

Access to the public telephone network at a fixed location for residential and non-residential customers

Publicly available local telephone services provided at a fixed location for residential and non-residential customers

Publicly available international telephone services provided at a fixed location for residential and non-residential customers

Decision Notice 11/14

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Executive Summary

The communications regulatory framework requires the Gibraltar Regulatory Authority (GRA or the Authority) to define relevant markets susceptible to ex-ante regulation, appropriate to national circumstances in accordance with the market definition procedure outlined in the Framework Directive¹. In addition, the Authority is required to conduct an analysis of the relevant markets to decide whether or not they are effectively competitive and, having identified competition problems, propose appropriate regulatory measures.

On 22nd January 2014, the Authority issued a national consultation on retail access to the public telephone network, retail local calls and retail international calls provided at a fixed location (Public Consultation No. 01/14).

After the consultation period and having considered the views of all respondents, the Authority set out in a Response to Consultation² its conclusions regarding the market review process including its SMP obligations and subsequent notification to the European Commission ("the Commission"), BEREC and other NRA's in accordance with Article 7 of the Framework Directive³. The Commission later issued a request for information⁴ to which the Authority replied⁵.

The Commission issued its final comments⁶ regarding cases GI/2014/1593 to 1598.

This decision deals with the three markets below:

- Retail access to the public telephone network at a fixed location
- Retail local calls from a fixed location
- Retail international calls from a fixed location.

The Authority shall designate Gibtelecom as having SMP in the following markets:

- Retail access to the public telephone network at a fixed location
- Retail local calls from a fixed location
- Retail international calls from a fixed location.

¹ DIRECTIVE 2002/21/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) OJ [2002] L 108/33.

² Response to Consultation 06/14.

³ See footnote 1 above.

⁴ Request for information pursuant to Article 5(2) of Directive 2002/21/EC on cases GI/2014/1593-1598.

⁵ Gibraltar Regulatory Authority's response to the European Commission's request for information pursuant to Article 5(2) of Directive 2002/21/EC on cases GI/2014/1593-1598.

⁶ The Commission's comments pursuant to Article 7(3) of Directive 2002/21/EC on cases GI/2014/1593-1598.

This decision specifies the obligations to apply to SMP designated operators in the relevant markets.

1. Introduction

1.1 Background

The European regulatory framework for electronic communications networks and services is a set of five Directives⁷:

- Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (the Framework Directive)⁸
- Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (the Access Directive)⁹
- Directive 2002/20/EC on the authorisation of electronic communications networks and services (the Authorisation Directive)¹⁰
- Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (the Universal Service Directive)¹¹
- Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (the Privacy Directive)¹².

These five Directives were implemented as part of the Communications Act 2006¹³ (the Act). The legislation enables the Authority to carry out reviews of competition in relevant electronic communications markets to ensure that regulation remains appropriate in the light of changing market conditions, otherwise known as market reviews.

⁷ As Amended in 2009.

⁸ See footnote 1 above.

⁹ 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 (Access Directive) OJ [2002] L 108/7.

¹⁰ DIRECTIVE 2002/20/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) OJ [2002] L 108/21.

¹¹ DIRECTIVE 2002/22/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) OJ [2002] L 108/51.

¹² DIRECTIVE 2002/58/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) OJ [2002] L 201/37.

¹³ Communications Act 2006, Act No. 15, 2006. Please note this legislation implemented the latest regulatory reform package of 2009.

1.2 Market review methodology

In conducting a market review, the Authority must take account of the SMP procedures in the Act, sections 38-41, (the SMP procedures) as well as the provisions dealing with co-operation with the European Commission, BEREC¹⁴ and the regulatory authorities in the Member States, sections 22-24.

Section 39 of the Act requires the Authority to take due account of all applicable guidelines and recommendations which have been issued or made by the European Commission in pursuance of the provisions of a European Community instrument. Therefore, the Authority should take due account of the European Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex-ante regulation in accordance with Directive 2002/21/EC (the Recommendation).

Once the Authority has defined relevant markets, it shall analyse the state of competition within these markets to determine whether they are effectively competitive or not. Where markets are deemed to be effectively competitive or will become effectively competitive within the lifetime of the review, any existing regulation must be withdrawn¹⁵. Where markets are deemed to be uncompetitive, the Authority must consider appropriate regulatory obligations on any undertaking which has significant market power.

The main purpose of a market review is to identify the competitive conditions prevailing in a market by assessing systematically the competitive constraints which are faced by undertakings in the market. A market review commences by defining a market, which is then analysed to assess the degree of effective competition.

In accordance with European Commission Guidelines, the market analysis procedure is prospective – that is, it must be forward-looking.

The market review comprised three main components:

- Definition of the relevant market susceptible to ex-ante regulation
- Assessment of competition in each market, in order to identify competitive constraints and assess whether any undertaking(s) has SMP
- Where market power is identified, consideration of the appropriate SMP obligations in relation to that market.

The Authority took account of the approach recommended by the European Commission, and also considered the various guidelines and recommendations published by the European Commission, as well as the experience of other European NRAs.

¹⁴ Body of European Regulators of Electronic Communications.

¹⁵ Please note that regulation at retail level may depend on regulation at the wholesale level.

1.3 Market review procedure

The Authority collected market data from the various providers of electronic communications networks and services in order to carry out its market definition and market analysis, based on established economic and legal principles, and taking the utmost account of the Recommendation and the Guidelines.

The market review drew on a wide range of data and information to reach its conclusions. The Authority utilised data supplied by industry and also referred to comparative data from other jurisdictions.

On 22nd January 2014, the Authority issued a national consultation on retail access to the public telephone network, retail local calls and retail international calls provided at a fixed location (Public Consultation No. 01/14).

After the consultation period and having considered the views of all respondents, the Authority set out in a Response to Consultation¹⁶ its conclusions regarding the market review process including its SMP obligations and subsequent notification to the European Commission ("the Commission"), BEREC and other NRA's in accordance with Article 7 of the Framework Directive¹⁷. The Commission later issued a request for information¹⁸ to which the Authority replied¹⁹.

The Commission issued its final comments²⁰ regarding cases GI/2014/1593 to 1598.

In accordance with Section 22 of the Act the Authority has taken the utmost regard of these comments in this decision.

1.4 SMP designations

Gibtelecom was found to have 100% market share on all three markets below:

- Retail access to the public telephone network at a fixed location
- Retail local calls at a fixed location
- Retail international calls at a fixed location.

¹⁶ Response to Consultation 06/14.

¹⁷ See footnote 1 above.

¹⁸ Request for information pursuant to Article 5(2) of Directive 2002/21/EC on cases GI/2014/1593-1598.

¹⁹ Gibraltar Regulatory Authority's response to the European Commission's request for information pursuant to Article 5(2) of Directive 2002/21/EC on cases GI/2014/1593-1598.

²⁰ The Commission's comments pursuant to Article 7(3) of Directive 2002/21/EC on cases GI/2014/1593-1598.

1.5 Comments from the European Commission

On 8th May 2014, the Authority received a request for information²¹ pursuant to the Article 5(2) of Directive 2002/21/EC from the Commission. On 13th May 2014, the Authority replied to the Commission and gave its position²² concerning the retail access, retail local and international calls markets in Gibraltar.

On 5th June 2014, based on the additional information provided, the Commission published its comments²³ in a letter pursuant to Article 7(3) of Directive 2002/21/EC on cases GI/2014/1593-1598.

1.6 Structure of the SMP obligations

Retail access to the public telephone network at a fixed location

The Authority designates Gibtelecom as having SMP in the market for retail access to the public telephone network in Gibraltar.

The following obligations will apply to Gibtelecom in this market:

- Transparency
- Non-discrimination
- Accounting separation and cost accounting
- Price control.

Retail local calls at a fixed location

The Authority designates Gibtelecom as having SMP in the market for retail local calls at a fixed location in Gibraltar.

The following obligations will apply to Gibtelecom in this market:

- Transparency
- Non-discrimination
- Accounting separation and cost accounting
- Price control.

²¹ Request for information pursuant to Article 5(2) of Directive 2002/21/EC on cases GI/2014/1593-1598.

²² Gibraltar Regulatory Authority's response to the European Commission's request for information pursuant to Article 5(2) of Directive 2002/21/EC on cases GI/2014/1593-1598.

²³ The Commission's comments pursuant to Article 7(3) of Directive 2002/21/EC on cases GI/2014/1593-1598.

Retail international calls at a fixed location

The Authority designates Gibtelecom as having SMP in the market for retail international calls at a fixed location in Gibraltar.

The following obligations will apply to Gibtelecom in this market:

- Transparency
- Non-discrimination
- Accounting separation and cost accounting
- Price control.

These obligations are considered to be appropriate, proportionate and justified, in light of the competition problems identified.

1.7 Structure of this document

The rest of the decision is structured as follows:

Chapter 2 presents the European Commission's comments.

Chapter 3 provides for the designation of SMP on specific undertakings.

Chapter 4 specifies the obligations applicable to the SMP designated operators in the relevant markets.

2. European Commission's comments

On 8th May 2014, the Authority received a request for information²⁴ pursuant to Article 5(2) of Directive 2002/21/EC²⁵ from the European Commission to which the Authority replied.

On 5th June 2014, based on the Authority's additional information provided, the Commission published its comments in a letter pursuant to Article 7(3) of Directive 2002/21/EC on cases GI/2014/1593-1598. The EC's comments are summarised in sections 2.1 below.

2.1 Lack of details concerning price control obligations

The Commission noted that in the GRA's draft measures, it stated that the details of the price control obligations to be imposed on Gibtelecom will be subject to further consultations. The Commission therefore explained the need to complete the regulatory process for these relevant markets as swiftly as possible in order to enhance transparency and legal certainty for all market players.

²⁴ Request for information pursuant to Article 5(2) of Directive 2002/21/EC on cases GI/2014/1593-1598.

²⁵ See footnote 1 above.

3. Authority's Response to the European Commission's comments

3.1 Lack of details concerning price control obligations

The Authority acknowledged the Commission's comments on the lack of details concerning the price control obligations. In Response to Public Consultation 06/14, the Authority proposed a price control obligation in all three markets in the form of a retail price notification framework. This framework required Gibtelecom to provide sufficient cost data and analyses to demonstrate that the proposed prices²⁶ for products and services are not anti-competitive, unduly discriminatory and that they comply with the principle of cost orientation. The specific details of what the Authority meant by "sufficient cost data and analyses" was never outlined in the response. The Authority stated, however, that these details would be the subject of further consultations on the matter.

On 5th June 2014, the Authority published a consultation on Accounting Separation, Cost Accounting Systems, Cost Orientation and Retail Price Notification. In such document, the Authority explains and proposes the level of information and data that must be submitted by SMP operators in order to comply with their SMP obligations. After taking into account operator comments, a resulting Decision Notice will be published on the issue.

²⁶ This includes new prices, price increases and price reductions (whether permanent or temporary, for special offers, trials or promotions) referred to under the Transparency obligations.

4. Designation of undertakings with SMP

Having regard to the sections above, in particular sections 2 and 3, the Authority is of the view that, and in accordance with the Universal Service and Users' Rights Regulations:

- Gibtelecom shall be designated as having SMP in the market for retail fixed narrowband access.
- Gibtelecom shall be designated as having SMP in the market for retail local calls at a fixed location.
- Gibtelecom shall be designated as having SMP in the market for retail international calls at a fixed location.

A reference in this section to any given undertaking shall be taken to include any and all undertakings which are affiliated with, or controlled by, the undertaking in question.

5. SMP Obligations

Gibtelecom SMP obligations

5.1 Retail Fixed Access

Transparency

Gibtelecom shall notify the Authority 45 days in advance of changes to terms and conditions, prices of new services and price increases.

Gibtelecom shall notify the Authority 30 days in advance for price reductions.

Gibtelecom shall publish changes to terms and conditions, information on increase to tariffs and information on prices for new services 30 days in advance.

In terms of a decrease in tariffs, Gibtelecom shall be obliged to publish this information at least 14 days in advance.

Publication should be by prominent notice in the local press and on the company website.

Non-discrimination

Gibtelecom should not unduly discriminate between customers.

This does not prevent Gibtelecom from offering different terms and tariffs to different customer groups, but such differences must be objectively justifiable.

Accounting separation and cost accounting

Gibtelecom shall account separately for its retail fixed access to the public telephone network at a fixed location.

Gibtelecom shall prepare and submit to the Authority an audited accounting separation report every year starting 30th September 2014.

Furthermore, Gibtelecom shall ensure that:

a) it operates and maintains a cost accounting system that complies with the specific requirements and guidelines issued by the Authority,

b) it operates and maintains a cost accounting system suitable for ensuring compliance with Regulation 14 of the Universal Service and Users' Rights Regulations,

c) it operates and maintains a cost accounting system which is annually verified by a qualified independent person,

d) it publishes in its annual accounts a statement concerning its compliance with the cost accounting system it is required to operate,

e) it maintains cost accounting systems which produce appropriate information to demonstrate compliance with cost-orientation.

Price control

With regards to the pre-notification of new prices, price increases and price reductions (whether permanent or temporary, for special offers, trials or promotions) referred to under the Transparency obligations, Gibtelecom shall provide sufficient cost data and analyses to demonstrate that the proposed prices are not anti-competitive, unduly discriminatory and that they comply with the principle of cost orientation.

Gibtelecom shall ensure that its prices are cost oriented.

5.2 Retail Fixed Local Calls

Transparency

Gibtelecom shall notify the Authority 45 days in advance of changes to terms and conditions, prices of new services and price increases.

Gibtelecom shall notify the Authority 30 days in advance for price reductions.

Gibtelecom shall publish changes to terms and conditions, information on increase to tariffs and information on prices for new services 30 days in advance.

In terms of a decrease in tariffs, Gibtelecom shall be obliged to publish this information at least 14 days in advance.

Publication should be by prominent notice in the local press and on the company website.

Non-discrimination

Gibtelecom should not unduly discriminate between customers.

This does not prevent Gibtelecom from offering different terms and tariffs to different customer groups, but such differences must be objectively justifiable.

Accounting separation and cost accounting

Gibtelecom shall account separately for its retail fixed access to the public telephone network at a fixed location.

Gibtelecom shall prepare and submit to the Authority an audited accounting separation report every year starting 30th September 2014.

Furthermore, Gibtelecom shall ensure that:

a) it operates and maintains a cost accounting system that complies with the specific requirements and guidelines issued by the Authority,

b) it operates and maintains a cost accounting system suitable for ensuring compliance with Regulation 14 of the Universal Service and Users' Rights Regulations,

c) it operates and maintains a cost accounting system which is annually verified by a qualified independent person,

d) it publishes in its annual accounts a statement concerning its compliance with the cost accounting system it is required to operate,

e) it maintains cost accounting systems which produce appropriate information to demonstrate compliance with cost-orientation.

Price control

With regards to the pre-notification of new prices, price increases and price reductions (whether permanent or temporary, for special offers, trials or promotions) referred to under the Transparency obligations, Gibtelecom shall provide sufficient cost data and analyses to demonstrate that the proposed prices are not anti-competitive, unduly discriminatory and that they comply with the principle of cost orientation.

Gibtelecom shall charge its retail customers using a per-second billing format. The format shall require per-second billing to apply to all calls lasting more than one minute. Calls less than one minute are not subject to this obligation.

Gibtelecom shall ensure that its prices are cost oriented.

5.3 Retail Fixed International Calls

Transparency

Gibtelecom shall notify the Authority 45 days in advance of changes to terms and conditions, prices of new services and price increases.

Gibtelecom shall notify the Authority 30 days in advance for price reductions.

Gibtelecom shall publish changes to terms and conditions, information on increase to tariffs and information on prices for new services 30 days in advance.

In terms of a decrease in tariffs, Gibtelecom shall be obliged to publish this information at least 14 days in advance.

Publication should be by prominent notice in the local press and on the company website.

Non-discrimination

Gibtelecom should not unduly discriminate between customers.

This does not prevent Gibtelecom from offering different terms and tariffs to different customer groups, but such differences must be objectively justifiable.

Accounting separation and cost accounting

Gibtelecom shall account separately for its retail fixed access to the public telephone network at a fixed location.

Gibtelecom shall prepare and submit to the Authority an audited accounting separation report every year starting 30th September 2014.

Furthermore, Gibtelecom shall ensure that:

- a) it operates and maintains a cost accounting system that complies with the specific requirements and guidelines issued by the Authority,
- b) it operates and maintains a cost accounting system suitable for ensuring compliance with Regulation 14 of the Universal Service and Users' Rights Regulations,
- c) it operates and maintains a cost accounting system which is annually verified by a qualified independent person,
- d) it publishes in its annual accounts a statement concerning its compliance with the cost accounting system it is required to operate,
- e) it maintains cost accounting systems which produce appropriate information to demonstrate compliance with cost-orientation.

Price control

With regards to the pre-notification of new prices, price increases and price reductions (whether permanent or temporary, for special offers, trials or promotions) referred to under the Transparency obligations, Gibtelecom shall provide sufficient cost data and analyses to demonstrate that the proposed prices are not anti-competitive, unduly discriminatory and that they comply with the principle of cost orientation.

Gibtelecom shall charge its retail customers using a per-second billing format. The format shall require per-second billing to apply to all calls lasting more than one minute. Calls less than one minute are not subject to this obligation.

Gibtelecom shall ensure that its prices are cost oriented.