



Review of Wholesale Broadband Access Services under Sections 39 and 40 of the Communications Act, 2009

Preliminary Determination

ECS 04/2020

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1. Introduction

Following its review of the resale fixed broadband offer (“BRO”) obligation (ECS 09/2018),¹ and as indicated in its Annual Plan for 2018,² the Utilities Regulation and Competition Authority (“URCA”) has conducted a review of Wholesale Fixed Access (“WFA”) services to better understand the current demand for and provisioning of these services in The Bahamas. As part of its review, URCA has considered the wider set of WFA services, such as wholesale business connectivity services and wholesale broadband access (“WBA”) services.

URCA has collected further feedback from key stakeholders within this process, particularly via discussions with access seekers in The Bahamas and subsequent information requests it has sent to specified licensees. These access seekers are hereafter referred to as Other Licensed Operators (“OLOs”) and include all licensed providers other than The Bahamas Telecommunications Company Ltd. (“BTC”) and Cable Bahamas Ltd. (“CBL”). Based on this feedback, URCA has concluded that this review should focus on WBA services, and in particular, wholesale Dedicated Internet Access (“DIA”) services.³ As further set out in the remainder of this Preliminary Determination, URCA considers that wholesale DIA services form part of the WBA market previously defined by URCA.

Given this, and taking into account the Significant Market Power (“SMP”) findings set out in ECS 09/2018, this document therefore has the following objectives:

- to set forth URCA’s preliminary findings on whether there is a need to impose additional SMP obligations in the WBA service market(s) in The Bahamas (i.e., whether BTC and CBL, as dominant providers in the respective geographic markets for WBA services, should be required to provide wholesale DIA services on regulated terms), and the rationale for URCA’s proposed intervention;
- to set forth URCA’s specific proposed SMP obligations for the market(s); and
- to invite comments from stakeholders on URCA’s proposals.

1.1 Background to the Consultation

URCA is the governing body of the regulatory regime for electronic communications in The Bahamas and was established under the Utilities Regulation and Competition Authority Act, 2009. Under the Communications Act, 2009 (“Comms Act” or the “Act”),⁴ URCA is responsible for licensing undertakings that provide, operate or maintain an electronic communications network or provide an electronic

¹ Available at <https://www.urcabahamas.bs/wp-content/uploads/2018/08/Final-Determination-Resale-Broadband-Obligation.pdf>

² Available at <https://www.urcabahamas.bs/wp-content/uploads/2018/05/2017-Annual-Report-and-2018-Annual-Plan.pdf>

³ URCA notes that there is no distinction between wholesale and retail DIA services in terms of technical and service characteristics. URCA understands from discussions with the service providers that, from the sellers’ perspective, buyers are only considered to be “wholesale” or “retail” customers depending on whether the buyer uses the service to deliver a retail service. As such, URCA understands that both retail and wholesale customers commonly pay the same price for both retail and wholesale DIA services, for a given bandwidth.

⁴ Available at <https://www.urcabahamas.bs/wp-content/uploads/2016/08/The-Communications-Act-2009-.pdf>

communications service. The Comms Act also provides, in sections 4 and 5 of the Act, guidelines that URCA must follow for issuing regulatory and other measures (including Determinations). The Comms Act gives URCA wide-ranging powers which are to be exercised in full compliance with the principles of good regulation.

URCA is required to introduce regulatory and other measures which are efficient and proportionate to its purpose and must introduce them in a manner that is transparent, fair and non-discriminatory. This means that where URCA believes that market forces alone are unlikely to achieve a policy objective within a reasonable timeframe, URCA may introduce regulatory requirements, having due regard to the costs and implications for affected parties.⁵ However, as a general principle, market forces should be relied upon as much as possible and regulatory measures should be introduced by URCA only when necessary. In general, this means that more prescriptive regulatory measures are only imposed on operators who have a position in a market such that they can act to an appreciable extent independently of competitors, consumers and subscribers (i.e., a position of SMP).

In ECS 09/2018, URCA reviewed, amongst others, the competitive dynamics in the retail fixed broadband and WBA markets and confirmed BTC's and CBL's SMP positions in their respective geographic markets for WBA services.⁶

Within ECS 09/2018 and its Annual Plan for 2018, URCA also stated its intent to conduct a review of WFA services, including a consideration of whether other regulated WFA services should also be introduced in addition to the BRO. This question has been posed, in part, due to industry feedback received during the BRO review that URCA's existing ex-ante regulatory remedies and specifically, the regulated wholesale product set offered by BTC and CBL are inadequate.

As outlined in the introduction above, stakeholder feedback has guided URCA's view that this review should now focus on wholesale DIA services. URCA understands that OLOs are predominantly buying unregulated WBA services, (most notably wholesale DIA) in order to support the provision of end-to-end retail broadband services, as well as other connectivity services. The OLOs expressed particular concerns regarding the pricing and provisioning of DIA services.

As such, this review focuses on assessing whether there is a need for URCA to impose additional SMP obligations on BTC and CBL beyond the current BRO regulation and, if so, what form of regulatory obligations are required on wholesale DIA services.

In considering this, URCA recognises that wholesale DIA services are not used solely as an input to retail broadband services but also as a wholesale input for OLOs.⁷ That is, these services are an important input for those providers without their own infrastructure wishing to offer retail services in The Bahamas. Furthermore, wholesale DIA services are an important component of an OLO's network structure.

⁵ See section 5(b)(i), 5(b)(ii) and 5(c) of the Comms Act.

⁶ CBL was considered to have SMP in the four (4) islands where it had network coverage, including New Providence, Grand Bahama, Abaco and Eleuthera, with BTC being considered to have SMP in all remaining islands.

⁷ See Section 3.2.1 below.

For the avoidance of doubt, the focus on wholesale DIA services and thus the WBA market within this document does not imply that URCA may not review the need to impose regulation on other WFA services (such as wholesale business connectivity services, bitstream and/or passive infrastructure access services) in the future. However, based on the industry feedback received to date, URCA currently sees a heightened need to focus at this time on wholesale DIA services.

1.2 Procedures for Making a Determination

URCA has wide-ranging powers under the Comms Act, especially as it relates to SMP licensees. In particular, URCA's power to impose obligations on SMP licensees is derived from sections 40 and 5(b) of the Comms Act, which allows URCA to introduce regulatory measures where in its view, “... *market forces are unlikely to achieve the electronic communications policy objectives within a reasonable timeframe*”.

In doing so, URCA must adhere to all relevant principles of the Comms Act, in particular:

- the objectives of the electronic communications sector policy as specified under section 4 of the Comms Act; and
- guidelines for regulation and other measures as per section 5(a), (b), (c) and (d) of the said Act.

The procedures for making a determination, as contained in the Comms Act at section 99(1)(a) and (b), collectively prescribe that if, on its own motion, URCA has reason to believe that a determination is necessary, it may make determinations relating to (amongst other things):

- any obligations on a licensee regarding the terms or conditions of any licence, including obligations in licence conditions and regulations;
- any activity set out in the Comms Act; and
- where the Comms Act provides for URCA to “determine” or “to make determinations” as is the case under section 39 (1).

Pursuant to section 99(2) of the Comms Act, in making any determination, URCA must comply with section 11 of the said Act which requires URCA to afford persons with sufficient interest a reasonable opportunity to comment on regulatory or other measures that in URCA’s opinion are of public significance. A person whose rights or interests may be materially adversely affected or prejudiced by the proposed regulatory or other measure shall have sufficient interest. Section 13 of the Comms Act establishes that a regulatory and other measure is of public significance if it can lead to, inter alia, a significant impact on persons carrying on activities in those areas where URCA has functions under the Comms Act. URCA considers the regulatory and other measures consequential to this consultation are of public significance, therefore, URCA affords anyone with sufficient interest the opportunity to comment on URCA’s preliminary views and proposals contained herein.

1.3 How to respond to this Consultation

URCA invites responses on this Preliminary Decision/Determination from all interested parties. Initial responses on this Preliminary Decision should be submitted to URCA by 5:00 p.m. on 27 May 2020. Interested parties will then have the opportunity to further comment on submissions made by other respondents by 30 June 2020.

Written responses or comments on this Preliminary Determination should be sent to URCA's Chief Executive Officer, either:

- By hand, to URCA's office at Frederick House, Frederick Street, Nassau; or
- By mail, to P.O. Box N-4860, Nassau, Bahamas; or
- By fax, to (242) 393-0153; or
- By email, to info@urcabahamas.bs.

Where a respondent believes that URCA's approach and/or proposals are contrary to relevant principles and objectives or outside the international mainstream, the respondent should state his or her position and clearly set out the reasoning for such position, together with evidential information to substantiate their position.

URCA proposes to and reserves the right to make all responses available to the public by posting responses online on its website. If a response is marked confidential, reasons should be given to facilitate URCA's evaluation of the request for confidentiality. URCA may, in its sole discretion, publish or refrain from publishing any document or submission.

Persons may obtain copies of this document by downloading it from the URCA website at www.urcabahamas.bs.

1.4 Structure of the Remainder of this Document

The remainder of the document is structured in the following way:

- Section 2 sets out URCA's Preliminary Determination;
- Section 3 provides the context for this Preliminary Determination;
- Section 4 sets out URCA's preliminary views on the need to impose additional SMP obligations in the WBA market(s) to cover the ex-ante regulation of wholesale DIA services; and
- Section 5 presents next steps.

2. URCA’s Preliminary Determination

This Section sets out the Determination which URCA proposes to make, subject to URCA’s consideration and review of any representations and objections made by interested parties. URCA’s Determination will be addressed to, and will be binding upon, the Licensees referred to in the Determination:

“WHEREAS,

- (i) Section 39(1) of the Communications Act, 2009 empowers URCA to determine that a Licensee has Significant Market Power (SMP) in a market where the Licensee “... *individually or with others, enjoys a position of economic strength which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors, consumers and subscribers.*”;
- (ii) pursuant to section 39(2) of the Communications Act 2009, URCA issued ECS 20/2011, the “*Methodology for Assessment of Significant Market Power (SMP) under Section 39(2) of the Communications Act, 2009*” (the “SMP Methodology”⁸), containing criteria relating to the definition of markets in the electronic communications sector, and against which market power may be assessed; and
- (iii) URCA, having conducted a review of wholesale broadband access services in The Bahamas in accordance with the Communications Act, 2009 and the SMP Methodology (SMP Guidelines) considers that it is appropriate to make certain determinations regarding the definition of markets, the existence of licensees having SMP in those markets, and the extent to which ex-ante regulation is appropriate and necessary in those markets.

URCA proposes to make the following determination:

1. Confirmation of Wholesale Broadband Access market product scope

For the reasons explained in Section 4 below, URCA confirms its 2018 findings from its market review of wholesale broadband access (“WBA”) services in The Bahamas.

Determination of Relevant Market

Upon its review of the available evidence and in line with the approach set out in Section 3 below, URCA confirms the following relevant product and geographic markets for the provision of WBA services in The Bahamas:

- a. Product Scope. The relevant wholesale market for broadband services provided at a fixed location includes the following products/services: copper and fibre-based WBA services (currently offered by BTC); and cable-based WBA services (currently offered by CBL).

⁸ Also referred to as URCA's SMP Guidelines.

Upon its review of the available evidence in Section 4.1.1 below, URCA preliminarily finds that end-to-end wholesale Dedicated Internet Access (“DIA”) services fall within the relevant product scope of the WBA market.

b. Geographic Scope. Consistent with ECS 09/2018, URCA has defined two geographic markets:

- Geographic Market 1 - The islands where BTC and CBL both have network infrastructure enabling them to offer WBA services (i.e., New Providence, Abaco, Grand Bahama and Eleuthera); and
- Geographic Market 2 - All remaining islands (i.e., where only BTC has a network infrastructure enabling it to offer WBA services).

2. Confirmation of SMP Determination

Based on its review of the available evidence and in line with the approach set out in Section 3 below, URCA has assessed the competitive dynamics in each of the relevant markets (as identified above).

Given this, consistent with ECS 09/2018 URCA has determined that:

- i. CBL holds SMP in the market for WBA services in Geographic Market 1.
- ii. BTC holds SMP in the market for WBA services in Geographic Market 2.

3. Obligations Imposed on SMP Licensees

Given the position of economic strength held by BTC and CBL in each relevant market and in light of the potential challenges to competition which URCA’s review has indicated may arise, the following obligations shall continue to be applied to both SMP Licensees, namely:

- i. BTC and CBL shall comply with the non-market specific SMP obligations specified in section 40(4) of the Comms Act, Conditions 34 and 35 of the Individual Operating Licences (“IOL”) and specific SMP obligations on wholesale services, accounting separation and cost accounting as set out in the current and also any future determinations, decisions, regulations issued by URCA and which will remain in place until such time as determined by URCA;
- ii. In addition, BTC and CBL shall offer end-to-end wholesale DIA services⁹ that are subject to quality of service guarantees, including requirements to offer services

⁹ As further discussed in Section 3.2.1, URCA notes that the various ways in which wholesale DIA services are used in The Bahamas fall into two categories: (i) an end-to-end service (i.e., to the customer premises), which allows OLOs to offer retail DIA services to their customers; and (ii) a service connecting to the OLO’s point of presence, or “PoP” (such as a base station or data centre), which allows OLOs to use wholesale DIA as an input for the delivery of retail

within a reasonable timeframe to interested parties. These non-price terms will then be submitted to URCA for approval (see item iv below);

- iii. BTC and CBL shall offer such wholesale DIA services at tariffs set equal to the efficiently incurred underlying costs (incl. a reasonable return on those costs) of providing same, with these tariffs being approved by URCA. As part of this process, BTC and CBL will have to submit verifiable and reliable cost information as requested by URCA; and
- iv. BTC and CBL shall amend their reference offers (i.e., the BTC RAIO and CBL's terms and conditions for fixed termination services) to include wholesale DIA services, setting out the tariff and non-price terms and conditions on which their wholesale DIA offers are provided. BTC and CBL shall also publish such details prominently on their websites and additionally make such information available in other formats upon request. These amendments to BTC and CBL reference offers shall be reviewed by URCA, and must be approved before final publication. The amendments set out in the reference offers for wholesale DIA services should include, at the minimum, the following:
 - the pricing of the wholesale DIA services in the form of a table setting out, for each bandwidth of wholesale DIA service, the corresponding regulated wholesale charges.
 - the main non-price terms and conditions including:
 - a detailed description of the wholesale DIA service offerings;
 - service ordering and delivery process and timings;
 - quality of service standards (including key performance indicators and financial compensation owed to access seekers should the SMP operator miss these);
 - billing and payment requirements;
 - details of a dispute resolution scheme; and
 - operations and maintenance procedures.

Fixed Wireless Access services. In order to ensure that regulation is effective, URCA considers that regulation of wholesale DIA services must apply to the full connectivity service demanded (to the end customer premise or the OLO's PoP), which may in some cases include other wholesale services (such as WLLs). As such, any reference to regulation of wholesale DIA services in this Preliminary Determination applies to both types of wholesale DIA services (to the end customer premise or the OLO's PoP).

3. Context for this Preliminary Determination

In this Section, URCA firstly provides an explanation of the evolution of ex-ante regulation of WBA services in The Bahamas, which has led to this review. This is followed by an overview of wholesale DIA services specifically and how they are used in The Bahamas, including the key service providers and wholesale customers.

3.1 History of WBA service regulation in The Bahamas

For context, it is first necessary to set out the history of WBA service regulation in The Bahamas. In this subsection, URCA describes the prevailing regulation of WBA services and explains previous regulatory decisions in relation to these services.

3.1.1 Current Ex-Ante Regulation of WBA Services in The Bahamas

In 2018, URCA conducted a review of broadband resale offers (BROs). As part of this review, URCA confirmed that BTC and CBL had SMP in the respective geographic markets for WBA services and reviewed the terms and conditions of the BROs. Following this, URCA began to conduct further discussions with OLOs in The Bahamas to better understand their broader demand for other wholesale services, and their experience in procuring these, from the SMP operators. This led URCA to conclude that it should conduct this further review of services in the WBA market, as communicated in URCA's Annual Plan for 2018.

In the subsections below, URCA sets out its recent decisions in relation to WBA services. This is followed by a description of URCA's approach to conducting market reviews.

3.1.2 Previous Decisions on Wholesale Broadband Access Services in The Bahamas

As part of its Final Decision on "Obligations imposed on Operators with Significant Market Power (SMP)" (ECS 11/2010) dated 22 April 2010,¹⁰ URCA set out the retail and wholesale services in markets in which BTC and CBL were presumed to have SMP. The services URCA identified in these retail and wholesale markets are detailed in **Table 1** below.

Table 1: BTC's and CBL's SMP Markets - Retail and Wholesale

BTC - Retail Services	BTC - Wholesale Services
(1) Fixed telephony access and local calling	(1) Fixed intra-island call termination
(2) Domestic long distance calling (DLD)	(2) Fixed inter-island call termination
(3) Domestic fixed calls to rated numbers	(3) Mobile call termination
(4) International long distance international calling	(4) SMS termination
(5) Broadband internet access in specified areas	(5) Termination to directory inquiries
(6) Retail National leased lines	(6) Termination to ancillary services
(7) Mobile access	(7) Termination to local emergency numbers or services

¹⁰ Obligations imposed on Operators with Significant Market Power (SMP) available at: <http://www.urcabahamas.bs/download/065539400.pdf>

(8) Local mobile calling	(8) Call transit
(9) Domestic long distance mobile calling	(9) Termination to free-phone numbers
(10) International long distance mobile calling	(10) Termination to operator assistance facilities
(11) Mobile data (internet, SMS and MMS)	(11) Access to the broadband and transmission networks
	(12) Wholesale national leased lines
CBL - Retail Services	CBL - Wholesale Services
(1) SuperBasic TV package	(1) Access to the broadband and transmission networks
(2) Digital TV packages	(2) Wholesale national leased lines
(3) Retail national leased lines	
(4) Broadband internet access	

In this Final Decision, URCA also set out the specific ex-ante obligations that would apply to the SMP operators.¹¹

These obligations included, amongst others, an obligation for both SMP operators to offer a BRO in the respective geographic markets where they were considered to have SMP.¹² This SMP obligation, which remains in place to date, aims to provide a low-cost option for alternative providers to enter the fixed broadband market without having to deploy their own network infrastructure, and so to offer retail services in direct competition to BTC and CBL. There are currently no other SMP obligations imposed on either operator which require them to provide any other forms of WBA service.¹³

Both SMP operators have since developed their BROs and made them available to interested parties.¹⁴ In 2010, pursuant to Section 5.1.3 of ECS 11/2010, URCA conducted a high-level compliance check of both Offers to ensure that these were complete and compliant with the relevant SMP obligation. URCA, however, did not review or approve the terms and conditions or pricing of these offers.

In 2014, URCA conducted a market review of the key retail communications services in The Bahamas, including retail broadband services (ECS 14/2014).¹⁵ This confirmed, amongst others, BTC's and CBL's SMP designations in retail broadband services. Given the focus on retail services, URCA, at the time, did not review the competitive dynamics in the relevant wholesale markets or ex ante remedies in wholesale markets.

In 2018, URCA concluded a review of the retail and wholesale broadband access service markets in The Bahamas. This confirmed CBL and BTC's dominance in Geographic Market 1 and Geographic Market 2, respectively, and the continued need for ex-ante regulation on both licensees. URCA, at the time, decided to continue with the obligation on both licensees to offer resale broadband services as the main SMP

¹¹ For CBL, the market review led to ex-ante obligations in the markets for high speed data and connectivity, and the pay TV market. For BTC, URCA imposed ex-ante obligations in the markets for fixed telephony, fixed broadband and mobile voice and data services.

¹² CBL was considered to have SMP in the four (4) islands where it had network coverage, including New Providence, Grand Bahama, Abaco and Eleuthera, with BTC being considered to have SMP in all remaining islands.

¹³ In particular, there are currently no regulated active or passive wholesale network access services in The Bahamas (such as bitstream or local loop unbundling, sub-loop unbundling, line sharing or virtual unbundling services).

¹⁴ BTC's resale offer is available on its website (<https://files.btcbahamas.com/2019/02/25/btc-broadband-resale-offer-2019j.pdf>).

CBL's resale offer is available on its website (<https://cablebahamas.com/wp-content/uploads/2018/10/CBL-Broadband-Resale-Offer-28Sep2018.pdf>).

¹⁵ Available at <http://www.urcabahamas.bs/download/094452600.pdf>

obligation for both licensees. URCA therefore reviewed the terms and conditions of the licensees' resale offers.

By virtue of these SMP findings, the "standard" regulatory obligations set out in section 40(4) of the Comms Act also apply to BTC and CBL in the relevant markets. In particular, these require that the SMP Licensees shall –

- a) not unduly discriminate against particular persons or a particular description of persons in relation to the electronic communications services offered by them;*
- b) provide technical specifications, or other relevant information about any interconnection essential facilities or other mandated wholesale electronic communications services on a reasonable and timely basis, amongst others; and*
- c) not adopt technical specifications for a network that prevents interconnection and interoperability with a network of a competitor.*

As explained in Section 1, URCA is now conducting a wider review of WBA services, with a focus on wholesale DIA services, as guided by stakeholder feedback. More specifically, this review focuses on assessing whether there is a need for URCA to impose additional SMP obligations on BTC and CBL, beyond the current BRO regulation and, if so, what form of regulatory obligations are most appropriate and proportionate.

3.2 Overview of wholesale DIA services in The Bahamas

In this subsection, URCA provides some context for wholesale DIA services, the WBA services which are the focus of this review. This includes:

- a description of the characteristics of wholesale DIA services;
- a summary of the service providers who offer wholesale DIA services;
- an overview of the customers who purchase wholesale DIA services; and
- an explanation of how wholesale DIA services are used by service providers in The Bahamas.

URCA then sets out its specific areas of concern in the WBA market and, as a result, the focus of this review.

3.2.1 Characteristics of wholesale DIA services

DIA services offer dedicated, symmetric Internet access accompanied by Service Level Agreements ("SLAs") which define the terms on which the services shall be provided (for example, defining speeds, quality of service, and reliability). This functionality contrasts to the point-to-point ("P2P") and point-to-multipoint ("P2MP") connectivity offered by Wholesale and Retail Business Connectivity services ("WBC" and "RBC", respectively), which do not include an element of Internet access. DIA services also differ from retail broadband services, in that the Internet connectivity delivered is symmetric and subject to higher standards of service as defined in SLAs.

URCA notes that DIA services are, in many jurisdictions, commonly sold as retail services, typically to large corporate retail customers, which purchase the services in order to deliver Internet connectivity to their premises. However, in The Bahamas, DIA services are also sold to OLOs as wholesale services, with those OLOs then using that service to provide Internet connectivity to their (corporate and residential) retail customers. For example, OLOs who purchase wholesale DIA services can then resell capacity downstream to retail broadband customers. OLOs who purchase wholesale DIA services may then also resell DIA services as retail DIA services in the same way as the licensees which sell wholesale DIA services.¹⁶ For both retail and wholesale customers, this Internet connectivity may then be extended further within their network in order to provide the final connectivity to retail end-customers using their own (or rented) infrastructure.¹⁷

In addition to being offered as standalone services or being used to deliver retail broadband services, service providers (both SMP operators and OLOs) also use DIA services as part of more complex ‘packaged’ connectivity solutions targeted at corporate customers (such as financial institutions or hospitality providers).¹⁸ These connectivity solutions are delivered using a number of underlying wholesale services, including DIA but also Wholesale Local Loops (“WLLs”), and the customer will not necessarily have full transparency of all the underlying wholesale services used by the retail service provider.

URCA understands that DIA services offered both to retail and wholesale customers are often sold at the same prices and on similar terms. DIA services sold to OLOs are considered by service providers as “wholesale” DIA service, although the underlying service is similar, if not identical, to DIA services sold to retail customers. Nevertheless, due to the fact the service is an input to OLOs’ retail services, regardless of its other uses by customers as a retail service, URCA assesses these DIA services as wholesale services. They are therefore referred to throughout this document as “wholesale DIA services”. Where necessary, URCA has made the distinction between retail and wholesale DIA services (for example, when discussing how these services are used by customers).

Furthermore, URCA notes that the various ways in which wholesale DIA services are used in The Bahamas fall into two categories:

- an end-to-end service (i.e., to the customer premises), which allows OLOs to offer retail DIA services to their customers; and
- a service connecting to the OLO’s point of presence, or “PoP” (such as a base station or data centre), which allows OLOs to use wholesale DIA as an input for the delivery of retail Fixed Wireless Access (“FWA”) services.

¹⁶ As noted in footnote 3 in Section 1, URCA understands that there is commonly no distinction between retail and wholesale DIA services in terms of technical and service characteristics. URCA further understands that both BTC and CBL charge the same price for wholesale DIA services (i.e., services sold to OLOs) and retail DIA services, for services of the same bandwidth.

¹⁷ For example, via wireless services delivered using a network of towers (and potentially other passive infrastructure such as street furniture), using Fixed Wireless Access (“FWA”) technology.

¹⁸ An example of these bespoke connectivity solutions are connectivity services provided to retail banks, which wish to connect their main office in The Bahamas to the Internet and also connect their network of ATMs or branches across The Bahamas. URCA understands that a bank would typically seek to meet its overall connectivity needs based on a bespoke solution/combination of connectivity products from one provider (or two providers for resilience).

In order to ensure that regulation is effective, URCA considers that any regulation of wholesale DIA services must include both types of wholesale DIA services. That is, any regulation of wholesale DIA services must apply to the full connectivity service demanded (to the end customer premise or the OLO's PoP), which may in some cases include other wholesale services (such as WLLs). This is to prevent the wholesale services commonly required along wholesale DIA services themselves becoming a bottleneck, thereby presenting similar regulatory issues to those identified for wholesale DIA. For the avoidance of doubt, this does not apply to these other wholesale services provided on a standalone basis.

As such, any reference to regulation of wholesale DIA services in this Preliminary Determination applies to both types of wholesale DIA services (to the end customer premise or the OLO's PoP).

3.2.2 Overview of service providers

DIA services are offered by three service providers in The Bahamas: BTC, CBL, and Global Nexus. URCA notes that Global Nexus is much smaller than the two main service providers, and relies on a third party's network access in The Bahamas (URCA understands that Global Nexus purchases Local Loops from BTC and CBL and leases wholesale international capacity on the ARCOS sub-sea cable system) to provide retail and wholesale DIA services and other retail and wholesale services in The Bahamas. More information on Global Nexus is provided in Section 4.

In line with its respective geographic network coverage area, BTC offers retail and wholesale DIA services throughout The Bahamas, whereas CBL offers these services only in the four largest islands: New Providence, Abaco, Grand Bahama and Eleuthera. Global Nexus currently offers retail and wholesale DIA services in New Providence, Grand Bahama, Eleuthera, Bimini, Andros and Exuma.

3.2.3 Demand for wholesale DIA services

In other jurisdictions, OLOs typically have no demand for wholesale DIA services provided by the incumbent or other providers. Their Internet connectivity needs are often better served with other wholesale services, such as bitstream. However, this situation differs in The Bahamas where a number of smaller, niche OLOs focus on serving a relatively small customer base, commonly using FWA technology to deliver "last-mile" services. However, these OLOs typically lack the required core network infrastructure and international connectivity to do so using such services. As such, these OLOs purchase wholesale DIA services, rather than investing in their own connectivity.

As stated above, in general, OLOs might use wholesale DIA services as an input to provide a range of retail (or other wholesale) services. URCA understands that the two main uses of DIA services by OLOs are (i) to resell DIA as a retail service and (ii) to obtain Internet connectivity as an input for their own retail broadband services.

URCA understands that wholesale DIA services in The Bahamas are mostly purchased by smaller OLOs,¹⁹ which commonly use these services as an input to (residential and commercial) retail broadband services, and in some cases retail DIA services. In particular, URCA is aware of the following OLOs purchasing wholesale DIA services, on a commercial basis.²⁰

- **Wicom**,²¹ a provider of business connectivity and FWA-based residential and business retail broadband services in New Providence, purchases wholesale DIA services from BTC and CBL in order to deliver Internet connectivity to its retail customers.
- **Bahamas WiMax**²² is a provider of FWA-based residential and business retail broadband services in Abaco, Exuma, New Providence, and Cat Island.²³ It is the only OLO listed by BTC as a purchaser of its wholesale DIA services.²⁴ Bahamas WiMax also purchases wholesale DIA services from CBL; URCA understands that it buys the service from CBL within CBL’s coverage footprint and from BTC elsewhere.
- **Coakster**,²⁵ a provider of FWA-based residential and business retail broadband services in Abaco, purchases wholesale DIA services from CBL in order to deliver Internet connectivity to its retail customers.
- **Secure Hosting**²⁶ is a cloud and data hosting provider with two data centres on New Providence and Grand Bahama. It purchases wholesale DIA services from BTC and CBL to provide backhaul from its data centres.
- **Aliv**²⁷ purchases wholesale DIA services from BTC and uses these in order to provide Internet connectivity to its own offices rather than to serve its customers. Although Aliv is a subsidiary of CBL, which provides its own wholesale DIA services, Aliv is subject to coverage obligations in areas where CBL does not have the necessary coverage to facilitate.

Retail DIA services are often bought by large corporate customers and may be sold as part of a wider connectivity solution (e.g., along with a number of WLLs), for example to connect branches of the customer’s own network. As explained further in Section 4, such services are often provided as a single bespoke service; the customer does not necessarily know the detailed breakdown of the retail DIA connection(s) and local loops (“LLs”) used to deliver the service. URCA does not have detailed information regarding the specific customers served by the SMP operators or the OLOs.

¹⁹ With the exception of Aliv, as noted above. URCA understands from the service providers’ submissions that BTC does not purchase any wholesale services from any other service providers and that Global Nexus does not purchase any wholesale DIA services.

²⁰ URCA notes that the specific OLOs listed below, which provided formal submissions to URCA, only represent a subset of all OLOs buying these wholesale DIA services.

²¹ <https://www.wicombahamas.com/>

²² <http://www.bahamaswimax.com/>

²³ Bahamas WiMax also noted that it has some presence in North Eleuthera and a basic presence in Grand Bahama.

²⁴ URCA is aware, however, that Wicom also purchases wholesale DIA services from BTC, and that some other OLOs have approached BTC with a view to purchasing DIA services. However, in the case of Coakster, BTC was unresponsive to the OLO’s requests (more detail provided in 4).

²⁵ <https://www.coakster.com/>

²⁶ <http://www.securehost.com/>

²⁷ <https://www.bealiv.com/>

As a result of industry feedback received during this review regarding the appropriateness of the existing ex-ante regulatory remedies, URCA has undertaken in-depth discussions with the OLOs. The objective of these discussions was to gain a thorough understanding of the characteristics of the services they purchase; the reasons behind their decisions; substitutability of various services; and their experiences in purchasing these services.

OLOs have experienced issues procuring wholesale services offered by the SMP operators which they use as a wholesale input in order to deliver retail broadband services to end-users. Some OLOs have also raised issues with the pricing of these services. In particular, OLOs are predominantly purchasing (currently unregulated) wholesale DIA services. These are used, at times in conjunction with other wholesale services, to support the provision of (end-to-end) retail broadband services, among others. Given that OLOs rely on these services in order to compete at both the wholesale and retail level, this is clearly a concerning matter for URCA.

3.2.4 Specific Areas of Concern relating to wholesale DIA services

As part of URCA's discussions with the OLOs and following the feedback subsequently provided by OLOs, URCA has identified a number of specific areas of concern, particularly in relation to wholesale DIA services. These areas relate to the processes involved in purchasing services; customer service and pricing. In most cases, similar concerns have been raised by multiple OLOs.

These areas of concern are summarised as follows:

- Concerns around constructive refusal to supply; and
- Potential excessive pricing and margin squeeze concerns in relation to retail broadband services.

Specific concerns raised by OLOs

The pricing concerns identified by URCA relate directly to the ability of OLOs to compete with the SMP operators at the retail level in the provision of retail broadband services, as wholesale DIA is a key input to the provision of OLOs' retail broadband services.

For example, in its discussions with the OLOs, URCA received a complaint from **Bahamas WiMax**²⁸ regarding the implications of CBL's current DIA pricing structure for its ability to compete with either BTC or CBL in the retail broadband market.

As noted above, Bahamas WiMax is a provider of retail broadband services in Abaco, Exuma, New Providence, and Cat Island. It uses FWA technology to deliver services across the "last mile" to end-users but, like OLOs providing fixed access services, relies on connectivity offered by BTC and CBL (and Global Nexus) in The Bahamas. These connectivity services include wholesale DIA.

The provider's main concern regards its ability to offer retail broadband services to its customers at a price that is competitive with BTC's and CBL's offerings, as a result of the pricing of wholesale DIA services it

²⁸ Bahamas WiMax is the trading name of Last Mile Communications Ltd.

faces. It referenced CBL's "Revon Enterprise Fiber" DIA service, which CBL sells to both wholesale (i.e., upstream) and retail (i.e., downstream) customers for the same price.

Bahamas WiMax acknowledged that in a competitive market it would be possible for OLOs to compete with the incumbents by 'oversubscribing' their upstream bandwidth. For example, an OLO would typically purchase less capacity than the sum of the 'underlying' retail bandwidths by an order of magnitude, since all the providers' customers are not likely to be requiring use of the entire bandwidth simultaneously. It noted, however, that the extent to which this is possible is limited. It submitted its view that this oversubscription ratio (also known as a 'contention ratio') is typically around 10 to 1 (i.e., providers would buy wholesale services of bandwidth equal to one-tenth, or 10%, of the bandwidth they need at the retail level). It added that rates higher than 15 to 1 would be likely to cause a poor user experience (i.e., it would become noticeable and have a negative effect on the retail customer).

Bahamas WiMax noted that in order to compete with the retail prices offered by BTC and CBL, for all retail broadband services with a bandwidth greater than 8Mbps, it would be required to operate using an oversubscription ratio of more than 20 to 1. This was reported to exceed 25 to 1 for higher-speed services, with bandwidths greater than 50Mbps. These calculations also did not include any consideration for downstream retail costs, i.e., ignoring the further costs that Bahamas WiMax incurs in order to deliver retail services. To URCA, these examples indicate that an OLO, regardless of how efficient it is, would be unable to compete with either BTC or CBL in terms of price, using their current unregulated wholesale DIA offerings as an input.

Bahamas WiMax added that, in an effort to find a substitute for the wholesale DIA services offered by the BTC and CBL, it considered procuring its own international connectivity from ARCOS, similar to Global Nexus. However, this would require it to co-locate at BTC's cable landing station in Nassau and purchase a WLL from there to its PoP. It considered the charge quoted by BTC and CBL for such a WLL to be uneconomical.

Wicom submitted its view that wholesale DIA prices charged by BTC and CBL are excessive and supported this with a comparison of the wholesale DIA prices for a 10Gbps connection paid by Wicom in The Bahamas against the prices for the same bandwidth in a number of other jurisdictions (2018). It also submitted information relating to a study on the per Mbps prices in the USA of IP Transit between 1998 and 2015. URCA understands that the significant reductions in the IP Transit cost over time have not been reflected in any DIA price reductions in The Bahamas as it has elsewhere, and considers this to be further evidence to support a need to conduct this review.

A third OLO, **Coakster**, submitted evidence to URCA of BTC's failure to respond to a request to subscribe to wholesale DIA services. BTC engaged with the OLO in initial discussions regarding pricing but did not respond to requests for updates on timings for several months, resulting in the OLO being unable to begin offering retail services to any end-customers and creating a lack of uncertainty for the OLO's business planning. In the same email conversations, BTC failed to provide updates regarding other elements of

wholesale access (tower sharing). Such behaviour could possibly constitute constructive refusal to supply.²⁹

URCA's summary of the OLOs' concerns

Together, URCA considers that these experiences demonstrate the limited willingness of BTC and CBL to engage with wholesale access seekers or offer wholesale access on reasonable terms. They provide further evidence that the current degree of regulation in the WBA market is insufficient to support the development of effective competition downstream, to the benefit of end-users.

This strongly suggests that there is a need to review the provision of wholesale DIA services to determine whether there is a need to widen the scope of existing ex-ante regulation within the WBA market.

3.2.5 Focus of This Review

Given the concerns identified above, URCA has conducted a further review of wholesale DIA services, considering both the need for, and if relevant, the most appropriate form of ex-ante regulation of these services going forward. This is covered in the following subsection.

Consultation questions – Focus on wholesale DIA services

Q1. Please provide comments on URCA's focus on wholesale DIA services in this preliminary determination. Please substantiate any responses with supporting evidence.

²⁹ For further details see URCA's Competition Guidelines (ECS COMP. 7 - Abuse of a dominant position), accessible on URCA's website.

4. Review of current WBA SMP obligations

As set out in Section 1 in ECS 09/2018, URCA found CBL to hold SMP in the provision of WBA services in geographic areas where it has network coverage and BTC to hold SMP in all remaining areas. At the time, URCA refrained from imposing new SMP obligations on either SMP operator, but instead requested both BTC and CBL to revise the terms and conditions of their BROs in line with URCA's requirements.

This Section sets out URCA's preliminary review of these SMP obligations in relation to WBA services in order to determine whether the BRO remains an appropriate and sufficient remedy, with a specific focus on wholesale DIA services.

4.1 Regulatory Treatment of wholesale DIA Services

As outlined above, this Section sets out URCA's assessment of the need to widen the scope of regulation within the WBA market, specifically to cover wholesale DIA services. In doing so, it sets out the regulatory treatment of wholesale DIA services, taking into account its 2018 market definition and SMP findings. In particular, based on the service characteristics, URCA first confirms that wholesale DIA forms part of the WBA market. It then briefly reconfirms that the dominance findings from ECS 09/2018 still hold. This is followed by an outline of the proposed ex-ante regulatory remedies to be imposed in relation to wholesale DIA services, taking into account the market failures observed in URCA's assessment.

URCA notes that in this Section it has relied on data from BTC and CBL, amongst others, in order to calculate wholesale DIA market shares as well as to inform its broader assessment of the competitive dynamics in the relevant retail and wholesale markets. This data includes regulatory reporting data that BTC and CBL are required to submit to URCA on a regular basis in addition to the data received from multiple information requests issued by URCA specifically for this review. It is important to highlight that the information gathering stage of this review was hampered extensively due to both BTC and CBL asking for deadline extensions to submit responses, claims by both operators that they lacked relevant data on their own services, and submissions of incomplete responses. Moreover, URCA has experienced extensive issues with the data provided by BTC and notes that this falls below the standards expected of a licensed operator. In particular, in the case of the data relating directly to wholesale (and retail) DIA services, several rounds of clarification were required in order to extract the necessary information from BTC, further delaying the overall review process. In the case of regulatory reporting data, ongoing issues relating to BTC's ability to provide the required data in a timely manner has forced URCA to look to other sources in order to support its understanding of the market. URCA urges BTC to engage cooperatively with URCA in future consultations and other data collection processes.

4.1.1 Market definition

URCA has firstly sought to confirm whether wholesale DIA services form part of the WBA market. In order to do this, it is first necessary to consider whether wholesale DIA services can be considered demand-side and/or supply-side substitutes for WBA services, or whether they may more likely form part of the wholesale business connectivity ("WBC") market, or indeed, a separate market altogether.

In line with ECS 20/2011 (“Methodology for Assessment of Significant Market Power (SMP) under Section 39(2) of the Communications Act, 2009”)³⁰, URCA first assesses demand-side substitutability, followed by supply-side substitutability. URCA then assesses the geographic scope of the WBA market.

Demand-side considerations

A review of demand-side substitutability requires a comparison of the service characteristics as well as an assessment of customers’ (OLO) views regarding the substitutability of the focal service, and any potential evidence in relation to observed customer switching. Here, URCA considers whether this suggests that wholesale DIA services belong in the WBA market (or the WBC market).

As outlined in Section 3, wholesale DIA services offer dedicated, symmetric Internet access accompanied by high standards of SLAs. DIA services serve as both wholesale and retail services. In a wholesale context, OLOs purchase these services in order to provide Internet connectivity to retail customers. For example, OLOs purchasing DIA services can resell capacity downstream to retail broadband customers, but may also resell the service as a ‘retail’ DIA service (either standalone or as part of a bespoke connectivity solution). At a retail level, business retail customers purchase these services in order to deliver Internet connectivity to their premises in The Bahamas. This connectivity may then be extended to other locations within The Bahamas using WLLs.

In order to assess whether wholesale DIA services are a demand-side substitute for WBA services, URCA has considered the similarities between wholesale DIA services and the BRO. Although wholesale DIA services offer symmetric access, whereas the BRO is an asymmetric retail service, both offer an element of Internet connectivity and provide customers (i.e., OLOs) with a wholesale input that can be used, in conjunction with other services, such as WLLs, to deliver retail broadband services to end-users.

As described in Section 3, wholesale DIA services exhibit differences to WBC services. Critically, however, the functionality of DIA services, as described above, contrasts to the P2P and P2MP connectivity offered by Wholesale and Retail Business Connectivity services (WBC and RBC services, respectively), which do not include Internet access.

Although wholesale DIA services differ from some other WBA services (such as the BRO) in that the Internet access is symmetric and subject to higher standards of SLAs, the element of Internet access is key. In particular, there are varying degrees of asymmetry and service standards, which blur the lines between wholesale DIA services and other services such as bitstream, which also provide high-bandwidth Internet connectivity to customers. This is particularly true for large corporate customers, which purchase retail variants of DIA, and small OLOs which rely on wholesale DIA services in order to support the provision of Internet connectivity to retail end-users via residential and commercial broadband services.

³⁰ Issued 13 October 2011 and available at <http://www.urcabahamas.bs/download/059384700.pdf>

Furthermore, OLOs have submitted to URCA that they do not consider WBC services to be demand-side substitutes for wholesale DIA services due to the differences in the functionality they provide (primarily the absence of an Internet connection in WBC services).

A demand-side assessment typically also analyses the relative prices of the services under consideration, but in this case URCA does not have the required information available to assess this particular metric. Nonetheless, given the stark differences in functional characteristics between wholesale DIA and WBC services, URCA considers that pricing is less important than might be the case in other market definition exercises. This is because a change in relative prices would not affect the fundamental differences between wholesale DIA and WBC services. Rather, the similarities between wholesale DIA and other WBA services (for example, high-capacity Internet access), support URCA's finding that wholesale DIA services are demand-side substitutes for WBA services.

Supply side considerations

An assessment of supply-side substitutability considers the ability of providers to switch between the supply of different services. Both BTC and CBL use the same infrastructure to deliver both wholesale DIA services and other WBA services which include an element of Internet connectivity and domestic connectivity.

In contrast, providers of WBC services must have their own Internet connectivity in order to switch from providing WBC services to alternatively, or additionally, providing wholesale DIA services. This would require non-trivial incremental investment into international connectivity (either in the form of self-supply or purchasing it from third parties) to be able to supply the Internet connectivity to the provider's PoP and thus represents a material barrier to entry.

URCA therefore considers that wholesale DIA services are a supply-side substitute for WBA services, but not for WBC services.

Summary of product market definition findings

In summary, URCA considers that wholesale DIA services (as referred to in Section 3.2.1 above) form part of the WBA market. This is for two key reasons related to the demand-side characteristics, beyond the obvious supply-side similarities:

- DIA services are a wholesale input into WBA services, as well as retail broadband services, in The Bahamas. This is the case both for the SMP operators, BTC and CBL, who offer their own DIA services, as well as the OLOs. That is, in order to offer any downstream services, a service provider requires Internet connectivity, which is facilitated by the DIA service.

- DIA services provide access to the Internet which cannot be replicated using other wholesale services, such as the P2P and P2MP connectivity facilitated by WLLs. This Internet access is a necessary input to OLOs' retail offerings, including both bespoke business solutions and retail and business broadband services.
- The OLOs which URCA has held in-depth discussions with in the course of this market review (and its wider regulatory remit) have explained that they do not consider any other wholesale services offered by BTC or CBL (for example, WBC services or standalone WLLs) to be demand-side substitutes for wholesale DIA services.

Geographic market definitions

A final consideration is the relevant geographic market definition for wholesale DIA services. As URCA has determined that these services form part of the WBA market, it believes it is appropriate to again consider the two geographic markets it has defined in 2018 for wholesale broadband services, namely:

- **Geographic Market 1** - The islands where BTC and CBL both have network infrastructure enabling them to offer WBA services (i.e., New Providence, Abaco, Grand Bahama and Eleuthera).
- **Geographic Market 2** - All remaining islands (i.e., where only BTC has a network infrastructure enabling it to offer WBA services).

Consultation questions – Market definition

Q2. Please provide comments on URCA's market definitions of WBA services as set out above. Please substantiate any responses with supporting evidence.

4.1.2 Competition assessment

In this Section, URCA presents its competition assessment within the markets described above. This includes confirmation of URCA's SMP findings in ECS 09/2018 as well as an in-depth assessment of the provision of wholesale DIA services in particular. For the avoidance of doubt, given that URCA has not amended the definition of the WBA market but rather only clarified the services which fall within it, there is no need to assess the competitive dynamics and BTC's and CBL's market power in the provision of

wholesale DIA services. URCA, however, considers this analysis to be helpful in order to confirm that the market dynamics for wholesale DIA services are similar to those in the wider WBA market.

4.1.2.1 Confirmation of SMP findings in the WBA market

As set out in Section 3.2.1, URCA's review of the retail and wholesale broadband access service markets in The Bahamas (ECS 09/2018) confirmed BTC's and CBL's dominance in these markets. More specifically, BTC and CBL were found to be dominant in:

- **Geographic Market 1** - The islands where BTC and CBL both have network infrastructure enabling them to offer WBA services (i.e., New Providence, Abaco, Grand Bahama and Eleuthera). CBL was found to hold SMP in the provision of WBA services in this area.
- **Geographic Market 2** - All remaining islands (i.e., where only BTC has a network infrastructure enabling it to offer WBA services). BTC was found to hold SMP in the provision of WBA services in this area.

URCA has considered a number of factors in assessing BTC's and CBL's SMP positions in the WBA market.

- First, only a limited period of time has passed since ECS 09/2018 was published. URCA understands that there have been very limited developments in competitive dynamics in the WBA or retail fixed broadband market since the 2018 review. In particular, there has been no new entry into the WBA market (or indeed any take-up of the BROs) since ECS 09/2018 was published. As such, the WBA market remains predominantly characterised by BTC's and CBL's self-supply of broadband access services (with, as set out further below, DIA services only constituting a small share of the overall market).

Given this, URCA understands that the SMP operators' market shares in retail broadband services remain very similar to those observed in ECS 09/2017 (and used to inform URCA's decision in ECS 09/2018).³¹ Given the significant element of self-supply in retail and wholesale broadband markets, this trend is also indicative of very limited movement in the WBA market.

- Secondly, wholesale DIA services account for only a small proportion of revenues when compared to retail broadband service revenues, indicating that these services do not constitute a significant part of this market. URCA notes that although it is not possible to measure the size/value of the wholesale market directly, given the significant level of self-supply, an assessment of the retail market revenues provides an indication of the relative market sizes. Retail DIA revenues for BTC and CBL constitute approximately 18% of total retail broadband and retail DIA revenues.³² As a result, the inclusion of wholesale DIA services within the WBA market will not change the overall

³¹ This is supported by third party (Telegeography) data on retail broadband connections, which shows that the market shares from BTC and CBL have remained stable between 2016 (for which the latest data was available during ECS 09/2017) and Q3 2019 (latest data currently available). Unfortunately, significant amounts of missing data from BTC prevented URCA from conducting a meaningful assessment of market shares using the regulatory reporting data submitted by BTC and CBL.

³² Based on 2018 retail broadband revenues submitted to URCA by BTC and CBL as part of their regulatory reporting requirements. Note that BTC has not submitted all the requested revenue data and so this is likely to be an underestimate of the total retail broadband market size.

market shares or SMP findings within the WBA market. Indeed, each provider’s market share in the WBA market is mirrored by its share of wholesale DIA services, set out below.

Given these factors, URCA considers the competitive dynamics in the retail and wholesale broadband markets has not changed to any significant degree since the 2018 review. URCA is therefore of the preliminary view that BTC and CBL continue to have SMP in their respective retail and wholesale broadband access markets, set out above.

Consultation questions – SMP designations

Q3. Please provide comments on URCA’s reconfirmation of the prevailing SMP designations in the WBA markets in The Bahamas. Please substantiate any responses with supporting evidence.

4.1.2.2 Assessment of Wholesale DIA services

As mentioned above, given the clarification that wholesale DIA services form part of the WBA market, there is no need to assess the competitive dynamics and BTC’s and CBL’s market power in the provision of wholesale DIA services. However, URCA considers this analysis to be helpful to confirm that market dynamics for these particular services are similar to those in the wider WBA market.

Overview of service providers

The two main providers of retail and wholesale DIA services in The Bahamas are the two SMP operators, BTC and CBL. Akin to other broadband services, both providers self-supply their DIA services and offer wholesale DIA services to third parties based on their end-to-end fixed network infrastructure.

A third, smaller provider, Global Nexus, also offers wholesale DIA services. However, in doing so it is dependent on third party wholesale inputs (i.e., it does not have an end-to-end network infrastructure in The Bahamas and procures wholesale services from BTC and CBL for its domestic connectivity and for its international connectivity from ARCOS, a subsidiary of Cable & Wireless, via a ‘wet capacity’ landing at BTC’s landing station in The Bahamas).³³

Figure 1 illustrates BTC’s and CBL’s shares of wholesale DIA services within **Geographic Market 1** (i.e., the areas where both BTC and CBL operate),³⁴ measured according to the share of wholesale DIA **revenues**

³³ URCA understands that Global Nexus focuses on offering retail rather than wholesale DIA services. Furthermore, it is positioned as a relatively premium provider, offering a higher quality of service than the SMP operators for a premium price and at the retail level focusing on a small number of corporate customers.

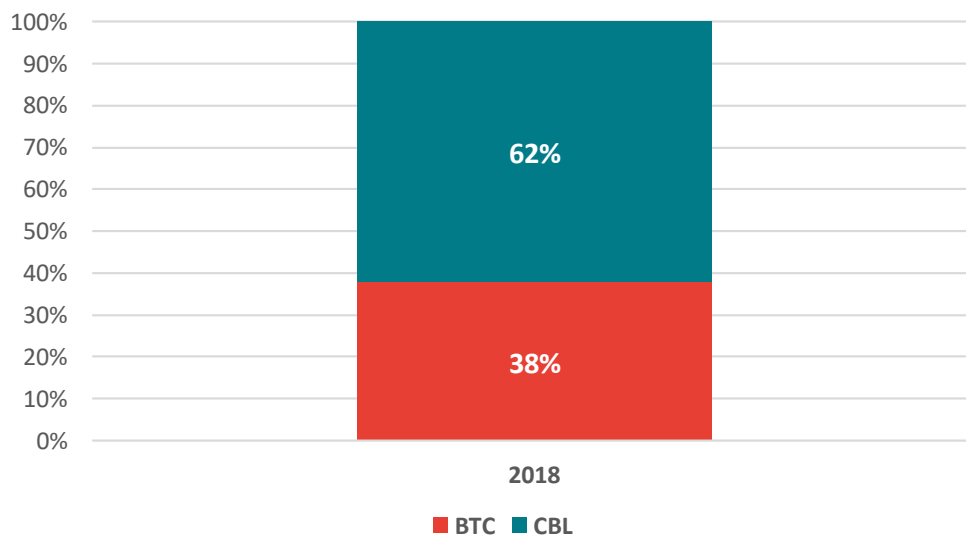
³⁴ Granular information relating to wholesale DIA connections was only available at the national level. As such, URCA has estimated the proportion of BTC’s DIA revenues which relate to each geographic market using historic data. URCA notes even if 100% of BTC’s revenues were assumed to be generated in Geographic Market 2, CBL would continue to hold the majority revenue share. This is also true for the shares of bandwidth. By definition, BTC has a 100% share in Geographic Market 2 for both measures, as only BTC operates a network in that area.

during 2018, the latest year for which data was available.³⁵ Typically URCA will also consider “market” shares in terms of the number of connections but notes that for wholesale DIA services, where each provider has only a handful of large customers, measuring volumes in terms of the total number of connections is less meaningful.

Furthermore, URCA notes it only used information with which to calculate market shares from the two SMP operators, excluding the presence of Global Nexus, the only other provider of DIA services in The Bahamas. However, URCA understands from its discussions with the industry that Global Nexus’s share of the total wholesale DIA services is negligible and therefore considers its analysis to be representative of the wider wholesale DIA service market.

The vertically integrated structures of BTC and CBL mean that their overall strength in the wholesale market is strongly influenced by their provision of retail DIA services, as they use their own wholesale network to provide retail DIA services. Notably, retail DIA services account for the majority of all DIA services offered by BTC and CBL in terms of both revenues and bandwidth. This self-supply must therefore be reflected in a full assessment of BTC’s and CBL’s position in the provision of wholesale DIA services. As such, the revenue shares presented in Figure 1 take into account self-supply of wholesale DIA services by both BTC and CBL.

Figure 1: BTC and CBL wholesale DIA revenue shares in Geographic Market 1, 2018

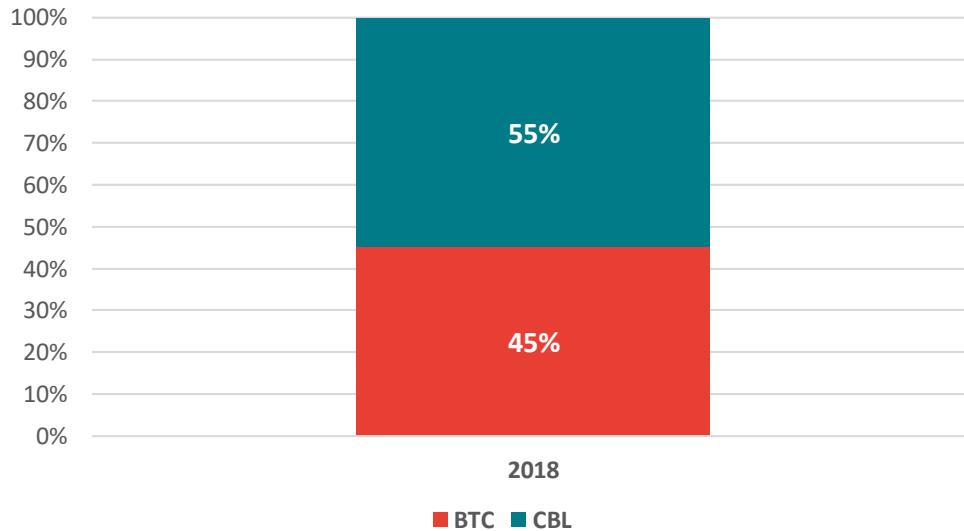


URCA considered that the varied uses of retail DIA services may raise concerns for the measurement of revenue-based shares. In particular, when these services are sold as part of a bespoke – or bundled – product offering, the revenues associated with individual service components may not be easily identifiable. URCA has therefore also derived BTC’s and CBL’s respective shares of **total bandwidth of**

³⁵ A comparison of revenue (or bandwidth) shares over time was not possible as data relating to retail services, required in order to ascertain self-supply volumes, was unavailable for years prior to 2018.

wholesale DIA services. These bandwidth shares, presented in Figure 2, provide a similar picture to the revenue shares presented earlier; with CBL again holding the majority share in Geographic Market 1.

Figure 2: BTC and CBL wholesale DIA bandwidth shares in Geographic Market 1, 2018



URCA notes that CBL’s stronger position in Geographic Market 1, according to both revenue and bandwidth shares presented in Figure 1 and Figure 2 above, is consistent with its position in the wider WBA market, where CBL was found to hold SMP (both in ECS 09/2018 and confirmed earlier in this Section).

URCA has not presented data here on market shares in **Geographic Market 2**. This is because BTC holds a monopoly in the wholesale provision in this market, as no other provider has network infrastructure in that market.

Wholesale DIA service pricing and profitability

Neither BTC nor CBL is currently subject to ex-ante price regulation in the provision of wholesale (or retail) DIA services. URCA is, therefore, able to assess pricing trends for DIA services with a view to identifying whether these trends suggest there is some degree of competition in the provision of these services.

In examining these price trends, URCA has not seen any evidence that DIA list prices have changed significantly over time. For example, none of the DIA service prices offered by the SMP operators have changed since 2017, when URCA gathered data in the course of its WBA market review culminating in ECS 09/2018.

Although the price benchmarking information submitted by Wicom, discussed in Section 3.2.4, lacks sufficient detail for URCA to be able to verify the comparability of the services, URCA considers that the absence of wholesale DIA price reductions over time as noted above, despite evidence of significant reductions in IP Transit costs, discussed in the same Section, is inconsistent with a competitive market dynamic.

The information available to URCA also does not allow it to compare wholesale DIA charges in The Bahamas against underlying unit costs in order to assess whether BTC or CBL are earning excess returns on the provision of these services. For example, URCA does not have access to sufficiently granular information in the SMP operators' separated accounts to undertake this analysis.

Neither BTC nor CBL faces price competition from OLOs within The Bahamas in their respective geographic SMP markets. Information relating to Global Nexus's pricing of DIA services was not available; however, as described earlier in this Section, URCA understands that Global Nexus focuses on offering premium services to customers who are less price-sensitive (i.e., competing on quality rather than on price) and therefore typically charges higher prices than BTC and CBL in return for higher quality services than those offered by BTC and CBL. Accordingly, Global Nexus is unlikely to be a viable supplier of wholesale inputs for many OLOs wishing to supply retail services to end-users in The Bahamas. Although Global Nexus has the technical ability to offer these services, it is unclear whether it would be able to compete on price with BTC and CBL. Importantly, URCA understands that one reason for this lack of price competition may relate to Global Nexus's dependence on inputs from BTC and CBL.

Barriers to Entry and Expansion for wholesale DIA services

In line with other WBA services, an alternative operator wishing to provide wholesale DIA services would require substantial capital investments in order to deploy the required infrastructure (both domestic and international connectivity). Given the presence of BTC's and CBL's existing end-to-end networks, URCA considers that the need to deploy any additional infrastructure in order to compete in the provision of wholesale DIA services constitutes a high barrier to entry (and thereafter, expansion), particularly given the small overall size of the Bahamian market, which limits the scale of demand from prospective wholesale customers. New entrants could seek to reduce these investment needs by instead procuring wholesale inputs from BTC and CBL (with respect to domestic connectivity) and international carriers (with respect to international connectivity), as has been the case for Global Nexus. However, as these services are currently not available on regulated terms, any such wholesale services would need to be procured on commercial terms.

Further, whilst Global Nexus has successfully entered the market, given its prevailing dependency on domestic connectivity inputs from BTC/CBL, URCA considers it to face potential barriers to expansion, at least compared to BTC and CBL who can self-supply these services. This puts BTC and CBL at a competitive advantage to Global Nexus.

Countervailing Buyer Power in the context of wholesale DIA services

Countervailing Buyer Power (“CBP”) could limit the ability of CBL or BTC to set wholesale DIA prices above the competitive level. However, in the context of wholesale DIA services, URCA has not seen any evidence of CBP, or of market conditions which might be conducive to CBP. Indications of potential CBP, and the reasons why these are not present in The Bahamas, include:

- Any one buyer's share of wholesale purchases constituting a sizeable proportion of BTC’s or CBL’s total output. URCA does not consider this to be the case. The significant share of the wholesale DIA market which is characterised by self-supply means that BTC and CBL are the main ‘consumers’ of wholesale output. Individual OLOs only purchase a small volume of wholesale DIA services, especially when taking into account self-supply by BTC and CBL.
- A single or a few buyers’ shares of purchases constituting a sizeable proportion of BTC’s or CBL’s total cost. Again, the importance of self-supply means this is not the case in the context of wholesale DIA services.
- A buyer which is able to switch between suppliers (i.e., between BTC and CBL) easily, where the supplier has invested in assets specific to that buyer. URCA understands that purchasers of wholesale DIA services typically choose BTC or CBL according to the presence of their networks, and furthermore that in providing wholesale DIA services BTC and CBL are not required to make any significant investments in customer-specific assets.

Given the above, URCA considers that, in absence of regulation, any potential CBP does not constrain BTC or CBL from pricing wholesale DIA services above the competitive level. Indeed, it notes that neither BTC nor CBL has submitted any evidence of any OLO exhibiting or exercising significant CBP.

4.2 Additional Ex-Ante Regulation of WBA Services

URCA’s approach to ex-ante regulation of telecommunications services must involve a consideration of proportionality. That is, since the overall Bahamian market is small and ex-ante regulation can be costly, URCA must consider whether the benefits of introducing any regulations outweigh the costs of setting and enforcing those regulations. However, URCA also has a responsibility to ensure that competition in telecommunications markets is effective and delivers good outcomes for end users and the economy overall.

In order to balance these objectives, URCA has generally taken a gradual approach to introducing ex-ante regulation. As described in Section 3.1.2, in the WBA market this began with the imposition of the obligation on SMP operators to offer BROs, which were subsequently reviewed. URCA now wishes to enhance the degree of downstream competition and, in particular, give OLOs an increased ability to differentiate the services they are able to offer to end-users.

Following extensive discussions with the stakeholders, particularly the OLOs, URCA believes that the most effective way in which to achieve the above would be to require BTC and CBL to offer wholesale DIA

services on regulated terms in the geographic markets where they respectively hold a position of SMP. This regulatory requirement would address a number of commercial realities faced by the OLOs and desirable to URCA, including the ability for service differentiation, competition across a greater part of the overall network, and therefore also a greater potential for cost savings, which are likely to lead to stronger competition on both pricing and quality measures. The need for such regulation is discussed in Section 4.2.1 below.³⁶

4.2.1 The Need for Ex-Ante Regulation of wholesale DIA Services

Given URCA's reconfirmation that wholesale DIA services form part of the WBA market, URCA now considers that the set of remedies in the WBA market must be extended to include wholesale DIA services. The introduction of ex-ante regulation in relation to wholesale DIA services includes, but is not limited to, the requirement to publish reference offers.

This finding is also supported by feedback provided by OLOs in response to URCA's market questionnaires, and in subsequent discussions, as set out in Section 3.2.4. URCA has investigated these matters and has come to the conclusion that these further support the need for intervention in the WBA market.

4.2.1.1 Expected Competition Problems and Consumer Harm

In ECS 09/2018, URCA set out its concerns regarding the market failures that could occur in the absence of ex-ante regulation in the WBA market, characterised by the behaviour of the SMP operators. The market failures found at the time were excessive charging (also referred to as excessive pricing) and refusal to supply. The definitions of the concepts, as set out in URCA's market review and URCA's Competition Guidelines, are repeated below for reference.

- **Excessive Charging.** Excessive charging at the wholesale level is a key concern of regulatory and competition authorities in the electronic communications sector. Excessive pricing occurs when the SMP operator is able to set its prices above the efficient cost of providing these services and thus earn greater profits (supernormal profits) than would otherwise be possible in a competitive market. Excessive wholesale charging can lead to higher retail tariffs for end-users in related downstream (retail) markets and can also, in certain circumstances, limit the ability of access seekers to compete downstream.

URCA considers that in the defined markets, CBL and BTC (respectively), have the incentive and ability to engage in excessive charging, given their control over essential network infrastructure facilities and the limited degree of countervailing buyer power that access seekers have. Excessive pricing would result in higher input prices for any competing network which in turn could lead to higher retail tariffs to customers on different networks.

³⁶ As explained in Section 1, URCA may in future decide to introduce additional regulated wholesale products, such as wholesale business connectivity services or bitstream. Should URCA decide to introduce any such products, it would do so via a similar consultation process to this one in order to engage a wide range of market participants.

- **Refusal to Supply.** Refusal to supply occurs where an SMP operator in a wholesale market attempts to leverage its market power from the wholesale market into the relevant (retail) downstream market by denying, either explicitly or constructively, access to its network, or refusing to deal with competitors in the downstream market. This could amount to anti-competitive behaviour if, for example, the SMP operator controls a wholesale input or inputs which allow other players to operate and/or compete in the downstream market and which are technically or economically difficult to replicate. If the ability to replicate the SMP operator's wholesale service is limited, a refusal to supply may lead to foreclosure of the relevant downstream market.³⁷

In the case of wholesale DIA services, URCA has identified a third potential market failure: **margin squeeze**. Margin squeeze occurs when a vertically integrated operator sets wholesale and retail prices such that OLOs, which depend on access to the SMP operators' infrastructure, are unable to profitably replicate the SMP operators' retail offers (i.e., there is an insufficient margin between the retail and wholesale prices charged by the SMP operator).³⁸

4.2.1.2 Assessment of specific market failures

URCA now analyses each of the three market failures described above, with a specific focus on wholesale DIA services:

- Excessive charging;
- Refusal to supply; and
- Margin squeeze.

Each market failure is discussed in turn and assessed with reference to the available evidence and OLOs' submissions. URCA notes that the ability and incentive of SMP operators to engage in each form of anti-competitive conduct is sufficient to warrant the introduction of ex-ante regulatory remedies to protect OLOs, and competition in the wider ECS, from any abuse of a dominant position by the SMP operators. That is, URCA does not need to demonstrate that anti-competitive conduct has actually occurred.

³⁷ The concept of refusal to supply covers a wide range of anti-competitive practices, including a refusal to supply essential inputs to an existing or new competitor, a refusal to provide interface information, or more generally a refusal to grant access to an essential (bottleneck) facility or network. Refusal to supply also includes offering trading conditions so unreasonable that they amount to a constructive refusal to supply. Constructive refusal could, for example, take the form of unduly delaying or degrading the supply of a product or service, or involve the imposition of unreasonable conditions in return for the supply or charging unreasonably high prices for the products and services.

³⁸ For further details see URCA's Competition Guidelines (ECS COMP. 7 - Abuse of a dominant position), accessible on URCA's website.

Excessive charging

Excessive pricing is often a concern where a service provider enjoys a position of SMP and is not constrained in its pricing by the presence of competitors or ex-ante price regulation.

BTC's and CBL's respective SMP positions reflect their ability to behave, to an appreciable extent, independently of competitors and customers. For example, several factors, including a lack of competitive pressure from other service providers and countervailing buyer power from customers (see Section 4.1.2.2), allow both BTC and CBL, in their respective SMP markets, to price above the level that would be observed in a competitive market (i.e., above the cost-reflective level).

Both SMP operators have the ability to do so, in the absence of ex-ante price regulation, since their SMP positions in part reflect the limited choice faced by the OLOs, which in turn rely on the wholesale inputs offered by the SMP operators in order to provide services to end-users. In other words, BTC and CBL are able to increase their wholesale prices profitably above the competitive level as the OLOs who buy the services face a limited choice of viable alternatives.

Both SMP operators also have the incentive to raise prices; not only is it profitable for them to do so, but excessive pricing might also reduce the profits earned by their competitors, thereby harming their ability to invest in and expand their own businesses (and therefore to compete effectively with BTC and CBL at the retail level). Such behaviour might even drive OLOs out of the retail market, to the advantage of the SMP operators. Excessive prices might also discourage potential new entry by prospective OLOs who plan to purchase these wholesale services to enter and compete in the relevant downstream markets.

In summary, the SMP positions enjoyed by BTC and CBL create a clear ability and incentive for each provider to set excessive wholesale charges. URCA believes that, in the absence of remedies introduced to prevent BTC's and CBL's abuse of their dominant positions, competition in the ECS is likely to suffer.

Refusal to supply

URCA preliminarily considers that both BTC and CBL have control over wholesale DIA services in The Bahamas. OLOs must have access to wholesale DIA services on reasonable terms in order to compete effectively with BTC and CBL at the retail level, whether that is in the provision of retail broadband services or bespoke retail services which require an element of Internet connectivity. Although OLOs may be able to compete with BTC and CBL in the provision of retail broadband services using the BROs as a wholesale input, the wholesale DIA services allows greater differentiation of their services and more flexibility (for example, to provide a combination of retail broadband and bespoke retail services).

Indeed, the OLOs' submissions to URCA during the course of this review process have suggested that there have been concerns around potential refusal, by the SMP operators, to supply wholesale DIA services. Specifically, Coakster provided evidence of BTC allegedly failing to offer access to wholesale DIA on reasonable terms, etc. (see Section 3 above).

Margin squeeze

As introduced earlier, margin squeeze occurs when a vertically integrated operator sets wholesale and retail prices such that OLOs are unable to profitably replicate the SMP operators' retail offers using the vertically integrated operator's wholesale inputs. URCA notes that a margin squeeze may be committed if OLOs are unable to compete in the manner described above using only some of the SMP operators' wholesale inputs. That is, in the case of broadband services, even if OLOs are able to replicate the SMP operators' retail broadband offers by purchasing the BROs, URCA may find a margin squeeze if OLOs were unable to compete on the basis of a commonly-used wholesale input such as wholesale DIA. This is particularly the case where the wholesale input (i.e., wholesale DIA) offers clear advantages to the OLO and/or end-users (for example, a greater degree of retail service differentiation), compared to other wholesale inputs which represent a viable basis for retail competition (in this case, the BROs).

URCA considers that BTC's and CBL's control of infrastructure used to provide the wholesale inputs on which OLOs depend in order to compete in the provision of retail broadband provides both the incentive and ability for BTC and CBL to exercise a margin squeeze in the absence of wholesale regulation. In particular, since BTC and CBL are both vertically integrated (i.e., offering wholesale and retail services), they may have an incentive, in the absence of regulation, to charge relative retail and wholesale prices such that OLOs are unable to compete at the retail level.

URCA has received evidence submitted by the OLOs that alleges BTC and CBL may currently be exercising a margin squeeze. In particular, as explained in Section 3.2.4, OLOs have told URCA that the wholesale DIA prices charged by BTC and CBL do not allow them to compete in the broadband market at the retail level. URCA will investigate specific allegations of anticompetitive behaviour separately to this consultation process.

Consultation questions – The need for ex-ante regulation of wholesale DIA services

Q4. Please provide comments on URCA's preliminary views on the main competition problems or market failures that could arise from a licensee having SMP in respect of the provisioning of wholesale DIA services.

Q5. Please provide comments on URCA's preliminary views on the need for ex-ante regulation of wholesale DIA services.

Please substantiate any responses with supporting evidence.

4.2.2 Proposed SMP Remedies

URCA considers that all of the market failures identified in Section 4.2.1.2 could have detrimental effects on the level of competition in the electronic communications sector, as they may reduce OLOs' ability to compete in provision of retail services. This, in turn, could impact the interests of consumers who may face (among other things) higher prices, lower quality services and lower levels of innovation compared to a situation where these market failures did not materialise. In light of this, URCA sets out below the proposed additional regulatory obligations it proposes to impose on SMP operators in the WBA market.

Given that two of the market failures URCA has set out above in relation to the provision of Wholesale DIA services mirror those set out in ECS 09/2018, URCA is of the view that it is appropriate to introduce similar remedies for the provision of Wholesale DIA services, to those described within ECS 09/2018. However, given its concerns regarding the potential risk of margin squeeze, URCA is also of the preliminary view that additional remedies are required in order to prevent the SMP operators from being able to engage in such conduct. Each of the proposed SMP remedies is detailed below.

As set out in Section 3.2.1, URCA considers that any regulation of wholesale DIA services must include both types of wholesale DIA services in order to ensure that regulation is effective. That is, any regulation of wholesale DIA services must apply to the full connectivity service demanded (to the end customer premise or the OLO's PoP), which may in some cases include other wholesale services (such as WLLs). This is to prevent the wholesale services commonly required along wholesale DIA services themselves becoming a bottleneck, thereby presenting similar regulatory issues to those identified for wholesale DIA. For the avoidance of doubt, this does not apply to these other wholesale services provided on a standalone basis.

As such, the proposed SMP remedies in relation to wholesale DIA services, set out below, apply to both types of wholesale DIA services (to the end customer premise or the OLO's PoP).

4.2.2.1 Proposed additional SMP remedies in the WBA market

Under the statutory framework of the Comms Act, URCA is obliged to impose (and maintain or amend where they already exist) on SMP operators a range of appropriate and proportionate regulatory obligations from those permitted under section 40 of the Comms Act. URCA has therefore considered additional regulatory measures to remedy, mitigate or prevent any potential anticompetitive behaviour by BTC or CBL in the WBA market.

As a first step, URCA notes that a determination that a licensee has SMP in a relevant market triggers the non-market specific obligations in section 40(4) of the Comms Act and Conditions 34 and 35 of its IOL. As such, these will automatically apply to BTC and CBL if the findings set out in this document are confirmed in URCA's Final Determination.

Given the structural characteristics of WBA service markets, URCA considers that the section 40(4) and Conditions 34 and 35 IOL obligations by themselves would be insufficient to achieve the overall policy objectives of the Comms Act. The section 40(4) and Conditions 34 and 35 obligations provide the minimum threshold, but not a sufficient, level of protection against a SMP operator behaving anti-competitively. In

particular, these obligations do not guard against the following behaviours in relation to an essential “bottleneck facility”:

- excessive charging;
- refusal to grant access on reasonable terms; and
- margin squeeze.

This is evidenced by the OLOs’ submissions to URCA in the context of this wholesale market review, as detailed in Section 4.2.1.2. Further, without imposing additional obligations on SMP providers, OLOs may not have full visibility of the proposed price and non-price terms of wholesale DIA services, meaning there can be no guarantee to the wider market that the non-discrimination obligation is being complied with. To this end, URCA considers that it would be appropriate and proportionate to impose additional SMP conditions on BTC and CBL.

In particular, URCA proposes that:

- BTC and CBL shall be subject to an obligation to amend their reference offers to include wholesale DIA services (in line with the service description in Section 3.2.1), which shall then be reviewed and approved by URCA; and
- the charges contained in these reference offers shall be subject to cost-based regulation (i.e., wholesale DIA service charges shall be reflective of the efficiently incurred underlying costs of these services, including a reasonable return on those costs).

Preparation and publication of reference offer

BTC and CBL shall amend their reference offers (i.e., the BTC RAIO and CBL’s terms and conditions for fixed call termination services) to include wholesale DIA services, setting out the tariff and non-price terms and conditions on which their wholesale DIA offers shall be provided. BTC and CBL shall also publish such details prominently on their websites and additionally make such information available in other formats upon request.

The information set out in the reference offers for wholesale DIA services should include, at the minimum, the following:

- the pricing of the wholesale DIA services in the form of a table setting out, for each bandwidth of wholesale DIA service, the corresponding regulated wholesale charges.
- the main non-price terms and conditions including:
 - a detailed description of the wholesale DIA service offerings;
 - service ordering and delivery process and timings;
 - quality of service standards (incl. key performance indicators and financial compensation for missing these);
 - billing and payment requirements;

- details of a dispute resolution scheme; and
- operations and maintenance procedures.

The amended prices and non-price terms and conditions of the reference offers shall be reviewed by URCA, and must be approved before final publication. As part of this review process, URCA will share the draft reference offers with the industry for review and comments.

Cost-based wholesale charges

BTC and CBL's charges for wholesale DIA services shall be cost-based. These charges will be determined by URCA based on a separate costing exercise. As part of this process, BTC and CBL will have to submit cost information as requested by URCA.

Once the Final Determination on this review process is published, URCA will communicate separately on the approach to setting these cost-based charges (including the costing standard to be applied, the approach to determining the relevant costs, and proposed next steps in determining the charges).

For the avoidance of doubt, BTC and CBL shall also comply with the non-market specific SMP obligations specified in section 40(4) of the Comms Act, Conditions 34 and 35 of the IOLs and specific SMP obligations on wholesale services, accounting separation and cost accounting as set out in the current and also any future determinations, decisions, and regulations issued by URCA, and which will remain in place until such time as determined by URCA. Furthermore, URCA notes that the existing BRO obligations set out in ECS 09/2018 remain in place.

Consultation questions – Proposed SMP remedies

Q6. Please provide comments on URCA's preliminary views on the proposed SMP remedies in the WBA service markets.

5. Next steps

Within the previous Sections, URCA has set out its preliminary position on the need for ex-ante regulation of wholesale DIA services, in the form of requiring both BTC and CBL to amend their reference offers to include wholesale DIA services as well as the introduction of ex-ante price regulation of the wholesale DIA wholesale services offered by BTC and CBL.

URCA invites interested parties to comment on its preliminary position by responding to the consultation questions set out in this document by 5:00 p.m. on 27 May 2020. Interested parties will then have the opportunity to further comment on submissions made by other respondents by 30 June 2020.

URCA will then review all written responses to the consultation when preparing its Final Determination which will, amongst others, set out the specific SMP obligations imposed on BTC and CBL in relation to the wholesale DIA services described above.