



Decision and SMP Obligations – Retail Fixed Markets

Decision Notice No. 05/08

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Gibraltar Regulatory Authority

Suite 603, Europort

Gibraltar

Telephone +350 20074636 Fax +350 20072166

Web:<http://www.gra.gi>

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Executive Summary

The communications regulatory framework¹ requires the Gibraltar Regulatory Authority (“the Authority”) to define relevant markets appropriate to national circumstances and to analyse these markets to ensure that regulation remains appropriate in the light of changing market conditions, otherwise known as market reviews.

On 10th April 2007, the Authority issued a national consultation on its market analysis for retail fixed markets (Public Consultation No. 01/07).

Having considered the views of all respondents to the Public Consultation (“the Consultation”), the Authority set out in a Statement (Document No. 13/07) its conclusions regarding the market analysis process including its Significant Market Power (SMP) obligations and subsequent notification to the European Commission and other NRAs in accordance with article 7 of the Framework Directive.²

This decision deals with three markets defined as follows:

1. Retail access to the public telephone network at a fixed location
2. Retail national publicly available telephony services from a fixed location
3. Retail international publicly available telephony services from a fixed location

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

1. Access to the public telephone network at a fixed location for residential and non-residential customers in Gibraltar;
2. National publicly available telephony services from a fixed location market; and
3. International publicly available telephony services from a fixed location market (including managed VoIP services).

The Authority shall apply obligations on Gibtelecom in the relevant markets in which it has been designated as having SMP.

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

¹ Communications Act 2006, Act No. 15, 2006 (“the Act”).

² 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.

1. Background to the Review

1.1 Introduction

The European regulatory framework for electronic communications networks and services entered into force on 25th July 2003 in the European Union. The framework is designed to create harmonised regulation across Europe and is aimed at reducing entry barriers and fostering prospects for effective competition to the benefit of consumers. The legal basis for the regulatory framework is set out in five key Directives:

1. Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (the Framework Directive)³
2. Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (the Access Directive)⁴
3. Directive 2002/20/EC on the authorisation of electronic communications networks and services (the Authorisation Directive)⁵
4. Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (the Universal Service Directive)⁶
5. Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (the Privacy Directive)⁷.

The above Directives were implemented as part of the Act and accompanying Regulations. 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.

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, as well as the provisions dealing with co-

3 See footnote 2 above.

4 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.

5 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.

6 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.

7 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.

operation with the European Commission and the national 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.

Once the Authority has defined relevant markets for the purposes of ex ante regulation, 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 prospectively effectively competitive within the lifetime of the review, any existing regulation must be withdrawn. Where markets are deemed to be uncompetitive, the GRA must consider appropriate regulatory obligations on any undertaking which has SMP.

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 that market.

In accordance with European Commission Guidelines⁸ (the Guidelines), the market analysis procedure is prospective – that is, it must be forward-looking.

The market review comprised three main components:

1. Definition of the relevant markets
2. Assessment of competition in each relevant market, in order to identify competitive constraints and assess whether any undertaking has SMP
3. 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 took into account the various guidelines and recommendations published by the European Commission, as well as the experience of other European NRAs.

When the review was undertaken the Authority took account of the Commission's Recommendation (first edition) in which it identified a set of product and service markets which may be susceptible to ex ante regulation.⁹ Following the publication of the response to consultation, the Commission has adopted a revised

8 Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03) OJ [2002] C 165/6.

9 COMMISSION RECOMMENDATION of 11/02/2003 On Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, Brussels, 11/02/2003 C(2003)497.

Recommendation (second edition) on markets susceptible to ex ante regulation.¹⁰ The markets identified by the Commission in the second edition exclude telephone services markets (formerly Markets 3-6).

1.3 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 10th April 2007, the Authority issued a national consultation on its market analysis for retail fixed markets (Public Consultation No. 01/07). Having considered the views of all respondents, the Authority published a response to consultation and in accordance with Article 7(3) of Directive 2002/21/EC (the Framework Directive) notified the European Commission (the Commission) on 31st October 2007 (Document No. 13/07). The response to consultation set out the Authority's conclusions regarding SMP designations and SMP obligations.

The Commission published its comments on the response to consultation in a letter pursuant to Article 7(3) of Directive 2002/21/EC on cases GI/2007/0710-0715 on 30th November 2007.¹¹

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

1.4 Access to the public telephone network at a fixed location

In the review the Authority stated that a relevant market for access to the public telephone network at a fixed location for the purpose of making and/or receiving telephone calls and related services can be identified and the geographical extent of the market is the territory of Gibraltar.

The Authority reasoned that residential and non-residential customers are in the same market for retail access because:

1. The contractual terms of access do not differ significantly between residential and non-residential users, and the pricing structure is the same for residential and non-residential users.

10 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 of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services

11 SG-Greffe (2007) D/207339 of 30th November 2007 available at http://circa.europa.eu/Public/irc/info/ecctf/library?!=/gibraltar_gi/registered_notifications&vm=detailed&sb=Date_d

2. Operators do not classify demand categories differently (for example, ISDN access data is collected on a global basis).
3. Supply side substitution is straightforward, as the products are identical; a supplier to residential customers could easily divert to the supply of non-residential customers and vice versa.

The Authority notes that the publication of the second edition of the recommendation has resulted in the removal of separate markets for residential and non-residential customers in the access market to public telephony at a fixed location.

The Authority concluded in its review that:

1. All forms of narrowband access are in the same market and that the geographical scope of the market is Gibraltar.
2. Retail access to the public telephone network at a fixed location in Gibraltar is a relevant market for the purposes of ex ante regulation.

Gibtelecom has 100% of the market for retail fixed access in Gibraltar. The Authority assessed prospective competition and the factors which may qualify Gibtelecom's ability to price independently of competitors. The conclusion is that Gibtelecom will remain dominant in this market for the lifetime of this review.

The Authority therefore designates Gibtelecom as having SMP in the retail fixed access market in Gibraltar.

The following obligations will apply to SMP operators in this market:

- Obligation of transparency
- Obligation of non-discrimination
- Obligation of accounting separation
- Price control and cost accounting obligations

1.5 Publicly available national and international telephone services at a fixed location

The Authority notes that the publication of the second edition of the recommendation has resulted in the exclusion of publicly available local, national and international telephone services markets provided at a fixed location.

The Authority has taken account of this and has also taken account of the opinion of the ERG.¹² The Authority has reconsidered whether publicly available national telephone services at a fixed location in Gibraltar are markets that can be identified for the purposes of ex ante regulation.

¹² I/ERG Opinion on the draft recommendation on relevant markets, October 2007 ERG(07)25.

As set out in the Commission's Recommendation, when identifying markets other than those set out in the Annex to the Commission's Recommendation, three criteria should be cumulatively met:

1. The presence of high and non-transitory barriers to entry. These may be of a structural, legal or regulatory nature;
2. The state of competition within the barriers to entry over the review period;
3. The insufficiency of competition law to address market failures concerned.

The Authority in applying this test notes that according to the ERG "Failure to meet one of the criteria will in any event necessarily lead to the conclusion that the market is not a candidate for ex ante regulation".¹³

The Authority is of the view that there is a considerable structural barrier to entry into the market for publicly available telephone services at a fixed location in Gibraltar.

Work on Carrier Pre-Selection (CPS) started in 2004 with the publication of a Public Consultation and subsequent Decision Notice which set out the way in which CPS will be implemented in Gibraltar and established which operators are eligible for a CPS scheme. To date, there no fixed line operators are interconnected with the incumbent Gibtelecom and consequently the introduction of commercial CPS services has not been possible. Therefore the Authority does not believe that CPS services will be in operation before the end of the review timeframe. Notwithstanding, the Authority considers that it would be sensible to monitor market developments closely and would undertake a market review at any time in response to material structural changes affecting entry conditions.

The Authority therefore concludes that the markets for national and international publicly available telephone services at a fixed location in the territory of Gibraltar remain appropriate for ex ante regulation.

The Authority therefore designates Gibtelecom as having SMP in the retail publicly available national and international telephone services provided at a fixed location in Gibraltar.

The following obligations will apply to SMP operators in these two markets:

- Obligation of transparency
- Obligation of non-discrimination
- Obligation of accounting separation
- Price control and cost accounting obligations

¹³ ERG Report on Guidance on the application of the three criteria test, June 2008, ERG(08)21, pp. 16-17.

1.6 Structure of this document

The rest of the decision is structured as follows:

Chapter 2 provides for the designation of SMP on specific undertakings.

Chapter 3 specifies the obligations applicable to the SMP designated operators in the relevant markets.

2. Designation of undertakings with SMP

In accordance with the Access Regulations:

- Gibtelecom is designated as having SMP in the market for access to the public telephone network at a fixed location for residential and non-residential customers;
- Gibtelecom is designated as having SMP in the market for publicly available national telephone services provided at a fixed location for residential and non-residential customers; and
- Gibtelecom is designated as having SMP in the market for publicly available international telephone services provided at a fixed location for residential and non-residential customers.

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.

3. SMP Obligations

The Authority's Statement "Accounting separation, cost orientation, cost accounting methods and compliance under SMP obligations" Document No. 07/08 should also be read in conjunction with the SMP obligations below.

3.1 Access to the public telephone network at a fixed location

Transparency

1. Gibtelecom shall notify the Authority at least 60 days in advance of changes to terms and conditions (excluding price decreases).
2. Gibtelecom shall notify the Authority at least 30 days in advance for price reductions.
3. Gibtelecom shall publish changes to terms and conditions at least 30 days in advance of implementation.
4. Gibtelecom shall publish information on increases to tariffs at least 30 days in advance.
5. Gibtelecom shall publish information on decreases to tariffs at least 14 days in advance.
6. Publication shall include a prominent notice on the company's website.

Non-Discrimination

1. Gibtelecom shall not unduly discriminate between customers.

Price control and cost accounting obligations

1. Gibtelecom shall account separately for its retail fixed access services provided at a fixed location in Gibraltar.
2. Gibtelecom's monthly charges for its line access products facilitating publicly available telephone services on the fixed network shall be included in a basket of services to be subject to a retail price control commencing on 1 January 2009 or later if the public consultation is not concluded by this date.¹⁴

¹⁴ The form of the retail price control is the subject of a separate consultation. Retail Price Controls – Application of Rebalancing and a Price Cap control on Gibtelecom - Public Consultation 06/08.

3.2 National publicly available telephony services at a fixed location

Transparency

1. Gibtelecom shall notify the Authority at least 60 days in advance of changes to terms and conditions (excluding price decreases).
2. Gibtelecom shall notify the Authority at least 30 days in advance for price reductions.
3. Gibtelecom shall publish changes to terms and conditions at least 30 days in advance of implementation.
4. Gibtelecom shall publish information on increases to tariffs at least 30 days in advance.
5. Gibtelecom shall publish information on decreases to tariffs at least 14 days in advance.
6. Publication shall include a prominent notice on the company's website.

Non-Discrimination

1. Gibtelecom shall not unduly discriminate between customers.

Price control and cost accounting obligations

1. Gibtelecom shall account separately for its national publicly available telephony services at a fixed location market.
2. Gibtelecom shall charge its retail customers using a per-second billing format from 1 January 2009. 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.
3. Gibtelecom's retail charges for national publicly available telephone calling services on the fixed network may be included in a basket of services to be subject to a retail price control commencing on 1 January 2009 or later if the public consultation is not concluded by this date.¹⁵

3.3 International publicly available telephony services at a fixed location

Transparency

1. Gibtelecom shall notify the Authority at least 60 days in advance of changes to terms and conditions (excluding price decreases).

¹⁵ See footnote 14 above.

2. Gibtelecom shall notify the Authority at least 30 days in advance for price reductions.
3. Gibtelecom shall publish changes to terms and conditions at least 30 days in advance of implementation.
4. Gibtelecom shall publish information on increases to tariffs at least 30 days in advance.
5. Gibtelecom shall publish information on decreases to tariffs at least 14 days in advance.
6. Publication shall include a prominent notice on the company's website.

Non-Discrimination

1. Gibtelecom shall not unduly discriminate between customers.

Price control and cost accounting obligations

1. Gibtelecom shall account separately for its international publicly available telephony services provided at a fixed location in Gibraltar.
2. Gibtelecom shall charge its retail customers using a per-second billing format from 1 January 2009. 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.
3. Gibtelecom's charges for international publicly available telephone calling services on the fixed network may be included in a basket of services to be subject to a retail price control commencing on 1 January 2009 or later if the public consultation is not concluded by this date.¹⁶

¹⁶ See footnote 14 above.