

Subsidiary Legislation made under s.9.

Communications (Access) Regulations 2006

LN.2006/076

Amending enactments	Relevant current provisions	Commencement date
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2020/503	rr. 5(6A), 6(1)(aa), (2)(a)(i), (2)(ab), (ac), (2A)-(2P), (5), (5A), (8), 7(1)(b), (2), 9(3)(a), (e), (8)(a)-(b), (9)-(10), 10(2)(a), (7), 11(3), 12A, 13(2)(a), (aa), (4), (4A)-(4C), 14(2)(b)(ia), (c), (2A), (4A), 14B(2), (3A)-(3B), (4), (5A), (6), (6A), (7)-(8), 14C, Sch.	24.12.2020

EU Legislation/International Agreements involved:

Directive 2002/19/EC

Directive 2009/140/EC

Directive (EU) 2018/1972

ARRANGEMENT OF REGULATIONS

Regulation

1. Title.
2. Interpretation.
3. Confidentiality of information.
4. General framework for access or interconnection.
5. Rights and obligations for access or interconnection.
6. Functions of the Authority with regard to access or interconnection.
7. Conditional access systems and other facilities.
8. *Repealed.*
9. Imposition, amendment or withdrawal of SMP obligations.
10. Transparency.
11. Non-Discrimination.
12. Accounting Separation.
- 12A. Access to civil engineering.
13. Obligations of access to and use of specific network facilities.
14. Price control and cost accounting obligations.
- 14A. Functional Separation.
- 14B. Voluntary separation by a vertically integrated operator.
- 14C. Commitments procedure.
15. Publication of notice of obligations and access to information.
16. Notification to the European Commission.
17. Enforcement and Compliance.
18. Penalty for offences.

SCHEDULE*Deleted*

In exercise of the powers conferred on me by section 9 of the Communications Act 2006 and of all other enabling powers and in order to transpose into the law of Gibraltar Directive 2002/19/EC of 7 March 2002 of the European Parliament and of the Council on access to, and interconnection of, electronic communication networks and associated facilities, I hereby make the following Regulations.

Title.

1. These Regulations may be cited as the Communications (Access) Regulations 2006.

Interpretation.

2.(1) In these Regulations, except where the context otherwise requires—

“Authorisation Regulations” means the Communications (Authorisation and Licensing) Regulations 2006;

“operator” means a person providing or authorised to provide a public electronic communications network or an associated facility or both;

“Schedule” means the Schedule to these Regulations;

“SMP obligation” means an obligation imposed on a person pursuant to regulations 10, 11, 12, 13 or 14;

“SMP operator” means a person who has been found to have significant market power in a relevant market in accordance with section 38 of the Act;

“the Act” means the Communications Act 2006;

“Universal Service Regulations” means the Communications (Universal Service and Users’ Rights) Regulations 2006;

“wide screen television service” means a television service that consists wholly or partially of programmes produced and edited to be displayed in a full height wide-screen format. The 16:9 format is the reference format for wide-screen television services.

(2) In these Regulations the expression “access or interconnection” shall be construed as also meaning access and interconnection.

Confidentiality of information.

3. Where the Authority is required to publish or otherwise disclose information pursuant to these Regulations, it shall act in accordance with section 6 of the Act and with any other laws on the protection of privacy and confidential business information applicable in Gibraltar.

General framework for access or interconnection.

4. Without prejudice to regulation 27 of the Universal Service Regulations and to the conditions specified in the Schedule to the Authorisation Regulations, legislative or administrative measures which oblige operators, when granting access or interconnection, to—

- (a) offer different terms and conditions to different persons for equivalent services; or
- (b) impose obligations that are not related to the actual access or interconnection services provided,

are hereby abolished.

Rights and obligations for access or interconnection.

5.(1) An operator shall have—

- (a) the right to negotiate interconnection with another operator for the purpose of providing publicly available electronic communications services;
- (b) an obligation to negotiate interconnection with another operator for the purpose of providing publicly available electronic communications services when requested to do so by another operator whether authorised in Gibraltar pursuant to the Authorisation Regulations or in a Member State pursuant to Article 4 of the Authorisation Directive.

(2) An operator shall offer access or interconnection on terms and conditions which are consistent with any obligations imposed by the Authority pursuant to Regulations 6, 7, 8 and 9.

(3) An operator who has established a public electronic communications network for the purpose of the distribution of digital television services shall have an obligation to ensure that the network is capable of distributing wide-screen television services and television programmes.

(4) An operator to whom sub-regulation (3) applies who receives and redistributes television services or television programmes to the public shall have an obligation to redistribute in wide-screen format all television services and television programmes he receives in that format.

(5) Without prejudice to regulation 19 of the Authorisation Regulations, a person who acquires information from another person before, during or after the process of negotiating access or interconnection arrangements shall—

- (a) use that information solely for the purpose for which it was supplied; and
- (b) respect at all times the confidentiality of information transmitted or stored.

(6) A person shall not pass on any information referred to in sub-regulation (5) to any other person, in particular, to any of its departments, subsidiaries or partners for whom such information could provide a competitive advantage.

(6A) The Authority may facilitate for negotiations to be conducted through neutral intermediaries when conditions of competition so require.

(7) A person who fails to comply with sub-regulations (5) or (6) is guilty of an offence.

Functions of the Authority with regard to access or interconnection.

6.(1) The Authority shall, having regard to these Regulations and to its objectives as set out in section 19 of the Act, encourage and, where appropriate, ensure adequate access, interconnection and interoperability of services in such a way as to secure—

- (a) efficiency on the part of persons operating in electronic communications markets;
 - (aa) the deployment of very high capacity networks;
- (b) sustainable competition between such persons;
 - (bb) efficient investment and innovation; and
- (c) the greatest possible benefit for end-users of public electronic communications services.

(2) Without prejudice to any SMP obligations that it may impose pursuant to regulation 9, the conditions which the Authority may set pursuant to sub-regulation (1) include conditions which—

- (a) for the purpose of securing end-to-end connectivity for the end-users of public electronic communications services provided by means of a series of electronic communications networks—

- (i) impose obligations on a person, subject to general authorisation, controlling network access to any of those networks; and
 - (ii) require the interconnection of the networks;
- (ab) in justified cases, and to the extent that is necessary, impose obligations on a person, subject to general authorisation, who controls access to end-users, to make the services interoperable and
- (ac) to the extent that is necessary to ensure end-to-end connectivity between end-users, impose obligations on relevant providers of number-independent interpersonal communications services which reach a significant level of coverage and user uptake so as to make their services interoperable to the point where end-to-end connectivity between end-users is endangered due to a lack of interoperability between interpersonal communications services;
- (b) impose obligations on a person providing facilities for the use of application programme interfaces or electronic programme guides as the Authority considers to be necessary for securing—
- (i) that persons are able to have access to such programme services provided in digital form as the Authority may determine; and
 - (ii) that the facility for using those interfaces or guides is provided on terms which—
 - (aa) are fair and reasonable;
 - (bb) do not involve, or tend to give rise to, any undue discrimination against any person or description of persons; and
 - (cc) that providers of digital television services and equipment co-operate in the provision of interoperable television services for disabled end-users.

(2A) The Authority may provide guidance and make publicly available the procedures applicable to gain access and interconnection to ensure that small and medium-sized companies and operators with a limited geographical reach can benefit from the obligations imposed.

(2B) The obligations referred to in sub-regulation (2)(ac) shall be imposed only-

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- (a) to the extent necessary to ensure interoperability of interpersonal communications services and may-
- (i) include proportionate obligations on providers of those services to publish and allow the use, modification and redistribution of relevant information by the Authority and other providers; or
 - (ii) use and implement standards or specifications listed in section 20 of the Act or of any other relevant European or international standards;
- (b) where the European Commission, after consulting BEREC, has found an appreciable threat to end-to-end connectivity between end-users throughout the Union or in at least three Member States and has adopted implementing measures specifying the nature and scope of any obligations that may be imposed.

(2C) Without prejudice to sub-regulations (2), (2A) and (2B), the Authority may impose obligations to grant access to wiring and cables and associated facilities inside buildings or up to the first concentration or distribution point as may be determined by the Authority, where that point is located outside the building.

(2D) The obligations referred to in sub-regulation (2C) may be imposed on providers of electronic communications networks or on the owners of such wiring and cables and associated facilities-

- (a) where those owners are not providers of electronic communications networks; and
- (b) on the grounds that replication of such network elements would be economically inefficient or physically impracticable.

(2E) The access conditions imposed may include specific rules-

- (a) on access to such network elements and to associated facilities and associated services;
- (b) on transparency and non-discrimination and on apportioning the costs of access;
- (c) which, where appropriate, are adjusted to consider risk factors.

(2F) If the obligations imposed in accordance with sub-regulation (2C) do not sufficiently address high and non-transitory economic or physical barriers to replication which underlie an existing or emerging market situation significantly limiting competitive outcomes for end-users, the Authority may extend the imposition of such access obligations beyond the first concentration or distribution point, to a point that it determines to be the closest to end-users,

capable of hosting a sufficient number of end-user connections to be commercially viable for efficient access seekers.

(2G) The Authority shall consider relevant BEREC guidelines in determining the extent of the extension beyond the first concentration or distribution point and may impose active or virtual access obligations on technical or economic grounds.

(2H) The Authority shall not impose obligations in accordance with sub-regulation (2F) on providers of electronic communications networks where it determines that-

- (a) the provider has the characteristics listed in section 40C(1) of the Act and makes available a viable and similar alternative means of reaching end-users by providing access to a very high capacity network to any person, on terms and conditions which are non-discriminatory; or
- (b) the imposition of obligations would compromise the economic or financial viability of a new network deployment.

(2I) The Authority may extend the exemption provided in sub-regulation (2H) to other providers offering, on non-discriminatory terms and conditions, access to a very high capacity network;

(2J) The Authority may, by way of derogation from sub-regulation (2H)(a), impose obligations on providers of electronic communications networks fulfilling the criteria laid down in that paragraph where the network concerned is publicly funded.

(2K) Without prejudice to sub-regulations (2),(2A) and (2B), the Authority may impose obligations on providers of electronic communications networks in relation to-

- (a) the sharing of passive infrastructure; or
- (b) to conclude localised roaming access agreements,

only if directly necessary for the local provision of services which rely on the use of radio spectrum, in accordance with Gibraltar and European Union law and provided that no viable and similar alternative means of access to end-users is made available to any person on conditions which are non-discriminatory.

(2L) The Authority may impose the obligations referred to in sub-regulation (2K) only where this possibility is-

- (a) provided for when granting the rights of use for radio spectrum; and

- (b) based on the grounds that, in the area subject to such obligations, the market-driven deployment of infrastructure for the provision of networks or services which rely on the use of radio spectrum is subject to insurmountable economic or physical obstacles and therefore access to networks or services by end-users is severely deficient or absent.

(2M) In circumstances where access and sharing of passive infrastructure alone does not suffice to address the situation, the Authority may impose obligations on sharing of active infrastructure.

(2N) In exercising its functions under this regulation the Authority shall have regard to:

- (a) the need to maximise connectivity throughout Gibraltar, along major transport path significantly increases choice and higher quality of service for end-users;
- (b) the efficient use of radio spectrum;
- (c) the technical feasibility of sharing and associated conditions;
- (d) the state of infrastructure-based as well as service-based competition;
- (e) technological innovation;
- (f) the overriding need to support the incentive of the host to roll out the infrastructure in the first place.

(2O) The Authority may impose on the beneficiary of the sharing or access obligation, the obligation to share radio spectrum with the infrastructure host in the relevant area.

(2P) The Authority shall consider the relevant BEREC guidelines when defining the location of network termination points.

(3) *Deleted.*

(4) *Deleted.*

(5) Any obligation or condition imposed by the Authority pursuant to sub-regulations (1)-(2O) and any modification to any such obligation or condition, shall be—

- (a) objectively justifiable in relation to the access, interconnection or interoperability of services to which it relates;

- (b) not such as to discriminate unduly against particular persons or against a particular description of persons;
- (c) proportionate to what it is intended to achieve;
- (d) in relation to what it is intended to achieve, transparent; and
- (e) applied in accordance with the public consultation procedure and with sections 22 and 24A of the Act.

(5A) The Authority shall assess the results of the obligations and conditions imposed pursuant to this regulation 6 no later than five years after the adoption of the previous measure adopted in relation to the same persons and assess whether it would be appropriate to withdraw or amend them when considering evolving conditions. The Authority shall notify the outcome of its assessment in accordance with the procedures referred to in sections 12, 22 and 23 of the Act.

(6) The Authority may, subject to these Regulations and to sections 13, 22 and 92 or 96 of the Act, exercise its powers on any matter concerning access or interconnection, referred to in sub-regulation (1) on its own initiative, where it appears to the Authority that a question with regard to access or interconnection has arisen and needs to be determined.

(7) The Authority shall, when exercising its powers pursuant to sub-regulation (6), seek to secure the achievement of the objectives set out in section 19 of the Act.

(8) In sub-regulation (2)–

“application programme interface” or “API” means the software interface between applications to make use, in connection with any of the matters mentioned in sub-regulation (9), of facilities contained in the other software;

“electronic programme guide” means a facility by means of which a person has access to any service which consists of–

- (a) the listing or promotion, or both the listing and the promotion, of some or all of the programmes included in any one or more programme services; and
- (b) a facility for obtaining access, in whole or in part, to the programme service or services listed or promoted in the guide;

“end-to-end connectivity” means the facility–

- (a) for different end-users of the same public electronic communications service to be able to communicate with each other; and
- (b) for the end-users of different such services to be able, each using the service of which he is the end-user, to communicate with each other.

(9) The matters mentioned in sub-regulation (8), in the definition of “application programme interface”, are–

- (a) allowing a person to have access to programme services;
- (b) allowing a person, other than a person authorised to provide an electronic communications service or an electronic communications network or a person who makes associated facilities available, to make use of an electronic communications network by means of which a programme service is broadcast or otherwise transmitted;
- (c) allowing a person to become the end-user of a description of public electronic communications service.

Conditional access systems and other facilities.

7.(1) It shall be a duty of the Authority to ensure that–

- (a) access-related conditions are applied to every person who provides a conditional access system in relation to a protected programme service; and
- (b) that those conditions make all such provision as is necessary in order to ensure compliance with the requirements contained from time to time in Part I of Annex II of the Directive (conditions relating to access to digital programme services).

(2) The Authority shall, by notice issued under section 12 of the Act and published on its website, set out the requirements contained from time to time in Part I of Annex II of the Directive.

(3) The Authority may review any conditions applied in accordance with sub-regulation (1) for the purpose of determining whether to maintain, amend or withdraw any such conditions and for these purposes it shall act in accordance with the public consultation procedure and with section 22 of the Act.

(4) The Authority shall not give effect to a proposal to amend or withdraw any of the conditions unless–

- (a) it has carried out a market analysis under section 40 of the Act for the purpose of determining whether an operator (whether individually or jointly with others) has significant market power in the relevant market;
- (b) it has determined, in consequence of that analysis, that no operator (whether individually or jointly with others) has significant market power in the relevant market; and
- (c) it is satisfied that the amendment or withdrawal will not have an adverse effect on any or all of the matters mentioned in sub-regulation (5).

(5) Those matters are—

- (a) the accessibility for end-users to radio and television broadcasts and broadcasting channels and services in respect of which the Authority has set must-carry obligations in accordance with regulation 27 of the Universal Service Regulations;
- (b) the prospects for effective competition in the market for programme services provided by being broadcast or otherwise transmitted in digital form; and
- (c) the prospects for effective competition in the markets for conditional access systems and other associated facilities.

(6) The Authority shall give such notice as it considers reasonable to any person affected by any amendment or withdrawal of conditions carried out in accordance with this regulation.

(7) Conditions applied by the Authority in accordance with this regulation shall be without prejudice to any obligations which may be imposed on any person in relation to the presentation of electronic programme guides and other similar listing and navigation facilities.

(8) In this regulation “protected programme service” means a programme service the programmes included in which cannot be viewed or listened to in an intelligible form except by the use of a conditional access system.

8. *Repealed.*

Imposition, amendment or withdrawal of SMP obligations.

9.(1) Where, as a result of a market analysis carried out under section 40 of the Act, an operator is designated as having significant market power in a relevant market (an “SMP operator”) the Authority shall impose on such an operator such of the obligations set out in Regulations 10 to 14 (an “SMP obligation”) as the Authority considers appropriate.

(2) Without prejudice to sub-regulation (3), the Authority shall not impose an SMP obligation on an operator who is not an SMP operator.

(3) The Authority may, where it considers it appropriate, impose obligations for access or interconnection pursuant to—

- (a) Regulation 6;
- (b) regulation 7 (1);
- (c) section 31 of the Act;
- (d) section 52 of the Act;
- (e) Condition 7 in Part D Condition 6 in Part B of the Schedule to the Authorisation Regulations as applied by virtue of regulation 17 of those Regulations;
- (f) Regulations 23, 24 or 26 of the Universal Service Regulations;
- (g) Gibraltar laws on the processing of personal data and the protection of privacy in the electronic communications sector which place obligations on persons other than SMP operators; and
- (h) the need to ensure that Gibraltar can comply with an international agreement which is applicable to Gibraltar,

on any person, or any number or class of persons.

(4) The Authority shall, acting in accordance with section 22 of the Act, notify to the European Commission any decision to impose, amend or withdraw the obligation referred to in sub-regulation (3)(h).

(5) For the purposes of sub-regulation (4), the Authority shall not be required to notify the national regulatory authorities in the Member States pursuant to the procedure set out in section 22 of the Act.

(6) The Authority may, in exceptional circumstances, impose on an SMP operator obligations for access or interconnection other than those set out in regulations 10 to 14.

(7) The Authority shall impose such additional obligations as are referred to in sub-regulation (6) only if—

- (a) it has submitted the additional obligations to the European Commission for approval; and
- (b) the European Commission has approved the imposition of those additional obligations.

(8) An obligation imposed in accordance with the provisions of this regulation shall be—

- (a) based on the nature of the problem identified in the market analysis, considering where appropriate, the identification of transnational demand pursuant to Article 66 of the Directive;
- (b) proportionate to what the obligation is intended to achieve having regard where possible, to the costs and benefits;
- (c) objectively justified in the light of the objectives laid down in section 19 of the Act; and
- (d) imposed only after a public consultation procedure and a consultation under section 22 of the Act have been carried out.

(9) The Authority shall consider the impact of new market developments, such as commercial agreements, including co-investment agreements which may influence competitive dynamics.

(10) If the developments referred to in sub-regulation (9) are not sufficiently important to require a new market analysis in accordance with section 40 of the Act, the Authority shall assess whether to review the obligations imposed on persons designated as having significant market power and amend any previous decision by—

- (a) withdrawing obligations; or
- (b) imposing new obligations,

in order to ensure that such obligations continue to meet the conditions set out in sub-regulation (8). Sub-regulation (8)(d) shall apply to such amendments.

Transparency.

10.(1) The Authority may impose on an SMP operator an obligation to publish, in such manner as the Authority may from time to time direct, all such information as it may direct for the purpose of securing transparency in matters related to interconnection or access.

(2) Without prejudice to the generality of sub-regulation (1), an obligation imposed by the Authority pursuant to sub-regulation (1) may require the SMP operator to publish information concerning—

- (a) the terms and conditions for access, interconnection, supply and use, including any conditions altering access to and/or use of services and applications, in particular with regard to migration from legacy infrastructure where such conditions are allowed by Gibraltar or European Community law, including prices;
- (b) his accounting system in relation to interconnection or access;
- (c) the characteristics of his network; and
- (d) the technical specifications and interfaces necessary to ensure interoperability.

(3) An SMP operator who has an obligation to comply with this regulation shall—

- (a) provide to the Authority a copy of each of such agreements for interconnection or access as he may have entered into; and
- (b) make available a copy of any such agreement, save for such parts as may contain information on the commercial strategy of any of the parties to the agreement, to an interested party upon the request of any such party.

The Authority shall, should it be requested so to do by an interested party or should it consider it appropriate to do so, determine which parts of the agreement contain the information on the commercial strategy referred to in paragraph (b).

(4) The Authority may, in particular where it imposes obligations of non-discrimination on an SMP operator pursuant to regulation 11, require an SMP operator to publish a reference offer that is sufficiently unbundled to ensure that no person is required to pay for facilities which are not necessary for the service requested and such offer shall include—

- (a) a description of the relevant offerings broken down into components according to market needs; and
- (b) a description of the associated terms and conditions, including prices.

(5) The Authority may issue a direction requiring an SMP operator to whom this regulation applies to—

- (a) make changes to a reference offer to give effect to obligations imposed pursuant to these Regulations; and

(b) publish the reference offer with such changes.

(6) The Authority may specify in an SMP obligation referred to in sub-regulations (1) and (4)–

(a) the precise information to be made available; and

(b) the level of detail required, including such changes to the information provided which the SMP operator intends to implement within a period of six months from the date on which the information was provided.

(7) Notwithstanding sub-regulation (6), where pursuant to regulation 12A or regulation 13, the Authority has imposed an obligation on an SMP operator concerning wholesale network infrastructure access, the Authority shall require such operator to publish a reference offer which at the least–

(a) contains BEREC guidelines on the minimum criteria for a reference offer;

(b) ensures that key performance indicators are specified, where relevant; and

(c) sets out corresponding service levels and ensures compliance with them.

Non-Discrimination.

11.(1) The Authority may impose on an SMP operator an obligation not to discriminate unduly against particular persons, or against a particular description of persons, in matters related to interconnection or access.

(2) Without prejudice to the generality of sub-regulation (1), an obligation imposed by the Authority pursuant to sub-regulation (1) shall ensure that the SMP operator–

(a) applies equivalent conditions in equivalent circumstances to other persons providing equivalent services; and

(b) provides services and information to others under the same conditions and of the same quality as he provides for the purposes of his own services or for those of his subsidiaries or partners.

(3) The Authority may impose obligations on the SMP operator to supply access products and services to all persons, including to itself, on the same timescales, terms and conditions, including those relating to price and service levels, and by means of the same systems and processes, in order to ensure equivalence of access.

Accounting Separation.

12.(1) The Authority may impose on an SMP operator an obligation to maintain a separation for accounting purposes between such different matters relating to interconnection or access as the Authority may from time to time direct.

(2) The Authority may require an SMP operator to use a specific format and accounting method for the purpose of maintaining the separation referred to in sub-regulation (1).

(3) Without prejudice to the generality of sub-regulations (1) and (2), the Authority shall require an SMP operator to—

- (a) draw up accounts regarding his business activities in relation to interconnection or access;
- (b) ensure that such accounts—
 - (i) identify all elements of cost and revenue,
 - (ii) demonstrate how such cost and revenue have been calculated,
 - (iii) establish how such cost and revenue have been attributed to such activities, and
 - (iv) include an itemised breakdown of fixed assets and structural costs;
- (c) have those accounts audited by an independent auditor; and
- (d) publish such accounts.

(4) The Authority may, pursuant to sub-regulation (1), require a vertically integrated SMP operator to make transparent his wholesale prices and his internal transfer prices.

(5) Without prejudice to its general powers to require the provision of information pursuant to section 4 (1)-(3) of the Act, the Authority may require an SMP operator to provide to it such accounting records, including data on revenues received from third parties, as would, in the Authority's opinion, facilitate its task of verifying that the SMP operator concerned has complied with any obligations imposed upon him pursuant to regulations 10 or 11.

(6) Subject to regulation 3, the Authority may publish any information that it has obtained pursuant to this regulation where it considers that the publication of such information would contribute to an open and competitive market.

Access to civil engineering.

12A.(1) The Authority may, in accordance with regulation 9, impose obligations on an SMP operator to meet requests for access to, and use of, civil engineering and associated facilities in situations where, the Authority has considered the market analysis and concludes that denial of access or access or the imposition by an SMP operator under unfavourable terms and conditions having a similar effect would-

- (a) hinder the emergence of a sustainable competitive market; and
- (b) not be in the end-user's interest.

(2) The Authority may impose obligations on an SMP operator to provide access in accordance with this regulation, irrespective of whether the assets that are affected by the obligation are part of the relevant market in accordance with the market analysis, provided that the obligation is necessary and proportionate to meet the objectives of section 19 of the Act.

Obligations of access to and use of specific network facilities.

13.(1) The Authority may impose on an SMP operator an obligation to meet reasonable requests for access to, and use of, specific network elements and associated facilities in particular where the Authority considers that the denial of such access, or the imposition by an SMP operator of unreasonable terms and conditions having a similar effect, would-

- (a) hinder the emergence of a sustainable competitive market at the retail level;
- (b) not be in the interests of end-users; or
- (c) otherwise hinder the achievement of the objectives set out in section 19 of the Act.

(2) Without prejudice to the generality of sub-regulation (1), the obligations which the Authority may impose pursuant to sub-regulation (1) may include obligations requiring the SMP operator to-

- (a) give third parties access to, and use of, specific physical network elements and associated facilities, as appropriate, including unbundled access to the local loop and sub-loop;
- (aa) give third parties access to specific active or virtual network elements and service;
- (b) negotiate in good faith with persons requesting access;

- (c) maintain access to facilities already granted;
- (d) provide specified services on a wholesale basis for resale by third parties;
- (e) grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services;
- (f) provide co-location or other forms for the sharing of associated facilities;
- (g) provide specified services needed to ensure interoperability of end-to end services to users, including facilities for intelligent network services or roaming on mobile networks;
- (h) provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services;
- (i) interconnect networks or network facilities; or
- (j) provide access to associated services, such as identity, location and presence service.

(3) The Authority may attach conditions to any obligation imposed pursuant to sub-regulation (1) for the purpose of securing—

- (a) fairness and reasonableness in the way in which requests for access are made and responded to; and
- (b) that the obligations imposed under sub-regulation (1) are complied with within the periods and at the times required by or under the conditions.

(4) When considering the appropriateness of imposing any of the possible specific obligations referred to in sub-regulation (1) and, in particular when assessing, in accordance with the principle of proportionality, how such obligations could be imposed, the Authority shall analyse whether other forms of access to wholesale inputs, either on the same or on a related wholesale market, would be sufficient to address the identified problem in the end-user's interest.

(4A) The assessment referred to in sub-regulation (4) shall include—

- (a) commercial access offers;
- (b) regulated access pursuant to regulation 6; or

- (c) existing or planned regulated access to other wholesale inputs pursuant to this regulation.

(4B) The Authority shall consider the following factors when considering the matters referred to in sub-regulation (4)-

- (a) the technical and economic viability of using or installing competing facilities, the rate of market development, the nature and type of interconnection or access involved, including the viability of other upstream access products, such as access to ducts;
- (b) the expected technological evolution affecting network design and management;
- (c) the need to ensure technology neutrality enabling the parties to design and manage their own networks;
- (d) the feasibility of providing the access offered, in relation to the capacity available;
- (e) the initial investment by the facility owner, taking account of any public investment made and the risks involved in making the investment, with regard to investments in, and risk levels associated with, very high capacity networks;
- (f) the need to safeguard competition in the long term, with particular attention to economically efficient infrastructure-based competition and innovative business models that support sustainable competition, including those based on co-investment in networks;
- (g) where appropriate, any relevant intellectual property rights;
- (h) the provision of pan-European services.”

(4C) When considering, in accordance with regulation 9, imposing obligations on the basis of regulation 12A or of this regulation, the Authority shall examine whether the imposition of obligations in accordance with regulation 12A alone would be a proportionate means by which to promote competition and the end-user's interest.

(5) When imposing obligations on an operator to provide access in accordance with the provisions of this regulation, the Authority may lay down technical or operational conditions to be met by the provider and/or beneficiaries of such access, where necessary to ensure normal operation of the network.

(6) An obligation to follow specific technical standards or specifications shall be in compliance with the standards and specifications referred to in section 20 of the Act.

Price control and cost accounting obligations.

14.(1) The Authority may impose on an SMP operator an obligation relating to—

- (a) such price controls as the Authority may direct in relation to matters connected with the provision of specific types of access or interconnection to the relevant network, or with the availability of the relevant facilities;
- (b) such rules as the Authority may make in relation to those matters about the recovery of costs and cost orientation;
- (c) such rules as the Authority may make for those purposes about the use of cost accounting systems; and
- (d) the adjustment of prices in accordance with such directions given by the Authority as it may consider appropriate.

(2) The Authority shall not set an obligation falling within sub-regulation (1) except where—

- (a) it appears to it, from the market analysis carried out for the purpose of imposing that obligation, that the absence of effective competition in the relevant market means that there is a relevant risk of adverse effects arising from price distortion; and
- (b) it also appears to it that the imposition of the obligation is appropriate for the purposes of—
 - (i) promoting efficiency;
 - (ia) promote the deployment of new and enhanced networks;
 - (ii) promoting sustainable competition; and
 - (iii) conferring the greatest possible benefits on the end-users of public electronic communications services.
- (c) it appears to it that a demonstrable retail price constraint is present and that any obligations imposed in accordance with these regulations, including any economic replicability test imposed in accordance with regulation 11, ensures effective and non-discriminatory access.

(2A) When considering it appropriate to impose price control obligations on access to existing network elements, the Authority shall also consider-

(a) the benefits of predictable and stable wholesale prices in ensuring efficient market entry; and

(b) sufficient incentives for all SMP operators to deploy new and enhanced networks.

(3) In considering the matters mentioned in sub-regulation (2)(b), the Authority may have regard to the prices at which services are available in comparable competitive markets.

(4) For the purposes of this regulation, there is a relevant risk of adverse effects arising from price distortion if the SMP operator might—

(a) so fix and maintain some or all of his prices at an excessively high level; or

(b) so impose a price squeeze,

as to have adverse consequences for end-users of public electronic communications services.

(4A) In determining whether price control obligations would be appropriate, the Authority shall consider the need to promote competition and long-term end-user interests related to the deployment and take-up of next-generation networks, and in particular of very high capacity networks.

(5) When considering the imposition of an obligation under sub-regulation (1) and in order to encourage investment by the SMP operator, including in next generation networks, the Authority shall take into account any relevant investment made by the SMP operator in the matters to which the obligation relates and allow him a reasonable rate of return on adequate capital employed, taking into account any risks specific to a particular new investment network project.

(6) Where an SMP operator has an obligation under this regulation regarding the cost orientation of his prices, the burden of proof that charges are derived from costs, including a reasonable rate of return on investment, shall lie with the SMP operator concerned. For the purpose of calculating the cost of efficient provision of services, the Authority may use such cost accounting methods as it thinks fit. The Authority may issue a direction requiring an SMP operator to provide full justification for his prices, and may, where appropriate, require prices to be adjusted.

(7) Where the Authority imposes an obligation under this regulation which imposes rules on an SMP operator about the use of cost accounting systems in order to support price controls, the Authority shall also set, and apply to such an operator, an obligation to—

- (a) make arrangements for a description to be made available to the public of the cost accounting system used pursuant to that obligation; and
- (b) include in that description details of–
 - (i) the main categories under which costs are brought into account for the purposes of that system; and
 - (ii) the rules applied for the purposes of that system with respect to the allocation of costs.

(8) The Authority, or such a body as the Authority may designate which is–

- (a) suitably qualified for the purpose;
- (b) independent of the operator concerned; and
- (c) approved by the Authority for the purpose,

shall verify whether an SMP operator has complied with any cost accounting system imposed on him under this regulation.

(9) The Authority shall cause to be published annually a statement concerning compliance by an SMP operator with any cost accounting system imposed on him under this regulation.

(10) In sub-regulation (1)–

“the relevant facilities”, in relation to an SMP operator to whom this regulation applies, means the associated facilities made available by that operator in relation to a public electronic communications network; and

“the relevant network”, in relation to such an operator, means the public electronic communications network provided by that operator.

14A. Functional Separation.

(1) Where the Authority concludes that the appropriate obligations imposed under regulations 10 to 14 have failed to achieve effective competition and that there are important and persisting competition problems and/or market failures, identified in relation to the wholesale provision of certain access product markets, the Authority may, as an exceptional measure, and in accordance with the provisions of regulation 9, impose an obligation on

vertically integrated operators to place activities related to the wholesale provision of relevant access products in an independently operating business entity.

(2) The business entity referred to sub-regulation (1) shall supply access products and services to all operators, including to other business entities within the parent company—

- (a) on the same timescales, terms and conditions, including those relating to price and service levels; and
- (b) by means of the same systems and processes.

(3) When the Authority intends to impose an obligation for functional separation, it shall submit a proposal to the European Commission that includes—

- (a) evidence justifying the conclusions of the Authority as referred to in sub-regulation (1);
- (b) a reasoned assessment that there is no or little prospect of effective and sustainable infrastructure-based competition within a reasonable timeframe;
- (c) an analysis of the expected impact on—
 - (i) the Authority;
 - (ii) the operator, in particular on the workforce of the separated undertaking;
 - (iii) the electronic communications sector as a whole;
 - (iv) incentives to invest in a sector as a whole, particularly with regard to the need to ensure social and territorial cohesion;
 - (v) other stakeholders including, in particular, the expected impact on competition and any potential entailing effects on consumers; and
- (d) an analysis of the reasons justifying that this obligation would be the most efficient means to enforce remedies aimed at addressing the competition problems and/or markets failures identified.

(4) The proposed measure referred to in sub-regulation (2) shall include information on the following matters—

- (a) the precise nature and level of separation, specifying in particular the legal status of the separate business entity;

- (b) an identification of the assets of the separate business entity, and the products or services to be supplied by that entity;
- (c) the governance arrangements to ensure the independence of the staff employed by the separate business entity, and the corresponding incentive structure;
- (d) rules for ensuring compliance with the obligations;
- (e) rules for ensuring transparency of operational procedures, in particular towards other stakeholders; and
- (f) a monitoring programme to ensure compliance, including the publication of an annual report.

(5) Following the European Commission's decision on the proposed measure taken in accordance with Article 8 (3) of the Access Directive, the Authority shall conduct a co-ordinated analysis of the different markets related to the access network in accordance with the procedure set out in section 40 of the Act. On the basis of its assessment, the Authority shall impose, maintain, amend or withdraw obligations, in accordance with the provisions of the Act.

(6) An operator on which functional separation has been imposed pursuant to this regulation may be subject to—

- (a) any of the obligations identified in regulations 10 to 14 in any specific market where it has been designated as having significant market power in accordance with section 40 of the Act;
- (b) any other obligation authorised by the European Commission in a decision it has taken pursuant to Article 8 (3) of the Access Directive.

Voluntary separation by a vertically integrated operator.

14B.(1) Operators which have been designated as having significant market power in one or several relevant markets in accordance with section 40 of the Act, shall notify the Authority of their intention to transfer their local access network assets or a substantial part thereof to a separate legal entity under different ownership, or to establish a separate business entity in order to provide to all retail providers, including its own retail divisions, fully equivalent access products.

(2) The notification referred to in sub-regulation (1) shall be made at least three months before any intended transfer to allow the Authority to assess the effect of the intended transaction.

(3) Operators shall also inform the Authority of any change in the intended transaction referred to in sub-regulation (1) as well as of the final outcome of the process of separation.

(3A) Operators may offer commitments regarding access conditions that are to apply to their network during an implementation period after the proposed form of separation is implemented, with a view to ensuring effective and non-discriminatory access by third parties.

(3B) The offer of commitments referred to in sub-regulation (3A) shall include enough details, including in terms of timing of implementation and duration, to allow the Authority to conduct its functions under this regulation. Such commitments may extend beyond the maximum period for market reviews set out in section 40 of the Act

(4) The Authority shall assess the effect of the intended transaction together with the commitments offered, where applicable, on existing regulatory obligations.

(5) For the purpose referred to in sub-regulation (3), the Authority shall conduct a co-ordinated analysis of the different markets related to the access network in accordance with the procedure set out in section 40 of the Act.

(5A) The Authority shall consider any commitments offered by the operator, having regard in particular to the objectives set out in section 19 of the Act. In so doing, the Authority shall consult third parties in accordance with section 13 of the Act, and shall address, those third parties which are directly affected by the intended transaction.

(6) On the basis of its assessment, the Authority shall impose, maintain, amend or withdraw obligations in accordance with the provisions of the Act applying, if appropriate, section 40C of the Act

(6A) In its decision, the Authority may make the commitments binding, wholly or in part and by way of derogation from section 40 of the Act it may make the commitments binding, wholly or in part, for the entire period for which they are offered.

(7) Without prejudice to section 40C of the Act, the legally and/or operationally separate business entity that has been designated as having significant market power in any specific market in accordance with section 40 of the Act may be subject to-

- (a) any of the obligations referred to in regulations 10 to 14; or

- (b) any other obligations authorised by the European Commission pursuant to Article 68(3) of the Directive of, where any commitments offered are insufficient to meet the objectives set out in section 19 of the Act.

(8) The Authority shall monitor the implementation of the commitments offered by the operator that it has made binding in accordance with sub-regulations (4) and (5A) and shall consider their extension when the period for which they are initially offered has expired.

Commitments procedure.

14C.(1) Operators designated as having significant market power may offer commitments to the Authority regarding conditions for access, co-investment, or both, applicable to their networks in relation to:

- (a) cooperative arrangements relevant to the assessment of appropriate and proportionate obligations pursuant to regulation 9;
- (b) co-investment in very high capacity networks pursuant to section 40B of the Act;
or
- (c) effective and non-discriminatory access by third parties pursuant to regulation 14B, both during an implementation period of voluntary separation by a vertically integrated operator and after the proposed form of separation is implemented.

(2) The offer for commitments shall be sufficiently detailed-

- (a) as to the timing and scope of their implementation; and
- (b) their duration,

to allow the Authority to undertake its assessment pursuant to sub-regulations (3) and (4). Such commitments may extend beyond the periods for carrying out market analysis provided in section 40 of the Act.

(3) In assessing any commitments offered by an operator pursuant to this regulation, the Authority shall, perform a market test on the offered terms, by conducting a public consultation of interested parties.

(4) Potential co-investors or access seekers may provide views on the compliance of the commitments offered with the conditions provided, as applicable, in regulation 9, section 40B of the Act or regulation 14B and may propose changes.

(5) As regards the commitments offered under this regulation, the Authority shall, when assessing obligations pursuant to regulation 9(8), consider-

- (a) evidence regarding character of the commitments offered;
- (b) the openness of the commitments to all market participants;
- (c) the quick availability of access under non-discriminatory conditions, including to very high capacity networks, before the launch of related retail services; and
- (d) the overall adequacy of the commitments offered to enable sustainable competition on downstream markets and to facilitate cooperative deployment and take-up of very high capacity networks in the interest of end-users.

(6) The Authority shall communicate to the operator designated as having significant market power its preliminary conclusions whether the commitments offered comply with the objectives, criteria and procedures set out in this regulation and, as applicable, in regulation 9, section 40B of the Act or regulation 14B and under which conditions it may consider making the commitments binding.

(7) The operator may revise its initial offer to take account of the preliminary conclusions of the Authority with a view to satisfying the criteria set out in this regulation and, as applicable, in regulation 9, section 40B of the Act or regulation 14B.

(8) Without prejudice to first subparagraph of section 40B(3) and (4) of the Act, the Authority may issue a decision to make the commitments binding, wholly or in part.

(9) The Authority may derogate from section 40 of the Act and make some or all commitments binding for a specific period, which may be the entire period for which they are offered, and in the case of co-investment commitments made binding pursuant to section 40B(3) of the Act they shall be binding for a period of minimum seven years.

(10) This regulation is without prejudice to the application of the market analysis procedure pursuant to section 40 of the Act and the imposition of obligations pursuant to regulation 9.

(11) When making commitments binding pursuant to this regulation, the Authority shall assess under the provisions of regulation 9, the consequences of that decision for market development and the appropriateness of any obligation that it has imposed or would, absent those commitments, have considered imposing pursuant to that regulation 9 or regulations 10 to 14.

(12) When notifying the relevant draft measure under regulation 9 in accordance with section 22 and 23 of the Act, the Authority shall accompany the notified draft measure with the commitments decision.

(13) The Authority shall monitor, supervise and ensure compliance with the commitments that it has made binding in accordance with sub-regulation (8) in the same way in which it monitors, supervises and ensures compliance with obligations imposed under regulation 9 and shall consider the extension of the period for which they have been made binding when the initial period expires.

(14) If the Authority concludes that an operator has not complied with the commitments that have been made binding in accordance with sub-regulation (8), it may impose penalties on such persons in accordance.

(15) The Authority may reassess the obligations imposed in accordance with regulation 9(9) having regard to the procedure for ensuring compliance of specific obligations under these regulations.

Publication of notice of obligations and access to information.

15.(1) The Authority shall ensure the publication of a notice setting out the obligations which have been imposed pursuant to these Regulations and such notice shall include information on where copies of a statement of the obligations can be obtained.

(2) When the Authority amends or revokes any obligations imposed by it, sub-regulation (1) shall apply accordingly.

(3) The notice referred to in sub-regulation (1) shall identify the specific product, service and geographical markets in respect of which the specific obligations are imposed.

(4) Subject to regulation 3, the Authority shall ensure that up-to-date information in relation to the application of these Regulations is made publicly available in a manner that guarantees all interested parties easy access to that information.

(5) The Authority shall send to the European Commission a copy of any information published in accordance with this regulation.

Notification to the European Commission.

16.(1) The Authority shall notify to the European Commission—

- (a) the name of every operator who has been designated as an SMP operator pursuant to these Regulations; and

(b) the obligations imposed upon such operators pursuant to these Regulations.

(2) The Authority shall notify to the European Commission any changes made to any of the matters set out in sub-regulation (1).

(3) The Authority shall make the notification referred to in sub-regulation (2) as soon as is practicable after the change is made.

Enforcement and Compliance.

17.(1) The Authority shall monitor compliance with these Regulations.

(2) Where the Authority finds that a person has contravened an obligation, condition or requirement imposed on him under or pursuant to regulations 5 (1) (b), (2), (3) or (4), 6 (1), (2) or (3), 7 (1), 9, 10, 11, 12, 13, or 14, the Authority shall seek compliance with any such obligation, condition or requirement in accordance with the procedure set out in regulations 19 to 30 of the Authorisation Regulations.

(3) Where an obligation, condition or requirement set out in, or imposed on a person pursuant to, these Regulations forms part of general, numbering or licence condition within the meaning of regulation 17 of the Authorisation Regulations applicable to that person, a contravention of such an obligation, condition or requirement shall constitute a contravention of a condition within the meaning of regulation 17 of the Authorisation Regulations to which the procedure set out in regulations 19 to 30 of the Authorisation Regulations applies.

Penalty for offences.

18. A person guilty of an offence under any provision of these Regulations shall be liable—

- (a) on summary conviction, to a fine not exceeding level 5 on the standard scale; and
- (b) on conviction on indictment, to a fine.

SCHEDULE

Deleted