



# **Comparative Analysis of Regulatory Frameworks on Fixed Market Susceptible to *ex-ante* Regulation**

## **Final Report**

**KPMG**

**July, 2024**

## GLOSSARY

<b>Association Agreement</b>	Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part
<b>ComLaw</b>	Law of Georgia on Electronic Communications
<b>Commission, ComCom</b>	Georgian National Communications Commission
<b>EU</b>	European Union
<b>Framework Directive</b>	Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services
<b>Methodology</b>	Draft Methodology and Procedures for Determining Market Competitiveness and Authorized Undertakings with Significant Market Power
<b>SMP</b>	Significant Market Power
<b>UK</b>	United Kingdom
<b>ANACOM</b>	Portuguese National Communications Authority
<b>ComReg</b>	Commission for Communications Regulation
<b>NRA</b>	National Regulatory Authorities
<b>3CT</b>	Three-Criteria Test
<b>ESB</b>	Electricity Supply Board
<b>SoC</b>	Statement of Compliance
<b>BT</b>	British Telecom
<b>PIA</b>	Physical Infrastructure Access
<b>WDM</b>	Wavelength-division Multiplexing

<b>LLRO</b>	Leased Lines Regulated Offer
<b>FVCO</b>	Fixed Voice Call Origination
<b>FACO</b>	Fixed Access and Call Origination
<b>WCO</b>	Wholesale Call Origination
<b>WCT</b>	Wholesale Call Termination
<b>WLA</b>	Wholesale Local Access
<b>WCA</b>	Wholesale Central Access
<b>VULA</b>	Virtual Unbundling Local Access
<b>FTTx</b>	Fiber to the X
<b>BSA</b>	Bitstream Service
<b>P2P</b>	Peer to Peer
<b>GPON</b>	Gigabit-capable Passive Optical Network
<b>LLU</b>	Local Loop Unbundling
<b>BDUK</b>	Broadband Delivery UK

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## 1. Executive Summary

In March 2023 the National Communications Commission of Georgia (ComCom) assessed the fixed market for susceptibility to ex-ante regulation. As a result of the assessment, ComCom determined that the Wholesale Market of Access to Physical Infrastructure, the Wholesale Market of Lease Lines, and the Wholesale Market of Local and Central Access (WLA and WCA) are susceptible to ex-ante regulation and defined SMPs for each market. The analysis and the determination of the SMPs are submitted to telecom operators for public consultation. Concerned with the potential impact stemming from ComCom's proposal to impose ex-ante regulation in selected fixed telecommunications markets, MagtiCom LLC commissioned KPMG to conduct an analysis on the alignment of the proposed approach with the European countries' guidelines. As part of this analysis, KPMG performed a comparison of the assessment conducted by ComCom for Georgia with benchmarked European countries: Ireland, the UK, and Portugal.

This report highlights the areas where ComCom's approach is not in line with European countries' common practices in determining regulated markets, defining SMP, and assigning respective obligations. The main gaps identified are summarized below:

### **Fixed broadband wholesale market (local and central access)**

During the analysis of ComCom's assessment we identified that ComCom establishes the SMP without initially delineating geographical market boundaries. Instead, ComCom defines clusters based on contestability criteria only after the SMP is established. Settlements with higher contestability face fewer obligations, while those with lower contestability face stricter requirements.

This approach diverges from widely accepted practices in the European countries where potential breakdown of the national market into clusters happens explicitly during the geographical market definition stage, allowing for the emergence of multiple relevant markets based on criteria and assessment by each country's regulator. Defining clusters based on contestability criteria post-SMP establishment in the fixed broadband market by ComCom undermines the fairness and consistency of SMP assessments.

The discrepancies of ComCom's proposed approach become evident when examining specific market share percentages for each city, where Magticom, despite leading nationally, dominates only in 2 out of 7 cities with households above 10,000. Consequently, following the widely accepted approach would likely result in different SMPs determined for different clusters as opposed to Magticom being defined as a nationwide SMP.

Hence, ComCom should first segment the clusters into geographical markets and only following such segmentation, these geographical markets should serve as the foundation for the SMP assessment. Each specified market should undergo an independent evaluation based on criteria and official data specific to its respective market. Such approach ensures that all obligations are applied to the most appropriate SMP in each market.

### **Wholesale market for access to physical infrastructure**

During the analysis KPMG revealed that ComCom exclusively regulates duct access, unlike the general situation in the EU and the benchmarked countries, where other elements of the physical infrastructure are included to calculate the SMP. By exclusively regulating duct access without considering other infrastructure elements, ComCom's assessment of market dominance is incomplete.

ComCom should re-evaluate significant market dominance by including the number of poles, duct chambers, and street cabinets in the calculation, rather than only regulating duct access. This approach would ensure that all the infrastructure elements are considered and could lead to different results in the SMP assessment, aligning with European countries' best practices.

Additionally, in this market, ComCom imposes a geographical division of the market into 63 service areas to determine the SMP for each region. However, from a national perspective, the geographical coverage is minimal, with all operators except Silknet having less than 20% coverage. Therefore, the current division into 63 service areas is excessively fragmented, complicates the regulatory landscape and could lead to incorrect assessment of SMP.

In this case, ComCom should revise the geographical market definition and should group smaller settlements with similar characteristics, following the UK's approach, or consider a national perspective if the total market is homogeneous, as practiced by ComReg in Ireland and ANACOM in Portugal where a national SMP is defined due to the dominance of an operator like Silknet with over 50% coverage.

### **Leased lines wholesale market**

Based on the same perspective regarding the geographical market definition, ComCom's current approach for the leased lines wholesale market involves dividing the market into more than 50 routes and defining an SMP for each. The current division into more than 50 routes is excessively fragmented, complicates the regulatory landscape and could lead to incorrect assessment of SMP.



Instead, ComCom should assess SMP based on smaller and specific groups of routes or from a national perspective if the market is considered homogeneous. For example, in Portugal the SMP assessment is conducted for only two segments.

In conclusion, ComCom's current regulatory approaches in the wholesale markets for access to physical infrastructure, leased lines and fixed broadband diverge from European countries' best practices, leading to inconsistent SMP assessments.

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## Fixed Markets Susceptible to ex-ante Regulation

### 2. Wholesale Market of Local and Central Access provided at a Fixed Location (WLA and WCA)

#### 2.1. Georgia

##### 2.1.1. Market Definition and Susceptibility of the Market to ex-ante Regulation

Based on ComCom's market review of the Fixed Broadband, the Wholesale Market of Local and Central Access encompasses various services, including **Unbundled fibre services** based on FTTH P2P access network architecture, **VULA services** based on FTTH (P2P and GPON) and FTTB UTP Ethernet to Home access network architectures, Bitstream access service (BSA) at different levels (points of handover), and self-supply of FTTx from operators with their own FTTx networks. Regarding the geographical market, ComCom defined that the **legal and regulatory conditions are uniform throughout the entire territory of Georgia**. This determination is based on two main operators having national scope and the absence of evidence for different competitive conditions across Georgia. Factors contributing to this uniformity include the non-existence of wholesale offers, lack of (wholesale) access-based competition, absence of open access networks at the access network level, and a national retail market definition. As a result, ComCom concluded that the wholesale local and central access market has a **national geographical scope**.

Upon the realization of the three criteria tests, ComCom determined that **all three were met**. Firstly, the **existence of high and enduring structural barriers to entry**, stemming from the extensive size of the network and the substantial investment required for replication, points to a lack of effective competition in the wholesale local and central access market. Secondly, the market's current state, characterized by the absence of commercial agreements and the leading FTTx operators' reluctance to engage in such agreements, **suggests that the market does not naturally tend toward effective competition**. Lastly, considering a forward-looking perspective, the potential market power of the largest FTTx operators to restrict wholesale access services and impede competition in the downstream retail fixed broadband market underscores the **insufficiency of competition law alone to address the identified market failure**. Considering these findings, ComCom concluded that the market for wholesale local and central access is **susceptible to ex-ante regulation**.

### 2.1.2. SMP Assessment

In evaluating SMP conditions, ComCom found that MagtiCom holds **SMP** in the designated national market. This determination is grounded on various factors, encompassing **robust market shares** that consider both downstream retail market share and FTTx coverage capacity. Other contributing elements include **barriers impeding market entry and expansion**, MagtiCom's **absolute and relative size in comparison to competitors**, its **control over vital infrastructure** for national coverage, the **absence of countervailing buying power**, and its **reluctance for long-term and sustainable wholesale agreements**. Additionally, MagtiCom's substantial **economies of scale and scope**, derived from its national infrastructure, distribution channels, and vertical integration, further solidify its SMP status according to ComCom.

### 2.1.3. SMP Obligations

Concerning SMP obligations, ComCom sets **standard requirements** for the SMP holder, covering aspects such as **access, non-discrimination, transparency, cost accounting, price control**, and **accounting separation**. Notably, in this market, ComCom introduces **additional geographical classifications known as clusters**. The clusters function to categorize smaller geographical regions into three distinct groups, determined by comparable levels of contestability. This classification is established through the application of predefined cumulative criteria, organized into two levels, to assess contestability within each region. Cluster one is designated as the least contestable, while cluster three represents the most contestable. In the first assessment, a settlement is deemed contestable if it fulfils specific conditions: the presence of at least three FTTx operators, the SMP's share of FTTx subscribers being below 40%, and the existence of at least two additional operators with a 10% share of subscribers. If any of these criteria are not met, three additional criteria are used for region classification. These include the presence of three FTTx networks with the SMP's share of FTTx broadband access users exceeding 40% but trending toward less than 40%, the presence of three operators (including the SMP) with at least one covering a minimum of 80% of premises passed and another covering at least 20% of premises passed, and a settlement size above 100,000 inhabitants.

ComCom determines the level of contestability as the **extent of obligations** imposed on the SMP holder, with settlements exhibiting more contestability subject to fewer obligations, while those with less contestability face more stringent requirements.

## 2.2. Ireland

### 2.2.1. Market Definition and Susceptibility of the Market to ex-ante Regulation

In 2018, ComReg released a market review<sup>1</sup> identifying **national** WLA markets and **sub-national** WCA markets as relevant geographical markets. The national WLA markets include CG WLA products (LLU and Line Share products over copper networks) and NG WLA products (VULA products offered over FTTx networks). The WCA market comprises WCA-based Bitstream products delivered over copper and FTTx networks, including wholesale Bitstream provided using upstream WLA inputs. It also includes self-supply of WCA-based Bitstream by Eircom and BT Ireland, as well as WCA-based Bitstream that may potentially be offered by SIRO.

In terms of ex-ante regulation, ComReg has asserted that the purpose, as outlined in the European Commission's Explanatory Note to the 2014 Recommendation, is to address predictable competition challenges arising from structural factors in the industry. To specifically counter the potential issue of excessive pricing in the WLA Market, **ComReg advocates for the necessity of ex-ante regulation**. The application of competition law on an ex-post basis is often deemed ineffective in preventing excessive pricing, as demonstrated by the limited success of ex-post excessive pricing cases within EU jurisprudence. **Given the absence of potential competition in the WLA Market, evidenced by significant barriers to entry, an ex-post approach is considered unsuitable by ComReg.**

### 2.2.2. SMP Assessment

In assessing whether any service provider possessed SMP in the WLA and WCA Markets, ComReg considered factors such as existing competition (including market shares, vertical integration, and pricing behaviours), potential competition (including barriers to entry and economies of scale/scope), and the strength of countervailing buyer power. **ComReg determined that Eircom could independently operate to a significant extent in the Relevant WLA and WCA Market due to factors including its consistently high market share (over 96%), control of non-duplicable infrastructure, limited existing and potential competition, and the absence of effective countervailing buyer power.**

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<sup>1</sup> Market Review Wholesale Local Access (WLA) provided at a Fixed Location Wholesale Central Access (WCA) provided at a Fixed Location for Mass Market Products, 19 of November 2018.

### 2.2.3. SMP Obligations

This market incorporates all the obligations outlined by EU directives as the list of obligations that may be imposed on operators with SMP: (1) **Access obligation**, (2) **Non-discrimination**, (3) **Transparency**, (4) **Price control, Cost Accounting**, and **Accounting Separation**.

## 2.3. UK

### 2.3.1. Market Definition and Susceptibility of the Market to ex-ante Regulation

In the 2018 WLA Market Review<sup>2</sup>, Ofcom defines the relevant market by focusing on wholesale access over copper/fibre connections. It acknowledges that, without regulatory measures, a hypothetical monopolist isn't obligated to supply WLA to third parties. Ofcom sees this monopolist likely operating as a vertically integrated supplier, mainly serving retail customers. Unlike EU regulations, the UK doesn't distinguish this market for mass market products and **has no separation between Local and Central access markets**. For the geographical market of WLA, Ofcom historically identified it as national but differentiated between the UK excluding the Hull Area and the Hull Area. This determination was based on competitive constraints, suggesting uniform pricing within each area. Ofcom considers factors like demand and supply-side substitution, competitive conditions, and uniform pricing in defining WLA markets. It distinguishes between the Hull Area and the rest of the UK due to its unique competitive landscapes. The definition differentiates cable and non-cable areas and considers new build areas where BT is not present and areas covered by the BDUK program. After a thorough assessment, Ofcom defines the relevant geographical markets as the UK excluding the Hull area and the Hull area, conducting an SMP assessment for each area.

Regarding ex-ante regulation, Ofcom dictates that relying solely on national and EU competition law remedies wouldn't adequately address the identified competition concerns. Firstly, competition law primarily targets the abuse of a dominant position and may not be as effective as ex-ante regulation in promoting downstream competition. Secondly, for the review period's effectiveness, ex-ante regulation proves better suited as it can be tailored to the specific market circumstances and services offered. Thirdly, competition law lacks the regulatory certainty crucial for encouraging long-term infrastructure investment, especially when dealing with upstream SMP. Lastly, ex-ante regulation enables more timely enforcement due to the greater certainty and specificity it provides. Consequently, while competition law enforcement may be

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<sup>2</sup> Wholesale Local Access Market Review: Statement – Volume 1, 28 of March 2018.

employed when appropriate, Ofcom believes that relying on it alone is insufficient, and **ex-ante regulation is deemed necessary**.

### 2.3.2. SMP Assessment

Ofcom outlines key criteria for assessing **SMP in the WLA** at fixed locations, including market shares, pricing, profitability, barriers to entry, expansion, and countervailing buyer power. Applying these criteria, Ofcom designates BT as holding SMP in this market. The decision is based on factors such as BT's substantial and expectedly stable market shares, consistently exceeding 50% in local access connections across segments and geographic areas. Additionally, BT's control over underlying connections is identified as a crucial factor, allowing strategic leverage into various downstream services.

### 2.3.3. SMP Obligations

This market incorporates all the obligations outlined by EU directives as the list of obligations that may be imposed on operators with SMP: (1) **Access obligation**, (2) **Non-discrimination**, (3) **Transparency**, (4) **Price control**, **Cost Accounting** and **Accounting Separation**.

## 2.4. Portugal

### 2.4.1. Market Definition and Susceptibility of the Market to ex-ante Regulation

In 2023<sup>3</sup>, ANACOM defined the WLA market to include copper, fibre, and cable, while the WCA market, focusing on large-scale products, encompasses offerings supported in copper, fibre, and cable. Regarding the geographical market definition, ANACOM established specific criteria to split the national market into Area A and Area B, including civil parishes with **multiple high-speed networks, areas with two operators exceeding 90% coverage**, civil parishes in **predominantly urban areas indicating favourable business conditions**, and areas where the **primary operator's retail market share is declining or below 40%**. The application of these criteria determines the categorization of civil parishes into Area A or Area B, followed by an SMP assessment for each designated area. Area A is comprised of all the parishes that **fulfil** the presented criteria, while Area B is the parishes that do not.

With regards to the susceptibility of both markets to ex-ante regulation, the three criteria test was conducted by ANACOM both for the WCA and WLA markets. It was concluded that, **in the WCA market there is no need for ex-ante regulation** as the criteria were not fulfilled. However,

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<sup>3</sup> Decisão Sobre a Análise dos Mercados de Acesso a Infraestruturas Físicas, Acesso Local Grossista num Local Fixo e Acesso Central Grossista num Local Fixo, of 2023.

it was deemed that the **WLA market should be susceptible** and an SMP assessment was then conducted.

#### **2.4.2. SMP Assessment**

In the WLA market, ANACOM identifies specific criteria, such as market shares, barriers to entry and expansion, control of infrastructure not easily duplicated, potential competition, and countervailing negotiating power, for assessing SMP in the WLCA Market. Following the SMP evaluation, **ANACOM concludes that in Area 'A,' where no operator holds a market share exceeding 40%** and effective competition exists, there is no SMP. In contrast, **for Area 'B,'** considering factors like a stable **79.4% market share**, barriers to entry and expansion, non-replicable infrastructures, the absence of countervailing power, and potential competition in certain parishes, the Altice Group is identified as holding SMP in 407 parishes for B-MEO (Telecommunication Company in Portugal). Regarding the WCA market, as this was deemed not susceptible to ex-ante regulations, an SMP assessment was not conducted in this market.

#### **2.4.3. SMP Obligations**

This market incorporates all the obligations outlined by EU directives as the list of obligations that may be imposed on operators with SMP: (1) **Access obligation**, (2) **Non-discrimination**, (3) **Transparency**, (4) **Price control**, **Cost Accounting** and **Accounting Separation**.

### **2.5. Gap analysis**

- **Presently, ComCom is establishing the SMP without initially delineating geographical market boundaries, a departure from European countries' best practices. Hence, ComCom should first segment the clusters into geographical markets and subsequently enforce SMP obligations. Incorporating these changes by ComCom could lead to different results of the SMP assessment compared to those proposed, particularly when designating MagtiCom as the sole SMP.**

Upon conducting a comprehensive analysis of this approach, it has been determined that this method is not a commonly adopted practice within the European countries' guidelines or among the regulators that were assessed mainly because the potential breakdown of the national market happens explicitly during the geographical market definition stage, allowing for the emergence of multiple relevant markets based on criteria and assessment by each country's regulator. Afterward, this geographical market definition serves as the foundation for the SMP assessment, where each specified market undergoes an independent evaluation based on criteria and official data specific to its respective region. This comprehensive approach ensures

the similar implementation of regulations in each market, accommodating variations in SMP across different regions. Furthermore, all obligations applied to the SMP in each region are the same, eliminating the necessity to further define geographical areas for the imposition of distinct obligations.

Additionally, the use of distinct clusters based on contestability criteria further sets Georgia apart from widely accepted practices, impacting the consistency and comparability of SMP assessments across regions. This unique approach in Georgia causes concerns about the fairness and efficacy of a single SMP definition for the entire country, highlighting potential differences in regulatory outcomes. These concerns become more evident when examining the specific market share percentages for each city in Annex 2 of this report. Despite MagtiCom dominating the market shares on a national scale, it's apparent that out of 7 cities with households above 10k, MagtiCom leads in only 2 while other operators lead in the others. This raises questions about fairness and prompts consideration of whether, if the geographical market were defined following European countries' best practices, MagtiCom would be the sole SMP or other operators would be determined as the SMPs in different clusters.



## 3. Wholesale Market of Access to Physical Infrastructure

### 3.1. Georgia

#### 3.1.1. Market Definition and Susceptibility of the Market to *ex-ante* Regulation

ComCom defined the relevant market based on two steps (1) **product market definition**: where the conclusion was to include as focal product all the telecommunications physical infrastructures (ducts, duct chambers, poles and street cabinets) and also non-telecommunications physical infrastructure suitable for telecommunications use, that are potentially capable of facilitating the deployment of higher-speed broadband networks, except in the cases of technological and safety limitations that some networks face (e.g. gas and high-voltage power networks), (2) **geographical market definition** by dividing the national market into 63 service areas, primarily comprising major cities and municipalities. After that, the 3CT was performed to assess the susceptibility to ex-ante regulation.

Based on ComCom's assessment the 3CT are met considering the following:

1. The first criterion is fulfilled because there are high and non-transitory structural barriers to entry due to the very large size of the network and the correspondingly large investment that would be required to replicate it. Although there are no significant legal, administrative, or regulatory barriers to entry into this market, the structural barriers to entry are high and non-transitory.
2. Regarding the second criterion it is considered that there is a lack of movement in the market shares of competing physical infrastructures and there are no technological advancements that would allow rapid deployment or optimized use of alternative physical infrastructures.
3. And as for the third criterion, it is concluded that the competition law alone is insufficient to adequately address the market failures.

#### 3.1.2. SMP Assessment

ComCom determined the SMP based on the geographical definition and essentially based on the criterion of market shares. ComCom defined Silknet as an SMP operator in most of the areas by virtue of holding 100% market share. In other areas, ComCom identified Silknet as having SMP with a market share between 47.99% and 99.92%. In two areas, ComCom designated additional operators as SMP operators in specific areas (Akhali Kselebi, Akhteli, System Net, Caucasus Online and MagtiCom).

### 3.1.3. SMP Obligations

Based on ComCom's decision the SMP operators are required to publish a reference offer, containing the terms and procedures for giving access to ducts, including technically available access points and the deadline, which should not exceed 20 days. In addition, ComCom's decision fixes maximum tariffs (399.7 GEL, excluding taxes, per one channel kilometers of 100mm duct pipe per month). Thirdly, ComCom subjected the SMP operators to an obligation of non-discrimination to apply similar conditions (including tariffs, quality, and delivery terms) that are no less onerous than for its own structural subdivision, affiliated and/or other interconnected authorized entities and/or defined for internal consumption.

## 3.2. Ireland

### 3.2.1. Market Definition and Susceptibility of the Market to *ex-ante* Regulation

In Ireland, ComReg defines the **wholesale (physical) network infrastructure access at a fixed location** as the market where the focal product consists of passive telecom-specific infrastructure (ducts and poles) used to house or carry fixed elements of a wired network, regardless of the owner of that infrastructure and no matter the size or scope of that infrastructure. By contrast, non-telecom-specific physical infrastructure, currently used for housing wired electronic communications networks, is not part of the focal product of the relevant market.

ComReg conducted the three-criteria test and found that **all criteria are cumulatively met, meaning that this market is susceptible to ex-ante regulation.**<sup>4</sup>

### 3.2.2. SMP Assessment

ComReg designates Eircom as having SMP in the physical infrastructure market based on the size and other features of its physical infrastructure network. In practical terms, Eircom **is the only player that has a ubiquitous national physical infrastructure network** that makes it possible to provide wired network connectivity to almost every residential and business premises in Ireland. Overall, there is no viable alternative to Eircom's physical infrastructure network because it would be technically difficult, economically unviable, and very time consuming to replicate it. Moreover, buyers' bargaining power is not sufficient to prevent Eircom from behaving to an appreciable extent independently of competitors, customers, and consumers.

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<sup>4</sup> Physical Infrastructure Access (PIA) Market Review, 2023.

### 3.2.3. SMP Obligations

This market incorporates all the obligations outlined by EU directives as the list of obligations that may be imposed on operators with SMP: (1) **Access obligation**, (2) **Non-discrimination**, (3) **Transparency** and (4) **Price control, Cost Accounting and Accounting Separation**. Additionally, ComReg requires that the SMP should produce a Statement of Compliance (SoC). Under this obligation, in summary, the SMP is required to set out the measures and policies that it has in place to ensure regulatory compliance (regulatory governance) and to identify and mitigate compliance risks.

## 3.3. UK

### 3.3.1. Market Definition and Susceptibility of the Market to ex-ante Regulation

Ofcom defines the focal product of the Physical Infrastructure Access (PIA) Market as all telecom physical infrastructure used to host fixed elements of a network. After applying the three criteria test it concluded that the **physical infrastructure market is susceptible to ex-ante regulation**.<sup>5</sup> Ofcom excludes non-telecoms physical infrastructure as part of the relevant market.

### 3.3.2. SMP Assessment

Ofcom divides this market into 4 main areas: (1) BT-only areas, (2) BT and Virgin Media areas, (3) High Network Reach areas and (4) Central London Area, and BT is considered the SMP for each of these regions. The conclusion is based on the following: (a) BT's dominant downstream position, which is evidence of the market power it derives from control and ownership of its physical infrastructure; (b) BT is the only significant operator in the market – so there are no direct or indirect constraints; (c) The high entry barriers to constructing new physical infrastructure; (d) The absence of significant countervailing buyer power.

### 3.3.3. SMP Obligations

This market incorporates all the obligations outlined by EU directives as the list of obligations that may be imposed on operators with SMP: (1) **Access obligation**, (2) **Non-discrimination**, (3) **Transparency** and (4) **Price control, Cost Accounting and Accounting Separation**. As specific obligations, Ofcom defines specific requirements to provide PIA ancillary services and specific requirements for the publication of a reference offer and implementation timeframes.

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<sup>5</sup> Physical Infrastructure Market Review, 2018.

## 3.4. Portugal

### 3.4.1. Market Definition and Susceptibility of the Market to *ex-ante* Regulation

The focal product in physical infrastructure access is access to underground ducts and associated infrastructure (including manholes and access branches to buildings), as well as poles, which consist of infrastructure suitable for hosting equipment and cables for electronic communications networks (initially, for copper pair cables, later also for coaxial cables, and more recently, for fibre optic cables and associated equipment). ANACOM considers that the market under analysis meets the three criteria of competitiveness and is **thus susceptible to ex-ante regulation**.<sup>6</sup>

### 3.4.2. SMP Assessment

In the period between the end of 2020 and the conclusion of the first semester of 2022 that is covered in the last assessment provided by ANACOM, MEO consistently maintained a market share well above 50%, ranging from 79% to 95%, according to the specified indicator. The sustained and substantial **market presence of MEO during this timeframe reinforces its status as the SMP within the industry**, as indicated by its commanding share of the market.

### 3.4.3. SMP Obligations

This market incorporates all the obligations outlined by EU directives as the list of obligations that may be imposed on operators with SMP: (1) **Access obligation**, (2) **Non-discrimination**, (3) **Transparency** and (4) **Price control, Cost Accounting and Accounting Separation**.

## 3.5. Gap analysis

- **ComCom should conduct a re-evaluation, encompassing poles, duct chambers, and street cabinets, to reassess the significant market dominance.**

As ComCom's proposal is to expand the actual relevant market definition to include physical infrastructures such as ducts, duct chambers, poles, and street cabinets a reassessment of the SMP dominance should be performed.

- **ComCom must revise the geographical definition proposed to determine the SMP because the approach of dividing the market into 63 service areas is exaggerated and is not aligned with European countries' best practices.**

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<sup>6</sup> ANACOM: Physical Infrastructure Access, 2023.

As a crucial misalignment, it is highlighted that the geographical market definition considered by ComCom diverges from the benchmarked countries. When other European countries' regulators break down the national market, (1) they tend to do it by grouping smaller settlements with similar characteristics, the approach of Ofcom in the UK, and (2) consider the geographical market definition from a national perspective, like ComReg and ANACOM. This differs from ComCom's approach taken in this case, which suggests dividing the market into 63 service areas. This approach defines six SMPs, which is exaggerated and particularly notable as some of these areas exhibit minor coverage from a national perspective, with all of them, excluding Silknet, having less than 50% coverage as shown in Table №1.

Table №1

Company Name	KM	%
Akhali Kselebi	737	6%
MagtiCom	2,321	19%
CGC	141	1%
Foftnet	11	0%
System Net	6	0%
Georgian Railway	607	5%
DeltaCom	1,014	8%
Silknet	7,298	59%
OpenNet	189	2%
	12,323	100%

Source: ComCom

*Table 1 - Market shares of telecom ducts (in km) in terms of ownership*

- **ComCom's approach to considering the non-telecoms physical infrastructure is not coherent with the approach taken by the benchmarked regulators.**

ComCom's proposal regarding the inclusion of non-telecoms physical infrastructure as part of the relevant market should be dropped, in line with the guidelines defined by the other benchmarked regulators.

## **4. Wholesale Market of Lease Lines**

### **4.1. Georgia**

#### **4.1.1. Market Definition and Susceptibility of the Market to ex-ante Regulation**

As per ComCom's decision, the wholesale market of leased lines is divided into two segments: trunk and backhaul. However, the decision that regulates this market just defines a set of routes for transit segments and areas for backhaul as the relevant geographic markets. In each of these geographical markets, ComCom identified operators with SMP as being subject to ex-ante regulation.

#### **4.1.2. SMP Assessment**

In analyzing the holding of SMP by the authorized person in the relevant market segment, ComCom assessed combinations of the criteria, that are most appropriate for evaluating the competitive environment in the relevant market segment: (1) the authorized person's market share and its total volume, (2) difficulty to duplicate infrastructure, (3) technological advantage, (4) low level and/or non-existence of user power; (5) easy or privileged access to capital and financial resources, (6) Diversified types of services; (7) economy of scale, (8) economy due to the variety of types of services (economy of diversity), (9) vertical integration; (10) Developed retail sales network, (11) absence of potential competitors and (12) existing barriers regarding the expansion of the authorized person to the relevant market segment. Following this, ComCom defined an SMP for each route as detailed in the Annex 1 of this report.

#### **4.1.3. SMP Obligations**

The SMP operators defined by ComCom are subject to (i) an obligation to publish a reference offer, for both trunk and backhaul including the commitment to provide access within 20 calendar days, (ii) ensure unrestricted, transparent and non-discriminatory access to the technical means of its own network and types of electronic communication services of another authorised person, (iii) provide access to ducts, colocation space at regulated rates, (iv) provide access to their fibre optic cable (in case the authorised person seeking access to the network requests access on routes not identified in ComCom's decision, or an alternative access service, provision of data transmission (transportation) services to the fibre optic cable on a specific section at the rate fixed in the Decision), (v) non-discrimination, (vi) accounting separation and (v) maximum prices of 14.9 GEL per month per kilometre of fibre optic cable (not including taxes) and 0.50 GEL per megabit/s per month (not including taxes) for data transportation.

## 4.2. Ireland

### 4.2.1. Market Definition and Susceptibility of the Market to ex-ante Regulation

ComReg considers that this market **is divided into two separate markets: (1) trunk segments and (2) terminating segments** of wholesale leased lines. Trunk segments refer to the main, long-distance communication pathways or channels that form the backbone of a network. In the context of leased lines, trunk segments connect high densities of traffic via high-capacity connections, between and within major centres of population. Only circuits which are provided using established infrastructure, between urban centres, and which are of a capacity equal to or greater than STM-1 (155Mb/s) fall into the market for trunk segments of wholesale leased lines. Everything outside of the trunk segment market, including the main points of handover and generally lower densities of traffic, is part of the terminating segment market. These refer to the segments of the leased lines that connect to the end-user or customer premises.

The market for wholesale **trunk segments** of leased lines is considered **competitive** as it doesn't fully meet the 3CT. By applying the 3CT, ComReg proposes that, in the presence of robust wholesale regulation on the wholesale terminating segments of leased lines, entry barriers to the wholesale **trunk segments** of the leased lines market are no longer high and non-transitory. As a result, one criterion is not fulfilled, leading to the conclusion that this market should not be **deemed susceptible to ex-ante regulation** and consequently, all associated obligations are withdrawn.

However, the remaining market (for **wholesale terminating segments**) **remains uncompetitive** because the 3CT is cumulative met. This is because operators not currently in possession of a ubiquitous access network would be able to do so on a sufficiently widespread basis that would allow them to compete effectively with a hypothetical monopolist.

### 4.2.2. SMP Assessment

For the wholesale terminating segments, ComReg considered the factors set out in the EU directives to assess the SMP. The first criterion assessed is the market share that establishes that an operator like Eircom, with **more than 50%** falls into the definition of very large market shares provided by the EU. According to this definition, operators in such cases are inherently considered as holding a dominant position, except in exceptional circumstances. Nevertheless, ComReg has not assumed market share as a definitive indicator, it **has also considered a number of factors including those listed in the directives**: the overall size of the undertaking, control of infrastructure not easily duplicated, technological advantages or superiority, absence of or low countervailing buying power, easy or privileged access to capital markets/financial resources,

product/services diversification (e.g. bundled products or services); economies of scale, economies of scope, vertical integration, a highly developed distribution and sales network, absence of potential competition and barriers to expansion. After this assessment, ComReg continues to consider Eircom as the SMP.

#### 4.2.3. SMP Obligations

This market incorporates all the obligations outlined by EU directives as the list of obligations that may be imposed on operators with SMP: (1) **Access obligation**, (2) **Non-discrimination**, (3) **Transparency** and (4) **Price control, Cost Accounting and Accounting Separation**.

### 4.3. UK

#### 4.3.1. Market Definition and Susceptibility of the Market to ex-ante Regulation

According to Ofcom, the leased lines generally use optical fibres to make the physical connection between two points, typically provided with the equipment, such as Ethernet and WDM, provided by the supplier, or as a dark fibre connection with the equipment to create an end-to-end service provided to the customer.

Ofcom establishes a market boundary between **a competitive wholesale national trunk service and less competitive wholesale terminating segments markets**. Moreover, it further divides the trunk services market into two segments: one for longer-distance national trunk services and another for shorter-distance regional trunk services. Ofcom decided to incorporate the market concerning short distance into the termination segments market because competitive conditions for regional trunk circuits and terminating segments are broadly homogeneous. Due to the competitive nature of the wholesale national trunk market, as determined by the 3CT, **ex-ante regulation is exclusively applied for termination services, including the short-distance segments of trunk networks**.

#### 4.3.2. SMP Assessment

Ofcom considered that BT's existing position in the market was one of significant market power reflecting its very high market shares, the advantages of BT's near-ubiquitous network and its greater ability to benefit from economies of scale and scope. In addition, this situation would persist due to high barriers to entry and the limited prospect of the market developing towards effective competition. Ofcom did not consider that other factors such as countervailing buyer power and substitution to alternative services would constrain BT's market power. It remains the case that a high market share suggests a lack of competition, and new entry is unlikely due



to the declining nature of this market as the evidence suggests that migration is not price sensitive.

#### 4.3.3. SMP Obligations

This market incorporates all the obligations outlined by EU directives as the list of obligations that may be imposed on operators with SMP: (1) **Access obligation**, (2) **Non-discrimination**, (3) **Transparency** and (4) **Price control, Cost Accounting and Accounting Separation**.

### 4.4. Portugal

#### 4.4.1. Market Definition and Susceptibility of the Market to ex-ante Regulation

ANACOM defines that at the wholesale level, it is possible to define independent components of a leased line, including **terminating segments and trunk segments**.<sup>7</sup> The terminating segments provide symmetrical transmission capacity from a customer's network termination point up to an appropriate aggregation point, which, in the national case, is the local exchange. The trunk segments, in turn, provide symmetrical transmission capacity between two points of traffic aggregation, i.e., generally between two local exchanges.

Given that the wholesale market for **terminating segments** of leased lines was maintained in the Recommendation of EU in 2017, in its last review ANACOM **did not consider it necessary to perform the application of the 3CT** to this market and consequently, they classified it as **susceptible to ex-ante regulation**, aligning with the approach taken by other European countries. The **trunk segment** was divided into two markets: the market of "Routes C" covering routes which connect the main urban centres, with greater population and corporate density and where there are various competing alternative network offers in which for the purposes of ex-ante regulation was identified as not relevant, followed by the removal of obligations with respect to this market - and the market of "Routes NC" covering routes linking areas of lower population and corporate density that are susceptible to ex-ante regulation because 3CT is fully met and, because contrarily to "Routes C" it may not be possible for alternative operators to compete with the incumbent operator, i.e., these routes are served by a single operator, and it is unlikely that other operators will enter.

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<sup>7</sup> ANACOM: Retail Market and Wholesale Markets of Terminating and Trunk Segments of Leased Lines, 2018.

#### 4.4.2. SMP Assessment

It is considered that the companies of **Grupo PT operating in the wholesale markets of terminating segments throughout the entire national territory and trunk segments on "Routes NC" have SMP on these markets.** In any of the markets (terminating segments in the entire territory and trunk segments on "Routes NC"), Grupo PT, which is effectively the only relevant wholesale operator, has a **market share far in excess of 50%** - clearly above the 40% threshold which has been used in EU decision-making practice as the limit above which it considers that there are concerns as to situations of dominant position and even surpassing the criteria of a very large market share of 50% which is considered evidence of a dominant position, except in exceptional circumstances -, whereas there is no situation considered exceptional which, with respect to this criteria, justifies not identifying SMP on the part of this Group in the two markets under analysis. Additionally, ANACOM evaluates other criteria to reinforce the assessment of dominant position such as competition among installed companies: **barriers to entry and to expansion and rivalry** (economies of scale and/or scope, infrastructure which is difficult to replicate, vertical integration and/or exclusivity agreements, Rivalry: pricing, profitability, offer innovation and degree of diversification in the resources used) where the analysis conducted indicates an absence of effective competition in these markets. It also considers **potential competition** anticipating that current competitive conditions will persist over the short and medium term, although there may be some reduction in the incumbent operator's market share in the wholesale market of trunk lines on "Routes NC". **Countervailing buying power** is also assessed with the conclusion that the absence of a substantial number of active alternative operators results in a lack of meaningful countervailing power, and factors such as the obligation to publish prices and the market leader's size do not indicate significant restrictions on Grupo PT's behaviour in the relevant wholesale markets.

#### 4.4.3. SMP Obligations

This market incorporates all the obligations outlined by EU directives as the list of obligations that may be imposed on operators with SMP: (1) **Access obligation comprised in leased lines regulated offer (LLRO) that establishes the technical and commercial characteristics and conditions associated with the provision of wholesale leased lines, covering the entire national territory and for analogue and digital technologies,** (2) **Non-discrimination,** (3) **Transparency** and (4) **Price control, Cost Accounting and Accounting Separation.**

#### 4.5. Gap analysis

- **ComCom must revise the SMP assessment because assigning one operator as the significant market dominant for each route is excessive when compared to European benchmarked countries.**

As per ComCom, the wholesale market of leased lines is divided into two segments: trunk and backhaul. However, ComCom's decision that regulate this market just defines a set of routes for transit segments and areas for backhaul as the relevant geographic markets. In each of these markets, ComCom identified the operators with SMP as being subject to ex-ante regulation.

While implementation of ex-ante regulation is consistent with benchmarked countries, ComCom's defined approach for the assessment of the SMP, assigning one for each route outlined in the Annex 1, is excessive when compared to benchmarked countries. These countries assess the SMP from a national perspective or based on specific groups of routes. For instance, in Portugal, an SMP assessment is conducted for termination segments and for the "Routes NC," even though the conclusion was Grupo PT for both.

## 5. Conclusion

In summary, KPMG's assessment of Georgia's Telecommunications Regulatory Frameworks on Fixed Markets Susceptible to ex-ante Regulation has identified divergence from EU best practices, leading to inconsistent SMP assessments and, therefore, suggesting the need for regulatory adjustments.

The main findings pertained to the fact that ComCom's approach diverges among markets: in certain cases, it encompasses defining excessive groups and subsequently establishing SMPs, whereas, in others, it involves the absence of defining homogenous clusters within the geographical market definition and just defining a nationwide SMP.

To align with EU best practices, ComCom should:

- (1) Segment the clusters into geographical markets to evaluate and define SMP for each and subsequently enforce the required obligations
- (2) Consider multiple infrastructure elements and ensure uniform obligations across the regions;
- (3) Aggregate multiple regions and routes to establish SMPs in homogenous areas.

This comprehensive approach would lead to more accurate SMP assessments in the different markets across multiple regions.

## 6. Annexes

### 6.1. Annex 1

The following SMPs are defined for the relevant segment of the wholesale market of access to the trunk network market:

- Tbilisi - on the direction of Batumi (via Kutaisi) - JSC "Silknet", LLC "MagtiCom" and LLC "Delta Com"
- Tbilisi - in the direction of Poti - LLC "MagtiCom", LLC "Akhali Kselebi ", LLC "PC Max"
- Tbilisi - in the direction of Kaspi - LLC "MagtiCom" and LLC "Delta Com"
- on the direction of Poti - Batumi - JSC "Silknet", LLC "MagtiCom ", LLC "Delta Com" and "PC Max"
- Khashuri - in the direction of Gori - LLC "MagtiCom" and LLC "Delta Com"
- Batumi - in the direction of Kvishkheti - LLC "Delta Com"
- Gori - in the direction of Kaspi - LLC "MagtiCom " and LLC "Delta Com"
- Zestafon - in the direction of Alaverdi - JSC "Silknet"
- Zestafon - in the direction of Terjola - LLC "Akhali Kselebi" and LLC "Optic Fiber"
- Telecommunication network - LLC "Optic fiber telecommunication network - Foptnet"
- Kutaisi - in the direction of Tskaltubo - JSC "Silknet", LLC "MagtiCom " and LLC "Delta Com"
- Kutaisi-Martvili direction - LLC "MagtiCom", LLC "Delta Com", LLC "Akhali Kselebi" and LLC "Optic fiber telecommunication network - Foptnet".
- in the direction of Senak - Khobi - Zugdidi - JSC "Silknet", LLC "Delta Com" and LLC "PC Max"
- Tbilisi - in the direction of Batumi (Akhaltzikhe) - JSC "Silknet" and LLC "Delta Com"
- Tbilisi - in the direction of Akhalkalaki - LLC "MagtiCom"
- on Akhaltsikhe-Vale direction - JSC "Silknet" and LLC "Delta Com"
- Akhaltsikhe - in the direction of Abastumni - JSC "Silknet"
- Keda - in the direction of Khelvachauri - JSC "Silknet"
- Batumi - in the direction of Sarfi - JSC "Silknet"; LLC "Delta Com" and LLC "Georgian Railway"
- Kobuleti - in the direction of Ozurgeti - JSC "Silknet"
- Tbilisi - Telavi direction - JSC "Silknet"; LLC "MagtiCom"; LLC "Delta Com" and LLC "PC Max"
- Telavi - in the direction of Lagodekhi - LLC "Delta Com"
- on Tbilisi-Tianeti direction - LLC "MagtiCom " and LLC "Delta Com"
- on the direction of Tianeti - LLC "MagtiCom " and LLC "Delta Com"
- Gurjaani - in the direction of Kvareli - LLC "MagtiCom " and LLC "PC Max"
- Bakurtsikhe in the direction of Lagodekhi - LLC "MagtiCom " and LLC "Delta Com"
- Bakurtsikhe - Dedoplistskaro - LLC "MagtiCom " and LLC "Delta Com"
- Telavi - in the direction of Dusheti - JSC "Silknet" and LLC "Delta Com"
- Gurjaani - in the direction of Lagodekhi - JSC "Silknet"
- Bakurtsikhe-Tsnori direction - JSC "Silknet"
- in the direction of the Tsnori-Dodofli source - JSC "Silknet"
- Lagodekhi - in the direction of Ganjala - LLC "MagtiCom " and LLC "Delta Com"
- Tbilisi - in the direction of Dusheti - JSC "Silknet"; LLC "Delta Com" and LLC "Caucasus Online"
- Dusheti - JSC "Silknet" and LLC "Caucasus Online"

- Tbilisi - in the direction of transfer - JSC "Silknet"; LLC "MagtiCom", LLC "Delta Com" and LLC "Georgian Railway"
- Tbilisi - in the direction of Kazreti - LLC "Optic fiber telecommunication network"
- Gardabani - in the direction of the Red Bridge - JSC "Silknet" and LLC "Georgian Railway"
- Borjomi - in the direction of Bakuriani - JSC "Silknet"
- Khashuri - in the direction of Akhaltsikhe - JSC "Silknet"
- Tbilisi - in the direction of Marneuli - JSC "Silknet", Georgian Railways, "MagtiCom", LLC "Delta Comm", LLC "Caucasus Online" and LLC "Georgia Railway"
- Marneuli - in the direction of Sadakhlo - JSC "Silknet", LLC "MagtiCom", LLC "Delta Com" and LLC "PC Max"
- Marneuli - in the direction of the Red Bridge - LLC "MagtiCom" and LLC "Delta Com"
- Bolnisi - in the direction of the Tetri source - JSC "Silknet"
- Bolnisi - in the direction of Marneuli - LLC "MagtiCom" and LLC "PC Max"
- on Chakvi-Samtredia direction - Georgian Railways
- Natanebi - in the direction of Ozurgeti - LLC "Delta Com" and LLC "Georgia Railway"
- Zestafoni - in the direction of Sachkhere - LLC "Caucasus Online" and LLC "Georgia Railway"
- Zestafoni - in the direction of Batumi - LLC "MagtiCom" and LLC "PC Max"
- Tbilisi - Kutaisi direction - LLC "MagtiCom", LLC "Delta Com" and LLC "PC Max"
- in the direction of Tsalka-Akhalkalaki - LLC "PC Max"
- Tbilisi-Larsi direction - LLC "PC Max"
- in the direction of Zugdidi-Anaklia - LLC "PC Max"
- in the direction of Rustavi-Marneuli - LLC "PC Max"
- in the direction of Telavi-Kvareli - LLC "PC Max"
- Akhaltsikhe - in the direction of Akhalkalaki - LLC "PC Max"
- Rustavi - in the direction of Gurjaani - LLC "PC Max"

SMPs for the wholesale market for access to the "Backhaul" transmission network are:

- in Tbilisi – JSC "Silknet", LLC "MagtiCom", LLC "Delta Com", LLC "Akhali Kselebi" and LLC "Akhteli"
- in Kutaisi - JSC "Silknet", LLC "Akhali Kselebi", LLC "MagtiCom" and LLC "Delta Com"
- in Batumi - JSC "Silknet" and LLC "Caucasus Online"
- In Rustavi – LLC "Central Communications Corporation of Georgia"
- in Poti - LLC "Caucasus Online", LLC "Delta Com"

## 6.2. Annex 2

Market Share					
City	MagtiCom	Silknet	Akhali Kselebi	SkyTel	Other
Tbilisi	55%	37%	7%	0%	1%
Batumi	35%	62%	0%	0%	2%
Kutaisi	37%	44%	18%	0%	0%
Rustavi	28%	32%	41%	0%	0%
Poti	55%	37%	8%	0%	0%
Gori	39%	57%	3%	1%	0%
Zugdidi	35%	38%	13%	0%	14%

Figure 1- Market Shares of the Main 4 Operators in the top 5 populated geographies.

### 6.3. Annex 3

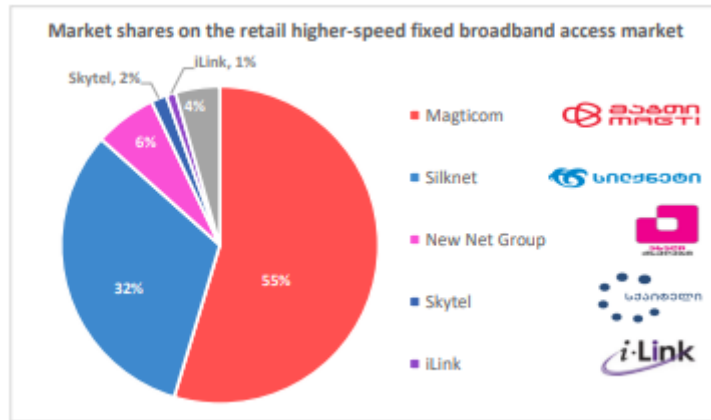


Figure 2- Market shares Analysis on fixed broadband access market

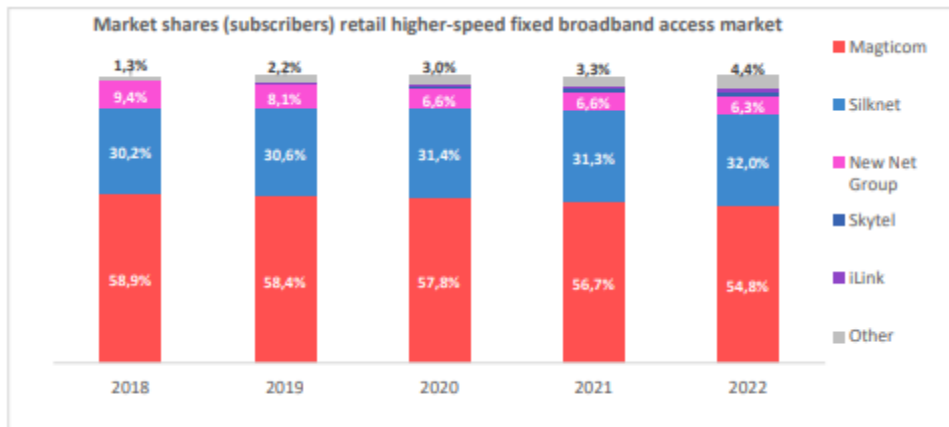


Figure 3- Market shares analysis on subscribers fixed broadband access market.

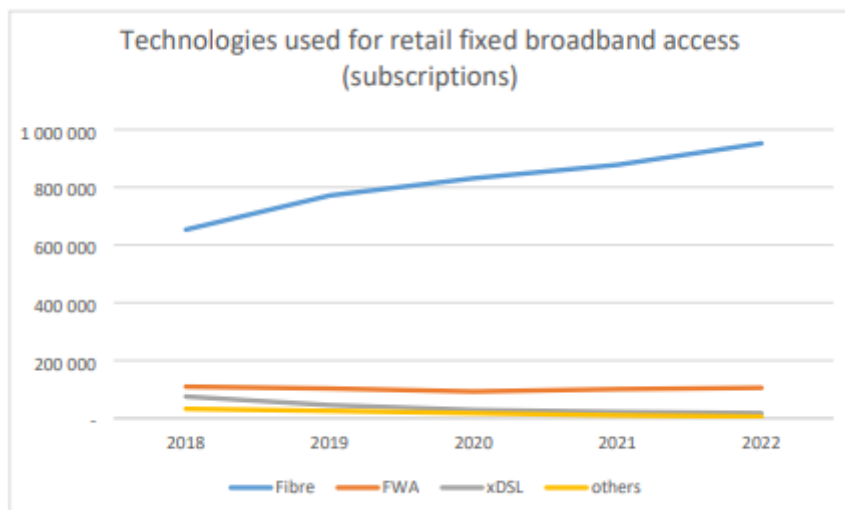


Figure 4- Technologies used (number of subscribers) fixed broadband access market.



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