

SECOND SUPPLEMENT TO THE GIBRALTAR GAZETTE

No. 4800 GIBRALTAR Thursday 24th December 2020

LEGAL NOTICE NO. 503 OF 2020

COMMUNICATIONS ACT 2006

COMMUNICATIONS (ACCESS) (AMENDMENT) REGULATIONS 2020

In exercise of the powers conferred on the Minister by section 9 of the Communications Act 2006, 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 Minister has made these Regulations-

Title.

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

Commencement.

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

Amendment to Regulations.

3. The Communications (Access) Regulations 2006 are amended in accordance with the provisions of these Regulations.

Amendment of Regulation 5.

4. In regulation 5, the following new sub-regulation is inserted immediately following sub-regulation (6)-

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

Amendment of Regulation 6.

5. In regulation 6-

(a) the following new paragraph is inserted between paragraph (a) and paragraph (b) of regulation 6(1)-

- “(aa) the deployment of very high capacity networks;”;
- (b) in sub-regulation (2)(a)(i), the words “,subject to general authorisation,” are inserted between the words “person” and “controlling network”;
- (c) in sub-regulation (2)(ab), the words “,subject to general authorisation,” are inserted between the words “person” and “who controls” and the “;” after the word “interoperable” is removed;
- (d) the following new sub-regulation is inserted after sub-regulation (2)(ab)-
- “(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;”;
- (e) the following new sub-regulations are inserted after sub-regulation (2)-
- “(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-
- (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.”
- (f) in sub-regulation (5), the words “pursuant to sub-regulations (1) or (2)” are replaced with the words “pursuant to sub-regulations (1)-(2O)”;
- (g) the following new sub-regulation is inserted after sub-regulation (5)-
- “(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.”;
- (h) in sub-regulation (8), the definition of “application programme interface” is replaced with-
- “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;”.

Amendment of Regulation 7.

6. In regulation 7, in sub-regulation (1)(b) and sub-regulation (2), the words “Part I of Annex I to the Access Directive” are replaced with the words “Part I of Annex II of the Directive”;

Amendment of Regulation 9.

7. In regulation 9-

- (a) in paragraph (a) of sub-regulation (3), the words “(1) and (2)” are deleted;
- (b) in paragraph (e) of sub-regulation (3), the words “Condition 6 in Part B of the Schedule to the Authorisation Regulations” are replaced with the words “Condition 7 in Part D Condition 6 in Part B of the Schedule to the Authorisation Regulations”;
- (c) in paragraph (a) of sub-regulation (8), the “;” at the end of the paragraph is deleted and the words “in the market analysis, considering where appropriate, the identification of transnational demand pursuant to Article 66 of the Directive;” are inserted after the words “problem identified”;
- (d) in paragraph (b) of sub-regulation (8), the “;” at the end of the paragraph is deleted and the words “having regard where possible, to the costs and benefits;” are inserted after the words “intended to achieve”;
- (e) the following new sub-regulations are inserted after sub-regulation (8)-

“(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.”.

Amendment of Regulation 10.

8. In regulation 10-

- (a) in sub-regulation (2)(a), the words “access or interconnection” are replaced with “access, interconnection, supply and use”;
- (b) in sub-regulation (2)(a), the word “limiting” is replaced with the word “altering”;
- (c) in sub-regulation (2)(a), the words “,in particular with regard to migration from legacy infrastructure” are inserted between the words “applications” and “where”;
- (d) sub-regulation (7) is replaced with the following-

“(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.

Amendment of Regulation 11.

9. In regulation 11, the following new sub-regulation is inserted after sub-regulation (2)-

“(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.”

Insertion of new Regulation 12A.

10. The following new regulation is inserted after regulation 12-

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.

Amendment of Regulation 13.

11. In regulation 13-

(a) sub-regulation (2)(a) is replaced in its entirety with-

“(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;”;

(b) in sub-regulation (2), the following new paragraph is inserted after paragraph (a)-

“(aa) give third parties access to specific active or virtual network elements and service;”;

(c) sub-regulation (4) is replaced in its entirety with-

“(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.”

Amendment of Regulation 14.

12. In regulation 14-

- (a) in sub-regulation (2)(b), the following new sub-paragraph is inserted after sub-paragraph (i)-

“(ia) promote the deployment of new and enhanced networks;”;

(b) in sub-regulation (2), the following new paragraph is inserted after paragraph (b)-

“(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.”;

(c) the following new sub-regulation is inserted after sub-regulation (2)-

(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.”;
- (c) the following new sub-regulation is inserted after sub-regulation (4)-

“(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.”

Amendment of Regulation 14B.

13. In regulation 14B-

(a) in sub-regulation (2), the words “in advance and with sufficient time” are replaced with “at least three months before any intended transfer”;

(b) the following new sub-regulations are inserted after sub-regulation (3)-

“(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”

(c) in sub-regulation (4), the words “together with the commitments offered, where applicable,” are inserted between the words “transaction” and “on existing”;

(d) the following new sub-regulation is inserted after sub-regulation (5)-

“(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.”

(e) in sub-regulation (6), the “.” at the end is removed and the words “applying, if appropriate, section 40C of the Act”;

(f) the following new sub-regulation is inserted after sub-regulation (6)-

“(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.”;

(g) sub-regulation (7) is replaced in its entirety with-

“(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.”;

(h) the following new sub-regulation is inserted after sub-regulation (7)-

“(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.”;

Insertion of new regulation 14C.

14. The following new regulation is inserted after regulation 14B-

“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.”

Deletion of schedule.

15. The Schedule is deleted in its entirety.

Dated: 24th December 2020.

SIR J BOSSANO,
Minister with responsibility for telecommunications.

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.