extent of highly intrusive wholesale access remedies imposed on Magticom (including in relation to IPTV and VoD) create significant unexpected – and in our view, insufficiently justified – costs. This is particularly so given the main retail outcomes highlighted by ComCom as a concern appears to be specifically about prices for above 100Mbps services, yet its remedies are significantly more wide reaching and intrusive.

As well as the direct cost burden of regulatory intervention, unexpected, unjustified, and disproportionate regulatory intervention will affect trust between industry, investors and regulators much more broadly and beyond this review period, leading to a highly uncertain and unattractive environment for investment. Such regulatory uncertainty will significantly reduce investment in the medium to long term, with network operators having very low-to-zero appetite to maintain their investments let alone invest for the future. This will lead to deteriorating quality of service and availability for consumers, and act as a drag on the opportunities for telecoms to enable economic growth. In the absence of a clear consumer theory of harm which needs to be addressed – and to the contrary, there are metrics which indicate the market is performing well – such an outcome should be all the more alarming.