

SECOND SUPPLEMENT TO THE GIBRALTAR GAZETTE

No. 3851 of 26 May, 2011

LEGAL NOTICE NO. 68 OF 2011.

COMMUNICATIONS ACT 2006

COMMUNICATIONS (ACCESS) (AMENDMENT) REGULATIONS 2011

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 Article 2 of Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, I hereby make the following Regulations—

Title and commencement.

1. These Regulations may be cited as the Communications (Access) (Amendment) Regulations 2011 and come into operation on the day of publication.

Amendments to the Communications (Access) Regulations 2006.

2. The Communications (Access) Regulations 2006 (the Principal Regulations) are amended in accordance with regulations 3 to 11.

Amendment to Regulation 5.

3. Regulation 5(1) of the Principal Regulations is amended by substituting the following paragraph for paragraph (b)—

“(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.”.

Amendments to Regulation 6.

4. Regulation 6 of the Principal Regulations is amended–

- (a) by deleting the word “and” after paragraph (b) in sub-regulation (1);
- (b) by inserting the following paragraph after paragraph (b) in sub-regulation (1)–

“(bb) efficient investment and innovation; and”;
- (c) by deleting the word “and” after paragraph (a)(ii) in sub-regulation (2);
- (d) by inserting the following paragraph after paragraph (a) in sub-regulation (2)–

“(ab) in justified cases, and to the extent that is necessary, impose obligations on a person who controls access to end-users, to make the services interoperable; and
- (e) by deleting the word “and” after paragraph (b)(ii)(aa) in sub-regulation (2);
- (f) by inserting the word “and” after paragraph (b)(ii) (bb) in sub-regulation (2);
- (g) by inserting the following sub-clause after paragraph (b)(ii) (bb) in sub-regulation (2)–

“(cc) that providers of digital television services and equipment co-operate in the provision of interoperable television services for disabled end-users.”;
- (h) by deleting sub-regulations (3) and (4);
- (i) by substituting “(1) or (2)” for “(1), (2) or (3) in sub-regulation (5);

- (j) by substituting the words “sections 22 and 24A” for the words “section 22” in sub-regulation 5(e);
- (k) by substituting the following sub-regulation for sub-regulation (6)–
 - “(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.”.

Repeal of Regulation 8.

- 5. Regulation 8 of the Principal Regulations is repealed.

Amendment to Regulation 9.

- 6. Regulation 9(3)(a) of the Principal Regulations is amended by substituting “Regulation 6(1) and (2)” for “Regulation 6(1) to (4)”.

Amendments to Regulation 10.

- 7. Regulation 10 of the Principal Regulations is amended–
 - (a) by substituting the following paragraph for paragraph (a) in sub-regulation (2)–
 - “(a) the terms and conditions for access or interconnection, including any conditions limiting access to and/or use of services and applications where such conditions are allowed by Gibraltar or European Community law, including prices;”;
 - (b) by substituting the following sub-regulation for sub-regulation (7)–

“(7) Notwithstanding sub-regulation (6), where, pursuant to 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 containing at least the elements set out in the Schedule.”.

Amendments to Regulation 13.

8. Regulation 13 of the Principal Regulations is amended–

(a) by substituting the following paragraph for paragraph (a) in sub-regulation (2)–

“(a) give third parties access to specified network elements, facilities or both such elements and facilities, including access to network elements which are not active and/or unbundled access to the local loop, in order, in particular, to allow carrier selection and/or pre-selection and/or subscriber line resale offer;”;

(b) by substituting the following paragraph for paragraph (f) in sub-regulation (2)–

“(f) provide co-location or other forms for the sharing of associated facilities;”;

(c) by deleting the word “or” after paragraph (h) and by substituting the word “or” for the full-stop after paragraph(i) in sub-regulation (2);

(d) by inserting the following paragraph after paragraph (i) in sub-regulation (2)–

“(j) provide access to associated services, such as identity, location and presence service.”;

(e) by substituting the following sub-regulation for sub-regulations (4)–

“(4) When considering the obligations referred to in sub-regulation (1) and, in particular, when assessing how such obligations could be imposed in a manner which is proportionate to the objectives set out in section 19 of the Act, the Authority shall take into account, in particular, the following factors–

- (a) the technical and economic viability of using or installing competing facilities, having regard to the state of market development, taking into account the nature and type of interconnection and/or access involved, including the viability of other upstream access products, such as access to ducts;
- (b) the feasibility of the provision of the proposed access;
- (c) the initial investment made by the facility owner, taking account of any public investment made and the risks involved in making the investment ;
- (d) the need to secure effective competition in the long-term, with particular attention to economically efficient infrastructure-based competition;
- (e) any rights to intellectual property that are relevant to the proposed access; and
- (f) the desirability of securing that electronic communications services are provided that are available throughout the European Community.”;

(f) by inserting the following sub-regulations after sub-regulation (4)–

“(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.”.

Amendment to Regulation 14.

9. Regulation 14 of the Principal Regulations is amended by substituting the following sub-regulation for sub-regulation (5)–

- “(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.”.

Insertion of regulations 14A and 14B.

10. The Principal Regulations are amended by inserting the following regulations after regulation 14–

“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.

14B. Voluntary separation by a vertically integrated operator.

- (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 in advance and with sufficient time 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.
- (4) The Authority shall assess the effect of the intended transaction 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.
- (6) On the basis of its assessment, the Authority shall impose, maintain, amend or withdraw obligations in accordance with the provisions of the Act.
- (7) The legally and/or operationally separate business entity 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.”.

Substitution of the Schedule.

11. The Principal Regulations are amended by substituting the following Schedule for the Schedule–

“SCHEDULE

Regulation 10

MINIMUM LIST OF ITEMS TO BE INCLUDED IN A REFERENCE OFFER FOR WHOLESALE NETWORK INFRASTRUCTURE ACCESS, INCLUDING SHARED OR FULLY, UNBUNDLED ACCESS TO THE LOCAL LOOP AT A FIXED LOCATION TO BE PUBLISHED BY NOTIFIED OPERATORS WITH SMP

For the purposes of this Schedule the following definitions apply:

- (a) “local sub-loop” means a partial local loop connecting the network termination point to a concentration point or a specified intermediate access point in the fixed public electronic communications network;
- (b) “unbundled access to the local loop” means full unbundled access to the local loop and shared access to the local loop; it does not entail a change in ownership of the local loop;
- (c) “full unbundled access to the local loop” means the provision to a beneficiary of access to the local loop or local sub-loop of the SMP operator allowing the use of the full capacity of the network infrastructure;
- (d) “shared access to the local loop” means the provision to a beneficiary of access to the local loop or local sub-loop of the SMP operator, allowing the use of a specified part of the capacity of the network infrastructure, such as a part of the frequency or an equivalent.

A. Conditions for unbundled access to the local loop.

1. Network elements to which access is offered covering in particular the following elements together with appropriate associated facilities:

- (a) unbundled access to local loops (full and shared);
- (b) unbundled access to local sub-loops (full and shared), including, when relevant, access to network elements which are not active for the purpose of roll-out of backhaul networks; and
- (c) where relevant, duct access enabling the roll-out of access networks.

2. Information concerning the locations of physical access sites, including cabinets and distribution frames, availability of local loops, sub-loops and backhaul in specific parts of the access network and, when relevant, information concerning the location of ducts and the availability within ducts.

3. Technical conditions related to access and use of local loops and sub-loops, including the technical characteristics of the twisted pair and/or optical fibre and/or equivalent, cable distributors, and associated facilities and, when relevant, technical conditions related to access to ducts.

4. Ordering and provisioning procedures, usage restrictions.

B. Co-location services.

1. Information on the SMP operator's existing relevant sites or equipment locations and planned update thereof.¹

2. Co-location options at the sites indicated under point 1 (including physical co-location and, as appropriate, distant co-location and virtual co-location).

3. Equipment characteristics: restrictions, if any, on equipment that can be co-located.

¹ Availability of this information may be restricted to interested parties only, in order to avoid public security concerns.

4. Security issues: measures put in place by notified operators to ensure the security of their locations.
5. Access conditions for staff of competitive operators.
6. Safety standards.
7. Rules for the allocation of space where co-location space is limited.
8. Conditions for beneficiaries to inspect the locations at which physical co-location is available, or sites where co-location has been refused on grounds of lack of capacity.

C. Information systems.

Conditions for access to notified operator's operational support systems, information systems or databases for pre-ordering, provisioning, ordering, maintenance and repair requests and billing.

D. Supply conditions.

1. Lead time for responding to requests for supply of services and facilities; service level agreements, fault resolution, procedures to return to a normal level of service and quality of service parameters.
2. Standard contract terms, including, where appropriate, compensation provided for failure to meet lead times.
3. Prices or pricing formulae for each feature, function and facility listed above.”.

Dated 26th May, 2011.

F J VINET,
Minister with responsibility for communications

EXPLANATORY MEMORANDUM

These Regulations transpose into the law of Gibraltar Article 2 of Directive 2009/140/EC that amends Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities.