SECOND SUPPLEMENT TO THE GIBRALTAR GAZETTE

No. 4800 GIBRALTAR Thursday 24th December 2020

LEGAL NOTICE NO. 506 OF 2020

COMMUNICATIONS ACT 2006

INTERPRETATION AND GENERAL CLAUSES ACT

COMMUNICATIONS ACT 2006 (AMENDMENT) REGULATIONS 2020

In exercise of the powers conferred upon it by section 23(g)(ii) of the Interpretation and General Clauses Act, and all other enabling powers, and in order to implement in the Law of Gibraltar Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code and recasting Directive 2002/19/EC, Directive 2002/20/EC, Directive 2002/21/EC and Directive 2002/22/EC, the Government has made these Regulations-

Title.

1. These Regulations may be cited as the Communications Act 2006 (Amendment) Regulations 2020.

Commencement.

2. These Regulations come into operation on the date of publication.

Amendment of the Communications Act 2006.

3. The Communications Act 2006 is amended in accordance with the provisions of these Regulations.

Amendment of Section 2.

4. In section 2–

(a) in subsection (1), the definition of "Access Directive" is deleted;

(b) in subsection (1), in the definition of "associated service" the words ", self-provision or automated provision" are inserted after the word "provision" and before the word "of services";

(c) in subsection (1), the definition of "Authorisation Directive" is deleted;

(d) in subsection (1), in the definition of "call" the words "electronic communications" are replaced with the words "interpersonal communications";

(e) in subsection (1), in the definition of "conditional access system" the word "authentication" is inserted between the words "any" and "system,";

(f) in subsection (1), in the definition of "conditional access system" the word "facility," is deleted;

(g) in subsection (1), in the definition of "consumer" the words ", craft" are inserted between the words "business" and "or";

(h) in subsection (1), the following new definition is inserted between the definitions of "direction" and "electronic communications apparatus"-

""Directive" means Directive (EU) 2018/1972 of the European Parliament and the Council establishing the European Electronic Communications Code, as the same may be amended from time to time;";

(i) in subsection (1), the definition of "electronic communications network", is replaced in its entirety with-

""electronic communications network" means transmission systems, whether or not based on a permanent infrastructure or centralised administration capacity, and, where applicable, switching or routing equipment and other resources, including network elements which are not active, which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including internet) and mobile networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed;";

(j) in subsection (1), the definition of "electronic communications service", is replaced in its entirety with-

""electronic communications service" means a service normally provided for remuneration via electronic communications networks, which encompasses, with the exception of services providing, or exercising editorial control over, content transmitted using electronic communications networks and services, the following types of services-

(a) internet access service;

(b) interpersonal communications service; and

(c) services consisting wholly or mainly in the conveyance of signals such as transmission services used for the provision of machine-to-machine services and for broadcasting;";

(k) in subsection (1), the definition of "Framework Directive" is deleted;

(l) in subsection (1), the definition of "general authorisation", is replaced in its entirety with-

""general authorisation" means the legal framework established under and pursuant to this Act ensuring rights for the provision of electronic communications networks or electronic communications services or both and laying down sector-specific obligations that may apply to all or to specific types of electronic communications networks and electronic communications services;";

(m) in subsection (1), the following definition is inserted between the definitions of "harmful interference" and "information"-

""harmonised radio spectrum' means radio spectrum for which harmonised conditions relating to its availability and efficient use have been established by way of technical implementing measures in accordance with Article 4 of Decision No 676/2002/EC;";

(n) in subsection (1), the following definitions are inserted between the definitions of "interconnection" and "leased line"-

""interpersonal communications service" means a service normally provided for remuneration that enables direct interpersonal and interactive exchange of information via electronic communications networks between a finite number of persons, whereby the persons initiating or participating in the communication determine its recipient(s) and does not include services which enable interpersonal and interactive communication merely as a minor ancillary feature that is intrinsically linked to another service;

"internet access service" means a publicly available electronic communications service that provides access to the internet, and thereby connectivity to virtually all end points of the internet, irrespective of the network technology and terminal equipment used;";

(o) in subsection (1), in the definition of "local loop" the word "circuit" is replaced with the word "path";

(p) in subsection (1), in the definition of "network termination point" the words "subscriber" and "subscriber's" are replaced with "end-user" and "end-user's";

(q) in subsection (1), the following definitions are inserted between the definitions of "network termination point" and "Privacy Directive"-

""'number-based interpersonal communications service" means an interpersonal communications service which connects with publicly assigned numbering resources, namely, a number or numbers in the Gibraltar Numbering Plan or international numbering plans, or which enables communication with a number or numbers in the the Gibraltar Numbering Plan or in an international numbering plan;

"number-independent interpersonal communications service" means an interpersonal communications service which does not connect with publicly assigned numbering resources, namely, a number or numbers in the Gibraltar Numbering Plan or international numbering plans, or which does not enable communication with a number or numbers in the Gibraltar Numbering Plan or in an international numbering plan;";

(r) in subsection (1), the following definition is inserted between the definitions of "publicly available telephone service" and "radiocommunications"-

""radio local area network" or "RLAN" means s low-power wireless access system, operating within a small range, with a low risk of interference with other such systems deployed in close proximity by other users, using, on a non-exclusive basis, harmonised radio spectrum;";

(s) in subsection (1), the following definitions are inserted between the definitions of "radiocommunications licence" and "significant market power"-

""security incident" means an event having an actual adverse effect on the security of electronic communications networks or services;

"security of networks and services" means the ability of electronic communications networks and services to resist, at a given level of confidence, any action that compromises the availability, authenticity, integrity or confidentiality of those networks and services, of stored or transmitted or processed data, or of the related services offered by, or accessible via, those electronic communications networks or services;

"shared use of radio spectrum" means-

(a) access by two or more users to use the same radio spectrum bands under a defined sharing arrangement which is authorised on the basis of a general authorisation; and

(b) individual rights of use for radio spectrum or a combination thereof, including regulatory approaches such as licensed shared access aiming to facilitate the shared use of a radio spectrum band, subject to a binding agreement of all parties involved, in accordance with sharing rules as included in their rights of use for radio spectrum in order to guarantee to all users predictable and reliable sharing arrangements without prejudice to the application of any applicable competition law;";

(t) in subsection (1), the following definition is inserted between the definitions of "signal" and "SMP obligation"-

""small-area wireless access point" means low-power wireless network access equipment of a small size operating within a small range, using licenced radio spectrum

or licence-exempt radio spectrum or a combination thereof, which may be used as part of a public electronic communications network, which may be equipped with one or more low visual impact antennae, and which allows wireless access by users to electronic communications networks regardless of the underlying network topology, be it mobile or fixed;";

(u) in subsection (1), the definition of "Specific Directives" is replaced with-

""Specific Directives" means the Directive and the Privacy Directive, as may be amended from time to time;";

(v) in subsection (1), in the definition of "transnational markets" the words "Article 15(4) of the Framework Directive" are replaced with "Article 65 of the Directive";

(w) in subsection (1), the definition of "Universal Services Directive" is deleted;

(x) in subsection (1), in the definition of "user" the words "natural or legal" are inserted between the words "means a" and "person";

(y) in subsection (1), the following definitions are inserted after the definition of "user"-

""very high capacity network" means either-

(a) an electronic communications network which consists wholly of optical fibre elements at least up to the distribution point at the serving location; or

(b) an electronic communications network which is capable of delivering, under usual peak-time conditions, similar network performance in terms of available downlink and uplink bandwidth, resilience, error-related parameters, and latency and its variation;

"voice communications service" means a publicly available electronic communications service for originating and receiving, directly or indirectly, national or international calls, or both through a number or numbers in the Gibraltar Numbering Plan or in an international numbering plan;";

(z) in subsection (8), the words "Framework Directive" are replaced with the word "Directive".

Amendment of Section 4.

5. In section 4-

(a) in subsection (1A), the following new paragraph is inserted between paragraphs (a) and (b)-

"(aa) information on electronic communications networks and facilities which is sufficiently detailed to enable the geographical survey and designation of areas in accordance with section 48A;";

(b) the following new subsections are inserted between subsection (1A) and subsection (2)-

"(1B) Where the information collected in accordance with subsection (1) is insufficient for the Minister and the Authority to perform the functions assigned to or conferred respectively upon them by or under this Act, such information may be inquired from other persons active in the electronic communications or closely related sectors.

(1C) The Minister and the Authority may each request information from the single information point established pursuant to section 13(6).

(1D) The Minister and the Authority shall not duplicate requests of information already made by BEREC pursuant to Article 40 of Regulation (EU) 2018/1971 where BEREC has made the information received available to the Minister and the Authority."

Amendment of Section 19.

6. In section 19-

(a) in subsection (1)(a)(i), the words "in the provision of electronic communications networks and associated facilities, including efficient infrastructure-based competition, and in the provision of electronic communications services and associated services" are inserted after the words "to promote competition";

(b) in subsection (2)(b)(i), the words "and facilitating convergent conditions for, investment in, and" are inserted between the words "obstacles to" and "the provision of";

(c) in subsection (2)(b)(i), the word "and" between the words "electronic communications services" and "associated facilities" is replaced with ",";

(d) in subsection (2)(b)(i), the words "and associated services" are inserted between the words "associated facilities" and "at European Community level";

(e) in subsection (2)(b)(i), the ";" after the words "at European Community level" is deleted and the words "by developing common rules and predictable regulatory approaches, by favouring the effective, efficient and coordinated use of radio spectrum and open innovation;" are inserted after the words "at European Community level";

(f) subsection (2)(b)(ii) is replaced in its entirety with-

"encouraging the establishment and development of trans-European networks, the provision, availability and interoperability of pan-European services, and end-to-end connectivity;";

(g) subsection (2)(c) is replaced in its entirety with-

"(c) in so far as promotion of the interests of users in Gibraltar is concerned-

(i) ensuring connectivity and the widespread availability and take-up of very high capacity networks, including fixed, mobile and wireless networks, and of electronic communications services;

(ii) enabling maximum benefits in terms of choice, price and quality on the basis of effective competition;

(iii) maintaining the security of networks and services;

(iv) ensuring a high and common level of protection for end-users through the necessary sector-specific rules;

(v) addressing the needs, such as affordable prices, of specific social groups, in particular end-users with disabilities, elderly end-users and end-users with special social needs;

(vi) choice and equivalent access for end-users with disabilities.";

(h) in subsection (3), the word "impartial," is inserted between the words "apply" and "objective";

(i) in subsection (3)(a), the ";" after the words "review periods" is removed and the words "and through cooperation with other national regulatory authorities, with BEREC, with the Radio Spectrum Policy Group and with the European Commission;" are inserted after the words "review periods";

(j) subsection (3)(c) is replaced in its entirety with-

"(c) apply Gibraltar and European Community Law in a technologically neutral fashion;";

(k) subsection (3)(e) is replaced in its entirety with-

"(e) take due account of the variety of conditions relating to infrastructure, competition, the circumstances of end-users and, in particular, consumers in Gibraltar, including local infrastructure managed by natural persons on a not-for-profit basis;";

(l) the superfluous subsection (3) appearing after subsection (4) is deleted;

(m) the following new subsection (5) is inserted after subsection (4)-

"(5) The Authority shall, where necessary, enter into co-operative arrangements with the national regulatory authorities of other Member States with the aim to foster regulatory co-operation."

Amendment of Section 20.

7. In section 20-

(a) in subsection (1), the word "and" is deleted at the end of paragraph (a) and the "." at the end of paragraph (b) is replaced with ";";

(b) the following new paragraphs are inserted after paragraph (b)-

"(c) providing services, technical interfaces or network functions;

(d) providing end to end connectivity; and

(e) facilitation of provider switching and portability of numbers and identifiers."

Amendment of Section 22.

8. In section 22, in subsection (1) the words "Article 7b of the Framework Directive" are replaced with "the Directive".

Amendment of Section 23.

9. In section 23-

(a) In subsection (2), the words "Article 7(4) of the Framework Directive (market identification that do not conform to European Commission recommendations and determinations that affect trade between Member States)" are deleted and replaced with "Article 32(4) of the Directive";

(b) In subsection (3), the words "Article 7(5)(a) of the Framework Directive" are deleted and replaced with "Article 32(6) of the Directive";

Amendment of Section 26.

10. In section 26-

(a) in subsection (6)(b), the words "Framework and" are deleted;

(b) in subsection (8), the words "Article 5 of the Framework Directive" are replaced with "Article 20 of the Directive";

(c) in subsection (8), the words ", including information gathered in the context of a geographical survey," are inserted between the words "information" and "classified";

(d) in subsection (8), the words "and personal data" are inserted between the words "business confidentiality" and "adopted".

Amendment of Section 32.

11. In section 32, in subsection (1), the words ", other than number-independent interpersonal communications services," are inserted between the words "electronic communications services" and "may be provided".

Amendment of Section 34A.

12. In section 34A-

(a) in subsection (1), the words "and proportionate" are inserted between the words "appropriate" and "technical";

(b) in subsection (2), the words ", including encryption where appropriate" are inserted between the words "subsection (1)" and "shall";

(c) in subsection (2), the "." after the word "networks" is deleted and the words "and services." are inserted after the word "networks";

(d) in subsection (4), the words "without undue delay" are inserted between the words "notify" and "the";

(e) in subsection (4), the words "breach of security or loss of integrity" are replaced with the words "security incident";

(f) the following new subsection is inserted between subsection (4) and subsection (5)-

"(4A) In order to determine the significance of the impact of a security incident, where available, the following parameters shall be considered:

(a) the number of users affected by the security incident

(b) the duration of the security incident

(c) the geographical spread of the area affected by the security incident

(d) the extent to which the functioning of the network or service is affected

(e) the extent of impact on economic and societal activities."

(g) the following new subsections are included after subsection (7)-

"(8) The Authority shall ensure that in the case of a particular and significant threat of a security incident in public electronic communications networks or publicly available electronic communications services, providers of such networks or services shall inform their users potentially affected by such a threat -

(a) of any possible protective measures or remedies which can be taken by the users; and

(b) where appropriate, of the threat itself.

(9) This section is without prejudice to Regulation (EU) 2016/679 and the Privacy Directive."

Amendment of Section 34B.

13. In section 34B-

(a) in subsection (1), the words "directions regarding the measures required to remedy a security incident or prevent one from occurring when a significant threat has been identified and" are inserted between the words "including" and "in relation";

(b) in subsection (3), the "."after the word "networks" is deleted and the words "and services." are inserted after the word "networks";

(c) the following new subsections are inserted after subsection (3)-

"(3A) In order to give effect to section 34A, the Authority may obtain the assistance of the Gibraltar CSIRT as defined in the Civil Contingencies Act 2007;

(3B) The Authority shall, where appropriate and in accordance with applicable Gibraltar law, consult and cooperate with the relevant law enforcement authorities, the Competent Authorities within the meaning of the Civil Contingencies Act 2007 and the Competent Authority under the Data Protection Act 2004."

New Section 36A.

14. The following new section is inserted following section 36-

"36A.(1) The Minister and the Authority may also grant rights of use for numbering resources from the Gibraltar Numbering Plan for the provision of specific services to persons other than providers of electronic communications networks or electronic communications services, provided that adequate numbering resources are made available to satisfy current and foreseeable future demand.

(2) The persons referred to in subsection (1) shall demonstrate their ability to manage the numbering resources and to comply with any relevant requirements set out pursuant to the Authorisation Regulations.

(3) The Minister or the Authority may suspend the further granting of rights of use for numbering resources to such persons if it is demonstrated that there is a risk of exhaustion of numbering resources

(4) The Minister or the Authority shall make available a range of non-geographic numbers which may be used for the provision of electronic communications services other than interpersonal communications services, throughout the European Union, without prejudice to Regulation (EU) No 531/2012 and Article 97(2) of the Directive.

(5) Where rights of use for numbering resources have been granted in accordance with subsection (1) to persons other than providers of electronic communications networks or electronic communications services, this subsection and subsection (4) shall apply to the specific services for the provision of which the rights of use have been granted.

(6) The Minister and the Authority shall ensure that the conditions listed in Part E of Schedule 1 of the Authorisation Regulations that may be attached to the rights of use for numbering resources used for the provision of services outside Gibraltar, and their enforcement, are as stringent as the conditions and enforcement applicable to services provided within Gibraltar, in accordance with the provisions of this Act.

(7) The Minister and the Authority shall ensure, in accordance with the provisions of the Authorisation Regulations, that providers using numbering resources of their country code in other Member States comply with consumer protection and other rules related to the use of numbering resources applicable in those Member States where the numbering resources are used. This obligation is without prejudice to the enforcement powers of the competent authorities of those Member States."

Amendment of Section 39.

15. In subsection (2), the words "and if applicable, also take into account the results of the geographical survey conducted in accordance with section 48A" between the words "section 23," and "whenever".

Amendment of Section 40.

16. In section 40-

(a) the following new subsection is inserted after subsection (6)-

"(6A) The Authority shall ensure that parties affected by the withdrawal of an SMP obligation receive an appropriate notice period, defined by balancing the need to ensure-

(a) a sustainable transition for the beneficiaries of those obligations and end-users;

(b) end-user choice; and

(c) that regulation does not continue for longer than necessary.

(6B) When setting the notice period, the Authority may determine specific conditions and notice periods in relation to existing access agreements.";

(b) the following new subsection is inserted after subsection (7)-

"(7A) A market may be considered to justify the imposition of regulatory obligations set out in this section if all of the following criteria are met-

(a) high and non-transitory structural, legal or regulatory barriers to entry are present;

(b) there is a market structure which does not tend towards effective competition within the relevant time horizon, having regard to the state of infrastructure-based competition and other sources of competition behind the barriers to entry;

(c) applicable competition law alone is insufficient to adequately address the identified market failure(s);

(7B) Where the Authority conducts an analysis of a market that is included in the recommendation, it shall consider that paragraphs (a), (b) and (c) of subsection (7A) have been met, unless the Authority determines that one or more of such criteria is not met because of specific circumstances applying to Gibraltar;

(7C) Where the Authority conducts the analysis required by subsection (7A), it shall consider developments from a forward-looking perspective in the absence of regulation imposed on the basis of this section in that relevant market, and shall consider all of the following-

(a) market developments affecting the likelihood of the relevant market tending towards effective competition;

(b) all relevant competitive constraints, at the wholesale and retail levels, irrespective of whether the sources of such constraints are considered to be electronic communications networks, electronic communications services, or other types of services or applications which are comparable from the perspective of the end-user, and irrespective of whether such constraints are part of the relevant market;

(c) other types of regulation or measures imposed and affecting the relevant market or related retail market or markets throughout the relevant period, including, without limitation, obligations imposed in accordance with section 52, and the Access Regulations;

(d) regulation imposed on other relevant markets pursuant to this section.

(7D) Where the Authority determines that, in a relevant market the imposition of regulatory obligations in accordance with this section is justified, it shall identify any persons which individually or jointly have a significant market power on that relevant market in accordance with section 38.

(7E) The Authority shall impose on such persons appropriate specific regulatory obligations in accordance with the Access Regulations or maintain or amend such obligations where they already exist if it considers that the outcome for end-users would not be effectively competitive in the absence of those obligations.";

(c) subsection (9)(a) is replaced in its entirety with-

"(a) within five years from the adoption of a previous measure where the Authority has defined the relevant market; that five-year period may, on an exceptional basis, be extended for up to one year, where the Authority has notified a reasoned proposal for an extension to the European Commission no later than four months before the expiry of the five-year period, and the European Commission has not objected within one month of the notified extension; or";

(d) in subsection (9)(b), the words "two years" are replaced with the words "three years";

(e) in subsection (10), the words "considers that it may not complete or" are inserted between the words "Authority" and "has not".

New Sections 40A, 40B and 40C.

17. The following new sections are inserted after section 40-

"**Termination Rates.**

"40A.(1) Where the European Commission decides, following its review in accordance with Article 75 of the Directive, not to impose a maximum mobile voice termination rate or a maximum fixed voice termination rate, or neither, the Authority may conduct market analyses of voice termination markets in accordance with section 40, to assess whether the imposition of regulatory obligations is necessary.

(2) If as a result of such analysis, the Authority imposes cost-oriented termination rates in a relevant market, it shall follow the principles, criteria and parameters set out in Schedule 2 and its draft measure shall be subject to the procedures referred to in sections 13, 22 and 23.

(3) The Authority shall closely monitor, and ensure compliance with, the application of the European Union-wide voice termination rates by providers of voice termination services.

(4) The Authority may, at any time, require a provider of voice termination services to amend the rate it charges to other providers and persons if it does not comply with Article 75(1) of the Directive.

(5) The Authority shall report annually to the European Commission and to BEREC in respect of the application of this section.

Regulatory treatment of new very high capacity network elements.

40B.(1) Persons which have been designated as having significant market power in one or several relevant markets in accordance with section 40 may offer commitments, in accordance with the procedure set out in the Access Regulations and subject to subsection (2), to open the deployment of a new very high capacity network that consists of optical fibre elements up to the end-user premises or base station to co-investment by-

(a) offering co-ownership or long-term risk sharing through co-financing; or

(b) through purchase agreements giving rise to specific rights of a structural character by other providers of electronic communications networks or electronic communications services.

(2) The Authority shall assess the commitments referred to in subsection (1), in order to determine whether the offer to co-invest complies with the following conditions-

(a) it is open at any moment during the lifetime of the network to any provider of electronic communications networks or electronic communications services;

(b) it would allow other co-investors which are providers of electronic communications networks or electronic communications services to compete effectively and sustainably in the long term in downstream markets in which the person designated as having significant market power is active, on terms which include-

(i) fair, reasonable and non-discriminatory terms allowing access to the full capacity of the network to the extent that it is subject to co-investment;

(ii) flexibility in terms of the value and timing of the participation of each co-investor;

(iii) the possibility to increase such participation in the future; and

(iv) reciprocal rights awarded by the co-investors after the deployment of the co-invested infrastructure;

(c) it is made public by the person in a timely manner and, if the person does not have the characteristics listed in section 40C(1), at least six months before the start of the deployment of the new network which period may be prolonged based on circumstances specific to Gibraltar;

(d) access seekers not participating in the co-investment can benefit at the outset from the same quality, speed, conditions and end-user reach as were available before the deployment, accompanied by a mechanism of adaptation over time confirmed by the Authority in light of developments on the related retail markets, that maintains the incentives to participate in the co-investment; such mechanism shall ensure that access seekers have access to the very high capacity elements of the network at a time, and on the basis of transparent and non-discriminatory terms, which reflect appropriately the degrees of risk incurred by the respective co-investors at different stages of the deployment and take into account the competitive situation in retail markets;

(e) it complies at a minimum with the criteria set out in Schedule 3.

(3) If the Authority concludes, taking into account the results of the market test conducted in accordance with the Access Regulations, that the co-investment commitment offered complies with the conditions set out in subsection (2), it shall-

(a) make that commitment binding; and

(b) shall not impose any additional obligations as regards the elements of the new very high capacity network that are subject to the commitments,

if at least one potential co-investor has entered into a co-investment agreement with the person designated as having significant market power.

(4) Subsection (3) shall be without prejudice to the regulatory treatment of circumstances that do not comply with the conditions set out in subsection (2), taking into account the results of any market test conducted in accordance with the provisions of the Access Regulations, but that have an impact on competition and are taken into account for the purposes of section 40 and the relevant provisions in the Access Regulations.

(5) The Authority may impose, maintain or adapt remedies as regards new very high capacity networks in order to address significant competition problems on specific markets, where the Authority establishes that, given the specific characteristics of these markets, those competition problems would not otherwise be addressed.

(6) The Authority shall monitor compliance with the conditions set out in subsection (2) on an ongoing basis and may require the person designated as having significant market power to provide it with annual compliance statements.

(7) This section is without prejudice to the power of the Authority to take decisions in the event of a dispute arising between persons in connection with a co-investment agreement considered by it to comply with the conditions set out in subsection (2).

Wholesale-only providers.

40C.(1) If the Authority designates a person which is absent from any retail markets for electronic communications services as having significant market power in one or several wholesale markets in accordance with section 40 it shall consider whether that person has the following characteristics-

(a) all its companies and business units, all companies that are controlled but not necessarily wholly owned by the same ultimate owner, and any shareholder capable of exercising control over the person, only have activities, current and planned for the future, in wholesale markets for electronic communications services and therefore do not have activities in any retail market for electronic communications services provided to end-users in Gibraltar;

(b) the person is not bound to deal with a single and separate person operating downstream that is active in any retail market for electronic communications services provided to end-users, because of-

(i) an exclusive agreement; or

(ii) an agreement which de facto amounts to an exclusive agreement.

(2) If the Authority concludes that the conditions laid down in subsection (1) are satisfied, it may impose on that person only obligations pursuant to the provisions of the Access Regulations or relative to fair and reasonable pricing is justified on the basis of a market analysis including a prospective assessment of the likely behaviour of the person designated as having significant market power.

(3) The Authority shall review the obligations imposed on the person in accordance with this section at any time if it concludes that the conditions laid down in subsection (1) are no longer met and it shall, as appropriate, apply the relevant provisions of the Access Regulations.

(4) The persons shall inform the Authority of any change of circumstance relevant to paragraphs (a) and (b) of subsection (1).

(5) The Authority shall review the obligations imposed on a person in accordance with this section if on the basis of evidence of terms and conditions offered by the person to its downstream customers, the Authority concludes that competition

problems have arisen or are likely to arise to the detriment of end-users which require the imposition of one or more obligations provided in the Access Regulations, or the amendment of the obligations imposed in accordance with subsection (2).

(6) The imposition of obligations and their review in accordance with this section shall be implemented in accordance with the procedures referred to in sections 13, 22 and 23."

New Sections 48A, 48B, 48C, 48D and 48E.

18. The following new sections are inserted immediately preceding section 49, in Part V – Acquisition of Land-

"**Geographical surveys of network deployments**.

48A.(1) The Authority shall conduct a geographical survey of the reach of electronic communications networks capable of delivering broadband ('broadband networks') by 21 December 2023 and shall update it at least every three years thereafter.

(2) The geographical survey shall include-

(a) a survey of the current geographic reach of broadband networks within Gibraltar;

(b) a forecast for a period determined by the Authority of the reach of broadband networks, including very high capacity networks, within Gibraltar.

(3) The forecast shall include -

(a) any information deemed relevant by the Authority;

(b) information on planned deployments by any person or public authority, of very high capacity networks; and

(c) significant upgrades or extensions of networks to at least 100 Mbps download speeds.

(4) The Authority shall request persons and public authorities to provide the information to the extent that it is available and can be provided with reasonable effort.

(5) The Authority shall decide the extent to which it is appropriate to rely on all or part of the information gathered in the context of such forecast.

(6) The information collected in the geographical survey shall-

(a) be at an appropriate level of detail;

(b) shall include sufficient information on the quality of service and parameters; and

(c) shall be treated in accordance with the confidentiality provisions of section 26(8).

(7) A person is guilty of an offence under subsection (4) if he-

(a) knowingly or negligently provides misleading, erroneous or incomplete information to the Authority; or

(b) whether, contrary to the information originally provided or any update thereof, the person or public authority either has deployed, extended or upgraded a network, or has not deployed a network and has failed to provide an objective justification for that change of plan.

48B.(1) The Authority may designate an area with clear territorial boundaries where, on the basis of the information gathered and any forecast prepared pursuant to section 48A(2) , it is determined that, for the duration of the relevant forecast period, no person or public authority has deployed or is planning to deploy a very high capacity network or significantly upgrade or extend its network to a performance of at least 100 Mbps download speeds.

(2) The Authority shall publish the designated areas.

(3) The Minister and the Authority may invite persons and public authorities to declare their intention to deploy very high capacity networks over the duration of the relevant forecast period within a designated area.

(4) Where the invitation referred to in subsection (3) results in a declaration by a person or public authority of its intention to do so, the Minister and the Authority may require other persons and public authorities to declare any intention to deploy very high capacity networks, or significantly upgrade or extend its network to a performance of at least 100 Mbps download speeds in the area.

(5) The Authority shall specify the information to be included in such submissions, in order to ensure at least a similar level of detail as that taken into consideration in any forecast pursuant to section 48A.

(6) The Authority shall inform any person or public authority expressing its interest whether the designated area is covered or likely to be covered by a next-generation access network offering download speeds below 100 Mbps on the basis of the information gathered pursuant to section 48A.

(7) The Authority shall make the results of the geographical survey available to BEREC and the European Commission upon their request and under the same conditions.

(8) If the relevant information is not available on the market, the Authority shall make data from the geographical surveys which are not subject to commercial confidentiality directly accessible in accordance with Directive 2003/98/EC to allow for its reuse.

(9)T he Authority may, where such tools are not available on the market, make available information tools enabling end-users to determine the availability of connectivity in different areas, with a level of detail which is useful to support their choice of operator or service provider.

Deployment and operation of small-area wireless access points.

48C.(1) The Authority shall not unduly restrict the deployment of small-area wireless access points.

(2) The Authority may require permits for the deployment of small-area wireless access points on buildings or sites of architectural, historical or natural value protected in accordance with applicable Gibraltar law or where necessary for public safety reasons.

(3) This section is without prejudice to the essential requirements laid down in Directive 2014/53/EU and to the authorisation regime applicable for the use of the relevant radio spectrum.

(4) The Authority shall ensure that operators have the right to access any physical infrastructure controlled by public authorities, which-

(a) is technically suitable to host small-area wireless access points; or

(b) is necessary to connect such access points to a backbone network, including street furniture, such as light poles, street signs, traffic lights, billboards, bus and tramway stops and metro stations.

(5) Public authorities shall meet all reasonable requests for access on transparent and non-discriminatory terms and conditions, which shall be made public at a single information point.

(6) Without prejudice to any commercial agreements, the deployment of small-area wireless access points shall not be subject to any fees or charges going beyond the administrative charges in accordance with the Authorisation Regulations.

Technical regulations on electromagnetic fields.

48D. The procedures laid down in Directive (EU) 2015/1535 shall apply with respect to any draft measure by the Authority that would impose on the deployment of small-area wireless access points different requirements with respect to electromagnetic fields than those provided for in Recommendation 1999/519/EC.

Migration from legacy infrastructure.

48E.(1) Persons which have been designated as having significant market power in one or several relevant markets in accordance with section 40 shall notify the Authority in advance when they plan to decommission or replace parts of the network with a new

infrastructure, including legacy infrastructure necessary to operate a copper network, which are subject to obligations pursuant to Articles 68 to 80 of the Directive.

(2) The Authority shall ensure that the decommissioning or replacement process-

(a) includes a transparent timetable and conditions;

(b) includes an appropriate notice period for transition; and

(c) establishes the availability of alternative products of at least comparable quality providing access to the upgraded network infrastructure substituting the replaced elements if necessary to safeguard competition and the rights of end-users.

(3) With regard to assets which are proposed for decommissioning or replacement, the Authority may withdraw the obligations after having ascertained that the access provider-

(a) has established the appropriate conditions for migration, including making available an alternative access product of at least comparable quality as was available using the legacy infrastructure enabling the access seekers to reach the same end-users; and

(b) has complied with the conditions and process notified to the national regulatory authority in accordance with this section.

(4) Such withdrawal shall be implemented in accordance with the procedures referred to in sections 13, 22 and 23.

(5) This section is without prejudice to the availability of regulated products imposed by the Authority on the upgraded network infrastructure in accordance with the procedures set out in section 40 and the Access Regulations."

Amendment of Section 50.

19. In section 50-

(a) the title of the section is substituted in its entirety with **"Amendment of rights and obligations."**;

(b) in subsection (1), the words "general authorisations and" are inserted between the words "concerning" and "rights";

(c) in subsection (1), the words "of use for radio spectrum or for numbering resources or rights to" are inserted between the words "rights" and "to install facilities";

(d) in subsection (1), the words "granted under section 49" are replaced with "granted pursuant to the provisions of this Act";

(e) in subsection (1)(b), the "." after the word "achieve" is removed and the words ", taking into consideration, where appropriate, the specific conditions applicable to transferable rights of use for radio spectrum or for numbering resources." are inserted after the word "achieve";

(f) in subsection (2), the words "or of the general authorisation," are inserted after the word "rights" and the words "to install facilities concerned" are deleted;

(g) in subsection (3), the words "A right to install facilities granted pursuant to section 49" are replaced with the words "A right to install facilities or rights of use for radio spectrum or for numbering resources granted pursuant to the provisions of this Act";

(h) in subsection (3)(a), the ";" after the word "justified" is removed and words "taking into account subsection (4);" are inserted after the word "justified";

(i) the following new subsections are inserted after subsection (3)-

"(4) The Minister may allow the restriction or withdrawal of rights of use for radio spectrum, including the rights referred to in section 65A-

(a) based on pre-established and clearly defined procedures; and

(b) in accordance with the principles of proportionality and non-discrimination.

In such cases, the holders of the rights may, where appropriate and in accordance with subsection (3)(b), be compensated appropriately.

(5) A modification in the use of radio spectrum as a result of the application of section 59 shall not alone constitute grounds to justify the withdrawal of a right of use for radio spectrum.

(6) Any intention to restrict or withdraw rights under the general authorisation or individual rights of use for radio spectrum or for numbering resources without the consent of the holder of the rights shall be subject to consultation of the interested parties in accordance with section 13."

Amendment of Section 52.

20. In section 52-

(a) in subsection (1)(b), the words "may take advantage" are replaced with the words "has taken advantage";

(b) in subsection (1)(c), the words "may take advantage" are replaced with the words "has taken advantage";

(c) in subsection (1), after "including associated facilities." the following words are inserted "Where necessary, the Authority may act as the single information point and, subject to subsection (8), set down rules for apportioning the costs of facility or property sharing and of civil works co-ordination";

(d) in subsection (2), the "." is removed and the words "and only in the specific areas where such sharing is considered necessary with a view to pursuing the objectives referred to in this subsection." are inserted after the word "views"."

New Section 58A.

21. The following new section is inserted after section 58-

"**Strategic planning and coordination of radio spectrum policy.**

58A. The Minister and the Authority may, through the Radio Spectrum Policy Group, co-operate with the regulatory authorities of other Member States in support of the strategic planning and co-ordination of radio spectrum policy approaches in the European Union, by-

(a) developing best practices on radio spectrum related matters;

(b) facilitating co-ordination between Gibraltar and other Member States;

(c) contributing to the development of the European internal market;

(d) co-ordinating the approach to the assignment and authorisation of use of radio spectrum; and

(e) publishing reports or opinions on radio spectrum related matters."

Amendment of Section 59.

22. In section 59-

(a) in subsection (2), the words "and electronic communications networks" are inserted between the words "electronic communications services" and "are allocated";

(b) in subsection (2)(a), the word "pro-competitive," is inserted between the words "objective," and "transparent,";

(c) in subsection (2)(b), the words "and other agreements applicable to Gibraltar adopted in the framework of the ITU applicable to radio spectrum" are inserted between the words "applicable to Gibraltar" and the ";" at the end of the paragraph;

(d) in subsection (3), the words "by electronic communication networks and electronic communications services" are inserted between the words "radio frequencies" and "within";

(e) in subsection (3), the words "networks and" are inserted between the words "interoperability of" and "services";

(f) in subsection (3), the "." is replaced with "by-" and the following paragraphs are inserted-

"(a) pursuing wireless broadband coverage of Gibraltar and its population at high quality and speed, as well as coverage of major transport paths in Gibraltar, including trans-European transport network as referred to in Regulation (EU) No 1315/2013 of the European Parliament and of the Council;

(b) facilitating the rapid development in Gibraltar of new wireless communications technologies and applications, including, where appropriate, in a cross-sectoral approach;

(c) ensuring predictability and consistency in the granting, renewal, amendment, restriction and withdrawal of rights of use for radio spectrum in order to promote long-term investments;

(d) ensuring the prevention of cross-border or harmful interference in Gibraltar in accordance with sections 59C and 62 respectively, and taking appropriate pre-emptive and remedial measures to that end;

(e) promoting the shared use of radio spectrum between similar or different uses of radio spectrum in accordance with applicable competition law;

(f) applying the most appropriate and least onerous authorisation system possible in accordance with section 62 in such a way as to maximise flexibility, sharing and efficiency in the use of radio spectrum;

(g) applying rules for the granting, transfer, renewal, modification and withdrawal of rights of use for radio spectrum that are clearly and transparently laid down in order to guarantee regulatory certainty, consistency and predictability;

(h) pursuing consistency and predictability throughout Gibraltar regarding the way the use of radio spectrum is authorised in protecting public health taking into account Recommendation 1999/519/EC.";

(g) the following new subsections are inserted between subsection (3) and subsection (4)-

"(3A) In the case of a lack of market demand in Gibraltar for the use of a band in the harmonised radio spectrum, the Minister may allow an alternative use of all or part of

that band, including the existing use, in accordance with the provisions of this section, provided that-

(a) the finding of a lack of market demand for the use of such a band is based on a public consultation in accordance with section 13, including a forward-looking assessment of market demand;

(b) such alternative use does not prevent or hinder the availability or the use of such a band in other Member States; and

(c) the Minister takes due account of the long-term availability or use of such a band in Gibraltar and the economies of scale for equipment resulting from using the harmonised radio spectrum in Gibraltar.

(3B) A decision to allow alternative use on an exceptional basis shall be subject to a regular review and shall in any event be reviewed promptly upon a duly justified request by a prospective user to the Minister for use of the band in accordance with the technical implementing measure.

(3C) The European Commission and other Member States shall be informed of the decision taken, together with reasons, as well as of the outcome of any review.;

(h) in subsection (5)(b), the words "taking utmost account of Recommendation 1999/519/EC" are inserted between the words "electromagnetic fields" and ";";

(i) the following new subsections are inserted after subsection (17)-

"(18) The Minister shall coordinate the use of harmonised radio spectrum for electronic communications networks and electronic communications services in Gibraltar having considered different market situations. This may include identifying one, or, where appropriate, several common dates by which the use of specific harmonised radio spectrum is to be authorised.

(19) Where harmonised conditions have been set by technical implementing measures in accordance with Decision No 676/2002/EC in order to enable the radio spectrum use for wireless broadband networks and services, the Minister shall allow the use of that radio spectrum by no later than 30 months after the adoption of that measure, or as soon as possible after the lifting of any decision to allow alternative pursuant to section 59.

(20) Subsection (19) is without prejudice to Decision (EU) 2017/899 and to the European Commission's right of initiative to propose legislative acts.

(21) The Minister may delay the deadline provided for in subsection (19) for a specific band under the following circumstances:

(a) to the extent justified by a restriction to the use of that band based on the general interest objective;

(b) in the case of unresolved cross-border coordination issues resulting in harmful interference with third countries, provided the Minister has, where appropriate, requested European Union assistance pursuant to Article 28(5) of the Directive;

(c) safeguarding the security of Gibraltar and defence; or

(d) force majeure pursuant to section 102.

(22) The Minister shall review such a delay at least every two years.

(23) The Minister may delay the deadline provided for in subsection (19) for a specific band to the extent necessary and up to 30 months in the case of-

(a) unresolved cross-border coordination issues resulting in harmful interference, provided that the Minister takes all necessary measures in a timely manner pursuant to section 59C (3) and Article 28(4) of the Directive;

(b) the need to ensure, and the complexity of ensuring, the technical migration of existing users of that band.

(24) In the event of a delay under sub section 21 to 23, the Minister shall inform the other Member States and the European Commission in a timely manner, stating the reasons.

(25) For terrestrial systems capable of providing wireless broadband services, the Minister shall, where necessary in order to facilitate the roll-out of 5G, take all appropriate measures to-

(a) reorganise and allow the use of sufficiently large blocks of the 3,4 -3,8 GHz band;

(b) allow the use of at least 1 GHz of the 24,25 -27,5 GHz band, provided that there is clear evidence of market demand and of the absence of significant constraints for migration of existing users or band clearance.

(26) The Minister may, extend any deadline laid down in respect of subsection (25), where justified, in accordance with subsection (3A) or subsections (19), (21) or (23).

(27) Measures taken by the Minister under subsection (25) shall comply with the harmonised conditions set by technical implementing measures in accordance with Article 4 of Decision No 676/2002/EC.

Amendment of Section 59B.

23. In section 59B-

(a) in subsection (1), the words "Article 9b(3) of the Framework Directive" are replaced with the words "Article 51(3) of the Directive";

(b) the following new subsections are inserted after subsection (4)-

"(4A) The Minister shall allow the transfer or lease of rights of use for radio spectrum where the original conditions attached to the rights of use are maintained. Without prejudice to the need to ensure the absence of a distortion of competition in accordance with section 65C, the Minister shall:

(a) submit transfers and leases to the least onerous procedure possible;

(b) not refuse the lease of rights of use for radio spectrum where the lessor undertakes to remain liable for meeting the original conditions attached to the rights of use;

(c) not refuse the transfer of rights of use for radio spectrum unless there is a clear risk that the new holder is unable to meet the original conditions for the right of use;

(4B) Any administrative charge imposed on persons in connection with processing an application for the transfer or lease of rights of use for radio spectrum shall comply with the provisions of the Authorisation Regulations.

(4C) Paragraphs (a), (b) and (c) of subsection (4A) shall be without prejudice to the Minister's power to enforce compliance with the conditions attached to the rights of use at any time, both with regard to the lessor and the lessee, in accordance with Gibraltar law.

(4D) The Minister shall facilitate the transfer or lease of rights of use for radio spectrum by giving consideration to any request to adapt the conditions attached to the rights and by ensuring that those rights or the relevant radio spectrum may to the best extent be partitioned or disaggregated.

(4E) The Minister shall make the relevant details relating to tradable individual rights publicly available in a standardised electronic format when the rights are created and keep those details for as long as the rights exist.";

(c) in subsection (6), the words "or assigned for broadcasting" are inserted between the words "free of charge" and "the licensee."

New Sections 59C, 59D and 59E.

24. The following new sections are inserted directly after 59B-

"Radio spectrum co-ordination.

59C.(1) The Minister may, without prejudice to the ITU Radio Regulations applicable to Gibraltar, provide that the use of radio spectrum is organised in Gibraltar in a way that no other Member State is prevented from allowing in Gibraltar the use of harmonised radio spectrum in accordance with European Union law.

(2) The Authority may co-operate with the national regulatory authorities of other Member States, and where appropriate, through the Radio Spectrum Policy Group, in the cross-border co-ordination of the use of radio spectrum in order to-

(a) ensure compliance with subsection (1);

(b) resolve any problem or dispute in relation to cross-border coordination or cross-border harmful interference between Gibraltar and another Member State, as well as with third countries, which prevents Gibraltar from using the harmonised radio spectrum in their territory.

(3) The Authority may request the Radio Spectrum Policy Group to address any problem or dispute in relation to cross-border co-ordination or cross border harmful interference.

Joint authorisation process to grant individual rights of use for radio spectrum.

59D.(1) The Authority may co-operate with the national regulatory authorities of other Member States and with the Radio Spectrum Policy Group, taking into account any interest expressed by market participants, by-

(a) jointly establishing the common aspects of an authorisation process; and

(b) where appropriate, jointly conducting the selection process to grant individual rights of use for radio spectrum.

(2) When designing the joint authorisation process, the Authority may take into consideration the following criteria:

(a) the authorisation processes shall be initiated and implemented by the Authority in accordance with a jointly agreed schedule with the national regulatory authority of the Member State concerned;

(b) it shall provide, where appropriate, for common conditions and procedures for the selection and granting of individual rights of use for radio spectrum among the Authority and the national regulatory authority of the Member State concerned;

(c) it shall provide, where appropriate, for common or comparable conditions to be attached to the individual rights of use for radio spectrum among the Authority and the national regulatory authority of the Member State concerned, inter alia allowing users to be assigned similar radio spectrum blocks;

(d) it shall be open at any time to other Member States until the joint authorisation process has been conducted.

(3) Where the Authority and the national regulatory authority of the Member State concerned do not act jointly, they shall inform those market participants of the reasons explaining their decision.

Access to radio local area networks.

59E.(1) The Authority shall allow the provision of access through RLANs to a public electronic communications network, as well as the use of the harmonised radio spectrum for that provision, subject only to applicable general authorisation conditions relating to radio spectrum use as referred to in section 62(4).

(2) Where that provision is not part of an economic activity or is ancillary to an economic activity or a public service which is not dependent on the conveyance of signals on those networks, any person, public authority or end-user providing such access shall not be subject to any general authorisation-

(a) for the provision of electronic communications networks or electronic communications networks services pursuant to section 32;

(b) to obligations regarding end-users' rights; or

(c) to obligations to interconnect their networks pursuant to the provisions of the Access Regulations.

(3) Article 12 of Directive 2000/31/EC shall apply to this section.

(4) The Authority shall not prevent providers of public electronic communications networks or publicly available electronic communications services from allowing access to their networks to the public, through RLANs, which may be located at an

end-user's premises, subject to compliance with the applicable general authorisation conditions and the prior informed agreement of the end-user.

(5) The Authority shall ensure that providers of public electronic communications networks or publicly available electronic communications services do not unilaterally restrict or prevent end-users from-

(a) accessing RLANs of their choice provided by third parties;

(b) allowing reciprocally or, more generally, accessing the networks of such providers by other end-users through RLANs, including third-party initiatives which aggregate and make publicly accessible the RLANs of different end-users.

(6) The Authority shall not limit or prevent end-users from allowing access, reciprocally or otherwise, to their RLANs by other end-users, including third-party initiatives which aggregate and make the RLANs of different end-users publicly accessible.

(7) The Authority shall not unduly restrict the provision of access to RLANs to the public-

(a) by public sector bodies or in public spaces close to premises occupied by such public sector bodies, when that provision is ancillary to the public services provided on those premises;

(b) by initiatives of non-governmental organisations or public sector bodies to aggregate and make reciprocally or more generally accessible the RLANs of different end-users, including, where applicable, the RLANs to which public access is provided in accordance with paragraph (a) of this subsection."

Amendment of Section 61.

25. In section 61, the following new subsections are inserted after subsection (1)-

"(1A) The Minister shall consider applications for individual rights of use for radio spectrum in the context of selection procedures-

(a) pursuant to subsection (10);

(b) set out in advance; and

(c) which reflect the conditions to be attached to such rights.

(1B) The Minister shall be authorised to request all necessary information from applicants in order to assess, on the basis of the procedure set out in subsection (1A), their ability to comply with those conditions.

(1C) Where the Minister concludes that an applicant does not possess the required ability, the Minister shall provide a duly reasoned decision to that effect."

New Section 61A.

26. The following new section is inserted after section 61-

"**Procedure for limiting the number of rights of use to be granted for radio spectrum.**

61A.(1) Without prejudice to section 59, where the Minister concludes that a right to use radio spectrum cannot be subject to a general authorisation and where the Minister considers whether to limit the number of rights of use to be granted for radio spectrum, the Minister shall-

(a) clearly state the reasons for limiting the rights of use by giving due weight to the need to maximise benefits for users and to facilitate the development of competition, and review, as appropriate, the limitation at regular intervals or at the reasonable request of affected persons;

(b) give all interested parties, including users and consumers, the opportunity to express their views on any limitation through a public consultation in accordance with section 13.

(2) If the Minister concludes that the number of rights of use is to be limited, the Minister shall establish the objectives pursued by means of a quantifiable competitive or comparative selection procedure under this section, giving due weight to the need to fulfil national and internal market objectives.

(3) The objectives that the Minister may set out with a view to designing the specific selection procedure shall, in addition to promoting competition, be limited to one or more of the following-

(a) promoting coverage;

(b) ensuring the required quality of service;

(c) promoting efficient use of radio spectrum by taking into account the conditions attached to the rights of use and the level of fees;

(d) promoting innovation and business development.

(4) The Minister shall define and justify the choice of the selection procedure, including any preliminary phase to access the selection procedure.

(5) The Minister shall state the outcome of any related assessment of the competitive, technical and economic situation of the market and provide reasons for the possible use and choice of measures.

(6) Any decision on the selection procedure chosen as well as the conditions that are to be attached to the rights of use shall be published and shall include the related rules.

(7) After having determined the selection procedure, the Minister shall invite applications for rights of use.

(8) Where the Minister concludes that additional rights of use for radio spectrum or a combination of general authorisation and individual rights of use can be granted, the conclusion shall be published the process of granting such rights initiated.

(9) Where the granting of rights of use for radio spectrum needs to be limited, the Minister shall grant such rights on the basis of selection criteria and a selection procedure which are objective, transparent, non-discriminatory and proportionate. Any such selection criteria shall give due weight to the objectives and requirements of sections 19, 58A, 59 and 59C.

(10) Where competitive or comparative selection procedures are to be used, the Minister may extend the maximum period for as long as necessary to ensure that such procedures are fair, reasonable, open and transparent to all interested parties, but by no longer than eight months, subject to any specific timetable established pursuant to section 59.

(11) The time limits referred to in subsection (10) shall be without prejudice to any applicable international agreements relating to the use of radio spectrum and satellite coordination.

(12) This section is without prejudice to the transfer of rights of use for radio spectrum in accordance with section 59B.

(13) Articles 23 and 35 of the Directive shall apply to this section."

Amendment of Section 62.

27. In section 62-

(a) in subsection (4), the words ", taking into account the specific characteristics of the radio spectrum concerned," are inserted between the words "cases where" and "a licence";

(b) in subsection (4)(b), the words "communications or" are inserted between the words "quality" and "service;";

(c) in subsection (4)(c), the word "or" is deleted;

(d) the following new paragraph is inserted after paragraph (c)-

"(ca) develop reliable conditions for radio spectrum sharing, where appropriate; or";

(e) the following new subsections are inserted after subsection (4)-

"(5) The Minister shall, when considering whether to issue general authorisations or to grant individual rights of use for the harmonised radio spectrum-

(a) consider the technical implementing measures adopted in accordance with Article 4 of Decision No 676/2002/EC;

(b) seek to minimise problems of harmful interference, including in cases of shared use of radio spectrum on the basis of a combination of general authorisation and individual rights of use.

(6) The Minister shall consider the possibility to authorise the use of radio spectrum based on a combination of general authorisation and individual rights of use by taking into account-

(a) the likely effects of different combinations of general authorisations and individual rights of use; and

(b) gradual transfers from one category to the other on competition, innovation and market entry.

(7) The Minister shall seek to minimise restrictions on the use of radio spectrum by taking appropriate account of technological solutions for managing harmful interference in order to impose the least onerous authorisation regime possible.

(8) When taking a decision pursuant to subsection (4)(1) the Minister shall ensure that the conditions for the shared use of radio spectrum are clearly set out in order to facilitate the efficient use of radio spectrum, competition and innovation."

New Sections 65A, 65B and 65C.

28. The following new sections are inserted after section 65-

"**Duration of rights.**

65A.(1) Where the Minister authorises the use of radio spectrum through individual rights of use for a limited period, the right of use, subject to section 61(6), shall be granted for a period that-

(a) is appropriate in light of the objectives pursued in accordance with section 61A(3);

(b) ensures competition

(c) ensures effective and efficient use of radio spectrum; and

(d) promotes innovation and efficient investments, including by allowing for an appropriate period for investment amortisation.

(2) Where the Minister grants individual rights of use for radio spectrum for which harmonised conditions have been set by technical implementing measures in accordance with Decision No 676/2002/EC in order to enable its use for wireless broadband electronic communications services ('wireless broadband services') for a limited period, regulatory predictability for the holders of the rights shall be ensured over a period of at least 20 years regarding conditions for investment in infrastructure which relies on the use of such radio spectrum, taking account of the requirements referred to in subsection (1).

(3) This section is subject, where relevant, to any modification of the conditions attached to those rights of use in accordance with section 50.

(4) The rights referred to in this section shall be valid for a duration of at least 15 years and include, where necessary to comply with subsection (1), an adequate extension thereof, under the conditions laid down in this section.

(5) The Minister, in consultation with the Authority, shall make available the general criteria for an extension of the duration of rights of use, in a transparent manner, to all interested parties in advance of granting rights of use, as part of the conditions laid down under section 61A (6) and (9). Such general criteria shall relate to-

(a) the need to ensure the effective and efficient use of the radio spectrum concerned;

(b) the objectives pursued in paragraphs (a) and (b) of section 59(3);

(c)the need to fulfil general interest objectives related to ensuring-

(i) safety of life;

(ii) public order;

(iii) public security or defence; and

(d) the need to ensure undistorted competition.

(6) Not later than two years before the expiry of the initial duration of an individual right of use, the Minister shall conduct an objective and forward-looking assessment of the general criteria laid down for extension of the duration of that right of use in paragraph (c) of section 59(3).

(7) If the Authority has not initiated enforcement action for non-compliance with the conditions of the rights of use, an extension of the duration of the right of use shall be granted unless it concludes that such an extension would not comply with the general criteria laid down in paragraphs (a) or (b) of subsection (5).

(8) On the basis of the assessment referred to in subsection (6), the Minister or the Authority shall notify the holder of the right as to whether the extension of the duration of the right of use is to be granted.

(9) If such extension is not to be granted, the Minister shall apply section 61 and section 62 for granting rights of use for that specific radio spectrum band.

(10) By way of derogation from section 23, interested parties shall have the opportunity to comment on any draft measure pursuant to subsection (6), (7) and (8) for a period of at least three months.

(11) This paragraph is without prejudice to the application of section 50 and compliance with conditions of the general authorisation or of rights of use for radio spectrum.

(12) When establishing fees for rights of use, the Minister shall take account of the mechanism provided for under this section.

(13) The Minister may derogate from subsections (2) and (3) of this section in the following cases-

(a) in limited geographical areas, where access to high-speed networks is severely deficient or absent and this is necessary to ensure achievement of the objectives of section 59(3);

(b)for specific short-term projects;

(c) for experimental use;

(d) for uses of radio spectrum which, in accordance with section 59, can coexist with wireless broadband services; or

(e) for alternative use of radio spectrum in accordance with section 59.

(14) The Minister may adjust the duration of rights of use laid down in this section to ensure the simultaneous expiry of the duration of rights in one or several bands.

Renewal of individual rights of use for harmonised radio spectrum.

65B.(1) The Minister shall take a decision on the renewal of individual rights of use for harmonised radio spectrum before the duration of those rights expired.

(2) Subsection (1) shall not apply where, at the time of assignment, the possibility of renewal has been explicitly excluded.

(3) The Minister shall assess the need for such renewal at the Minister's own initiative or upon request by the holder of the right, in the latter case not earlier than five years prior to expiry of the duration of the rights concerned.

(4) Subsection (3) shall be without prejudice to renewal clauses applicable to existing rights.

(5) In taking a decision pursuant to subsection (1), the Minister shall consider-

(a) the fulfilment of the objectives set out in sections 19 and 59(3), as well as public policy objectives;

(b) the implementation of a technical implementing measure adopted in accordance with Article 4 of Decision No 676/2002/EC;

(c) the review of the appropriate implementation of the conditions attached to the right concerned;

(d) the need to promote, or avoid any distortion of, competition in line with section 65C;

(e) the need to render the use of radio spectrum more efficient in light of technological or market evolution;

(f) the need to avoid severe service disruption.

(6) When considering the renewal of individual rights of use for harmonised radio spectrum for which the number of rights of use is limited, the Minister shall conduct an open, transparent and non-discriminatory procedure, where-

(a) all interested parties are given the opportunity to express their views through a public consultation in accordance with section 13; and

(b) clearly state the reasons for such possible renewal.

(7) The Minister shall take into account any evidence arising from the consultation of market demand from persons other than those holding rights of use for radio spectrum in the band concerned when deciding whether to renew the rights of use or to organise a new selection procedure in order to grant the rights of use pursuant to section 61A.

(8) A decision to renew the individual rights of use for harmonised radio spectrum may be accompanied by a review of the fees as well as of the other terms and conditions attached thereto. The Minister may adjust the fees for the rights of use by way of regulations.

Competition.

65C.(1) The Minister shall promote effective competition and avoid distortions of competition in the internal market when deciding to grant, amend or renew rights of use for radio spectrum for electronic communications networks and electronic communications services in accordance with this Act.

(2) When granting, amending or renewing rights of use for radio spectrum, the Minister may take appropriate measures such as-

(a) limiting the amount of radio spectrum bands for which rights of use are granted to any person, or, attaching conditions to such rights of use, such as the provision of wholesale access, roaming, in certain bands or in certain groups of bands with similar characteristics;

(b) reserving, if appropriate to a specific situation in the Gibraltar market, a certain part of a radio spectrum band or group of bands for assignment to new entrants;

(c) refusing to grant new rights of use for radio spectrum or to allow new radio spectrum uses in certain bands, or attaching conditions to the grant of new rights of use for radio spectrum or to the authorisation of new uses of radio spectrum, in order to avoid the distortion of competition by any assignment, transfer or accumulation of rights of use;

(d) including conditions prohibiting, or imposing conditions on, transfers of rights of use for radio spectrum, not subject to European Union or Gibraltar merger control, where such transfers are likely to result in significant harm to competition;

(e) amending the existing rights in accordance with the provisions of this Act where this is necessary to remedy ex post a distortion of competition by any transfer or accumulation of rights of use for radio spectrum.

(2) The Minister shall, take into account market conditions and available benchmarks and shall base his decisions on an objective and forward-looking assessment of-

(a) the market competitive conditions;

(b) whether such measures are necessary to maintain or achieve effective competition, and

(c) the likely effects of such measures on existing and future investments by market participants such as network roll-out,

by following the approach to market analysis as set out in section 40 (7C).

(3) When applying subsections (1) and (2), the Minister shall act in accordance with the procedures provided in sections 13, 50 and 61A(13)."

Amendment of Section 91.

29. in section 91-

(a) in subsection (12) the words "the general subject matter of" are inserted between the words "on" and "appeals";

(b) in subsection (12), the words ", as well as decisions or judgments," are inserted between the words "information" and "shall".

Amendment of Section 96.

30. In section 96-

(a) the following new subsection is inserted between subsection (2) and subsection (3)-

"(2A) The provisions of this section shall not apply to disputes relating to radio spectrum co-ordination covered by section 59C;";

(b) in subsection (5A), the words "Framework and" are removed;

(c) the following new subsection is inserted between subsections (5A) and (5B)-

"(5AA) Any obligations imposed on a party to a dispute by the Authority as part of the resolution of the dispute, after having received BEREC's opinion, shall be adopted within one month of such opinion having been received by the Authority"

Miscellaneous.

31.(a) In section 9, in subsection (1)(a), the words "Framework Directive" are replaced with the word "Directive";

(b) in section 20, in subsection (2) and subsection (3), the words "Article 17 of the Framework Directive" are replaced with the words "Article 39 of the Directive";

(c) in section 21, in subsection (1), the words "Article 19 of the Framework Directive" are replaced with the words "Article 38 of the Directive";

(d) in section 21, in subsection (1), the words "Framework Directive" are replaced with the word "Directive";

(e) in section 24A, in subsection (7) and subsection (9), the words "Article 7a(5) of the Framework Directive" are replaced with "Article 33 of the Directive";

(f) in section 38, in subsection (7), the words "Annex II to the Framework Directive" are replaced with "the relevant BEREC guidelines";

(g) in section 41, in subsection (1), the words "Article 15(4) of the Framework Directive" are replaced with "Article 65 of the Directive".

Insertion of Schedules.

30. The schedule is renamed "Schedule 1" and the following new schedules are inserted after Schedule 1-

"**SCHEDULE 2**

CRITERIA FOR THE DETERMINATION OF WHOLESALE VOICE TERMINATION RATES

Section 40A

Principles, criteria and parameters for the determination of rates for wholesale voice termination on fixed and mobile markets referred to in section 40A:

(a) rates shall be based on the recovery of costs incurred by an efficient operator; the evaluation of efficient costs shall be based on current cost values; the cost methodology to calculate efficient costs shall be based on a bottom-up modelling approach using long-run incremental traffic-related costs of providing the wholesale voice termination service to third parties;

(b) the relevant incremental costs of the wholesale voice termination service shall be determined by the difference between the total long-run costs of an operator providing its full range of services and the total long-run costs of that operator not providing a wholesale voice termination service to third parties;

(c) only those traffic-related costs which would be avoided in the absence of a wholesale voice termination service being provided shall be allocated to the relevant termination increment;

(d) costs related to additional network capacity shall be included only to the extent that they are driven by the need to increase capacity for the purpose of carrying additional wholesale voice termination traffic;

(e) radio spectrum fees shall be excluded from the mobile voice termination increment;

(f) only those wholesale commercial costs shall be included which are directly related to the provision of the wholesale voice termination service to third parties;

(g) all fixed network operators shall be considered to provide voice termination services at the same unit costs as the efficient operator, regardless of their size;

(h) for mobile network operators, the minimum efficient scale shall be set at a market share not below 20 %;

(i) the relevant approach for asset depreciation shall be economic depreciation; and

(j) the technology choice of the modelled networks shall be forward looking, based on an IP core network, taking into account the various technologies likely to be used over the period of validity of the maximum rate; in the case of fixed networks, calls shall be considered to be exclusively packet switched.

SCHEDULE 3

CRITERIA FOR ASSESSING CO-INVESTMENT OFFERS

Section 40B

When assessing a co-investment offer pursuant to section 40B the Authority shall verify whether the following criteria have at a minimum been met. The Authority may consider additional criteria to the extent they are necessary to ensure accessibility of potential investors to the co-investment, in light of specific local conditions and market structure:

(a) The co-investment offer shall be open to any person over the lifetime of the network built under a co-investment offer on a non-discriminatory basis. The person designated as having significant market power may include in the offer reasonable conditions regarding the financial capacity of any person, so that for instance potential co-investors need to demonstrate their ability to deliver phased payments on the basis of which the deployment is planned, the acceptance of a strategic plan on the basis of which medium-term deployment plans are prepared, and so on.

(b) The co-investment offer shall be transparent:

—

the offer shall be available and easily identified on the website of the person designated as having significant market power;

—

full detailed terms shall be made available without undue delay to any potential bidder that has expressed an interest, including the legal form of the co-investment agreement and, when relevant, the heads of term of the governance rules of the co-investment vehicle; and

—

the process, like the road map for the establishment and development of the co-investment project shall be set in advance, shall be clearly explained in writing to any potential co-investor, and all significant milestones shall be clearly communicated to all persons without any discrimination.

(c) The co-investment offer shall include terms to potential co-investors which favour sustainable competition in the long term, in particular:

—

All persons shall be offered fair, reasonable and non-discriminatory terms and conditions for participation in the co-investment agreement relative to the time they join, including in terms of financial consideration required for the acquisition of specific rights, in terms of the protection awarded to the co-investors by those rights both during the building phase and during the exploitation phase, for example by granting indefeasible rights of use (IRUs) for the expected lifetime of the co-invested network and in terms of the conditions for joining and potentially terminating the co-investment agreement. Non-discriminatory terms in this context do not entail that all potential co-investors shall be offered exactly the same terms, including financial terms, but that all variations of the terms offered shall be justified on the basis of the

same objective, transparent, non-discriminatory and predictable criteria such as the number of end-user lines committed for.

—

The offer shall allow flexibility in terms of the value and timing of the commitment provided by each co-investor, for example by means of an agreed and potentially increasing percentage of the total end-user lines in a given area, to which co-investors have the possibility to commit gradually and which is set at a unit level enabling smaller co-investors with limited resources to enter the co-investment at a reasonably minimum scale and to gradually increase their participation while ensuring adequate levels of initial commitment. The determination of the financial consideration to be provided by each co-investor needs to reflect the fact that early investors accept greater risks and engage capital sooner.

—

A premium increasing over time shall be considered to be justified for commitments made at later stages and for new co-investors entering the co-investment after the commencement of the project, to reflect diminishing risks and to counteract any incentive to withhold capital in the earlier stages.

—

The co-investment agreement shall allow the assignment of acquired rights by co-investors to other co-investors, or to third parties willing to enter into the co-investment agreement subject to the transferee person being obliged to fulfil all original obligations of the transferor under the co-investment agreement.

—

Co-investors shall grant each other reciprocal rights on fair and reasonable terms and conditions to access the co-invested infrastructure for the purposes of providing services downstream, including to end-users, in accordance with transparent conditions which are to be made transparent in the co-investment offer and subsequent agreement, in particular where co-investors are individually and separately responsible for the deployment of specific parts of the network. If a co-investment vehicle is created, it shall provide access to the network to all co-investors, whether directly or indirectly, on an equivalence of inputs basis and in accordance with fair and reasonable terms and conditions, including financial conditions that reflect the different levels of risk accepted by the individual co-investors.

(d) The co-investment offer shall ensure a sustainable investment likely to meet future needs, by deploying new network elements that contribute significantly to the deployment of very high capacity networks."

Dated: 24th December 2020.

SIR J BOSSANO,
Minister with responsibility for telecommunications,
for the Government.

EXPLANATORY MEMORANDUM

These regulations implement in the Law of Gibraltar, Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code and recasting Directive 2002/19/EC, Directive 2002/20/EC, Directive 2002/21/EC and Directive 2002/22/EC.