



GIBRALTAR REGULATORY
AUTHORITY

ACCOUNTING SMP OBLIGATIONS

Public Consultation

21st JUNE 2022

C03/22

FOREWORD

Under the provisions of the Communications (Access) Regulations, operators designated as having Significant Market Power (SMP) in Gibraltar may be required to provide all accounting records, including data on revenues received from third parties, in order to facilitate the Authority's task of verifying that the SMP operator concerned has complied with obligations imposed upon it.

The purpose of this consultation is to propose amendments to the current cost accounting and accounting separation obligations imposed on SMP operators.

In light of the regulatory experience gained in conducting market reviews, it is the Authority's view that the current accounting SMP obligations imposed are very burdensome and resource intensive for an operator conducting its electronic communications business in a market the size of Gibraltar. The proposed amendments include a more proportional approach to the existing accounting requirements.

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1. INTRODUCTION

The Communications Act 2006 (the "Act"), 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.

Under the provisions of the Communications (Access) Regulations 2006 (the "Access Regulations"), operators designated as having Significant Market Power ("SMP") in Gibraltar, may be required to provide accounting records, including data on revenues received from third parties, in order to facilitate the Authority's task of verifying that the SMP operator concerned has complied with obligations imposed upon it.

The purpose of this consultation is to propose amendments to the accounting separation and cost accounting obligations imposed on SMP operators, (the "Accounting SMP Obligations"). At present, Gibtelecom is the only operator which is subject to these accounting SMP obligations.

Accounting SMP obligations have been imposed in the following markets (*please see section 4 for complete list of obligations*):

- Wholesale call termination on individual public telephone networks provided at a fixed location
- Wholesale voice call termination on individual mobile networks
- Wholesale terminating segments of leased lines, irrespective of the technology used to provide leased or dedicated capacity
- Wholesale Broadband Access
- Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location.

Considering the regulatory experience gained in conducting market reviews, it is the Authority's view that the current Accounting SMP Obligations imposed are burdensome and resource intensive for an operator conducting its electronic communications business in a market the size of Gibraltar. The Authority therefore proposes to adopt a more proportional approach by removing the Accounting SMP Obligations established in each of the markets listed above.

The proposed removal of the Accounting SMP Obligations will affect all operators currently designated with SMP and will be taken into account when considering which obligations should be imposed on SMP operators in the future.

For the avoidance of doubt, the Authority is not proposing to remove any price control SMP obligations within the context of this consultation. These will remain unaffected together with all the other obligations currently imposed in each market.

The Authority invites all interested parties to provide comments on the question set out in this public consultation (See Annex A). Written comments will be accepted no later than 25th July 2022.

In order to promote further openness and transparency, the Authority will publish the names of all respondents and their responses on its website and will also make available for inspection responses to the consultation at its offices. Please note that this is subject to confidentiality. Respondents are asked to clearly identify material which is to be treated as confidential.

2. ACCOUNTING SEPARATION AND COST ACCOUNTING

Accounting separation

An accounting separation system is a comprehensive set of accounting policies, procedures and techniques that can be applied to the preparation of financial information that demonstrates compliance with non-discrimination obligations and the absence of anticompetitive cross-subsidies. The outputs from such a system must be capable of independent and auditable verification, and fairly present the transfer charge arrangements and relationship between product and service markets. Using accounting separation, the Authority imposes on the operator a set of rules on how accounting information should be collected and reported.

Accounting separation provides a higher level of detail of information than that derived from statutory financial statements to reflect as closely as possible, the performance of parts of the operator's business as if they had operated as separate businesses, and in the case of vertically integrated undertakings, to prevent discrimination in favour of their own activities and to prevent unfair subsidies.

In the case of transfer charges, these typically reflect the vertically integrated nature of the operator and will enumerate the wholesale/retail relationships between the economic markets and services within the undertaking's scope of activity. There should be a clear rationale for the transfer charges used and these should be clearly identified in sufficient detail to provide compliance with the transparency and non-discrimination obligations. The charge should be equivalent to the charge that would be levied if the product or service were sold externally rather than internally.

Cost accounting

A cost accounting system is a set of rules which supports the attribution of costs, revenues and capital employed to individual activities and services. More precisely, it describes a set of systems, processes and procedures that enable an operator to establish a record keeping regime necessary to meet its regulatory obligations which keeps track of and reports on revenues, costs, assets and capital employed.

When implementing a cost accounting system, the rules used for the allocation of costs should be displayed at a level of detail that makes clear the relationship between costs and charges of network components and services, and the basis on which directly and indirectly attributable costs have been allocated between different accounts needs to be provided.

The purpose of imposing an obligation to implement a cost accounting system is to ensure that fair, objective and transparent criteria are followed by the operator, when allocating their costs and services, and to provide the Authority with detailed and reliable information on their costs, in particular to ensure appropriate compliance with cost orientation for the prices in the relevant market.

3. LEGISLATION

The Authority has considered the legislation below as a basis for this consultation.

Communications Act 2006

Delivery of proposed measures to the European Commission and to the regulatory authorities in the Member States.

22.(1) Except where otherwise provided in a recommendation or guideline adopted by the European Commission pursuant to the Directive and subject to sections 23 and 24, the Authority shall comply with subsections (2)-(5) whenever it intends to adopt a measure which –

...

(d) relates to the setting, modification or revocation of an SMP obligation,

and which, in the Authority's opinion, would affect trade in services between Gibraltar and one or more Member States.

(2) Before adopting a measure referred to in subsection (1), the Authority shall –

(a) comply with the public consultation procedure;

...

Public consultation procedure.

13.(1) The Authority or the Minister, as the case may be, shall comply with the procedure set out in this section whenever –

(a) specific reference is made to the public consultation procedure in this Act for the purpose of adopting a measure; or

(b) the Authority intends to adopt a measure which has a significant impact on a market for electronic communications networks or electronic communications services.

(2) Before adopting a measure referred to in subsection (1), the Minister or the Authority, as the case may be, shall –

(a) publish a notification of the proposed measure;

(b) provide the reasons for the proposed measure;

(c) set out the effect of the proposed measure; and

(d) invite interested parties, including users and consumers, to make representations on the proposed measure within such period as may be specified in the notification.

(3) Save in exceptional circumstances, that period must be one ending not less than one month after the day of the publication of the notification.

Communications (Access) Regulations 2006

Imposition, amendment or withdrawal of SMP obligations.

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

...

(d) imposed only after a public consultation procedure and a consultation under section 22 of the Act have has been carried out.

9.(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.

4. ACCOUNTING SMP OBLIGATIONS

Gibtelecom is currently the only operator which is subject to Accounting SMP Obligations.

These have been imposed by the Authority pursuant to regulation 12 and 14 of the Access Regulations, which refer to accounting separation and price control and cost accounting obligations. Furthermore, the Authority published Response to Consultation and Decision C05/16¹ on 2nd November 2016, which outlines the key principles and compliance requirements for any operator imposed with Accounting SMP Obligations.

Below please find the specific obligations and the markets within which they have been imposed.

Wholesale call termination on individual public telephone networks provided at a fixed location²

Accounting separation

Gibtelecom shall account separately for its wholesale fixed call termination business.

In addition, Gibtelecom shall prepare and submit to the GRA an audited Accounting Separation Report every year on 30th September.

Cost accounting

Gibtelecom shall ensure that:

- a) it operates and maintains a cost accounting system that complies with the specific requirements and guidelines issued by the GRA from time to time;
- b) it operates and maintains a cost accounting system suitable for ensuring compliance with Regulation 14 of the Access Regulations;
- c) it operates and maintains a cost accounting system which is annually verified by a qualified independent person;

¹ Review of cost accounting methodology – Accounting Separation, Cost Accounting Systems, Cost Orientation and Retail Price Notification, Response to Consultation and Decision C05/16 (<https://www.gra.gi/uploads/documents/Communications/Documents/Decisions/C05-16.pdf>), accessed 20th June 2022.

² Wholesale call origination on the public telephone network provided at a fixed location, Wholesale call termination on individual public telephone networks provided at a fixed location - Decision Notice C11/15, 16th October 2015 (<https://www.gra.gi/uploads/documents/Communications/Documents/Decisions/C11-15%20-%20Decsion%20Notice.pdf>), accessed 20th June 2022.

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

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

Wholesale voice call termination on individual mobile networks³

Accounting separation

Gibtelecom shall account separately for its wholesale mobile termination business.

In addition, Gibtelecom shall prepare and submit to the Authority an audited Accounting Separation Report every year on 30th September.

Cost accounting

Gibtelecom shall ensure that:

a) it operates and maintains a cost accounting system that complies with the specific requirements and guidelines issued by the GRA from time to time;

b) it operates and maintains a cost accounting system suitable for ensuring compliance with Regulation 14 of the Access 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 his compliance with the cost accounting system he is required to operate;

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

Wholesale terminating segments of leased lines, irrespective of the technology used to provide leased or dedicated capacity⁴

Accounting separation

Gibtelecom shall account separately for its wholesale leased lines services.

³ Wholesale voice call termination on individual mobile networks, Wholesale SMS termination on individual mobile networks - Decision Notice C10/15, 16th October 2015 (<https://www.gra.gi/uploads/documents/Communications/Documents/Decisions/C10-15%20-%20Decsion%20Notice.pdf>), accessed 20th June 2022.

⁴ *Ibid*

Cost accounting

Gibtelecom shall maintain cost accounting systems which produce appropriate information to demonstrate compliance with cost-orientation.

Wholesale broadband access⁵

Accounting separation

Gibtelecom shall account separately for its wholesale broadband services.

Cost accounting

Gibtelecom shall maintain cost accounting systems which produce appropriate information to demonstrate compliance with cost-orientation.

Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location⁶

Accounting separation

Gibtelecom shall account separately for its unbundling services.

Cost accounting

Gibtelecom shall maintain cost accounting systems which produce appropriate information to demonstrate compliance with cost-orientation.

⁵ *Ibid*

⁶ Wholesale fixed markets - Decision Notice 04/08, 11th August 2008 (https://www.gra.gi/uploads/documents/Communications/Documents/Decisions/04_08.pdf), accessed 20th June 2022.

5. REGULATORY APPROACH

Methodology

The Authority has taken account of regulation 9 of the Access Regulations which deals with the imposition, amendment or withdrawal of SMP obligations. Regulation 9(8), 9(9) and 9(10) are of particular interest given that when assessing the impact of new market developments, if the Authority determines that these are not sufficiently important to require a new market analysis, then it can impose or withdraw any obligations as long as it complies with the public consultation procedure⁷ and a consultation pursuant to section 22 of the Act.

With respect to the proposed removal of the Accounting SMP Obligations within the markets considered, the Authority does not believe that developments such as commercial agreements, including co-investment agreements which may influence competitive dynamics, are sufficiently important to require new market reviews and so, the proposal to remove the obligations would appear to be the best approach.

Furthermore, it is also important to note that quite independently of the factors above, the Authority plans to carry out reviews of the markets above in the future. This is in line with its duty to periodically carry out such reviews⁸. As and when these assessments take place, the outcomes may see operators other than Gibtelecom (who is currently designated as the dominant operator in each of the markets in question), being found to have SMP, either in place of, or in parallel to Gibtelecom. Alternatively, these reviews may result in all SMP obligations removed entirely, or indeed, allocated to all operators.

Amendment or Removal of the Accounting SMP Obligations

The Authority considers that the Accounting SMP Obligations in a market the size of Gibraltar are overly burdensome. The accounting separation report ("ASR") which needs to be audited and submitted to the Authority on an annual basis, is a particularly extensive document which involves the pooling of considerable resources at a significant cost to an operator. This complex document needs to be produced by the relevant operator over a considerable amount of time and then submitted to the Authority for review. During this evaluation, the Authority also has to dedicate substantial resources in order to assess compliance and engage with the operator on numerous occasions in order to finalise and complete the exercise.

Initially, when the Authority first considered imposing the Accounting SMP Obligations, it was of the view that this report was required on an annual basis as it offered a valuable insight into an operator's business and also provided a means of assessing compliance with other SMP obligations imposed, such as non-discrimination and price controls. The ASR is also essential when a dispute arises between operators which involves a disagreement involving costs and prices. Having a readily available ASR provides transparency to the regulator and enables it to assess accounting data when needed. The Authority can also

⁷ See s13 of the Communications Act 2006 and section 3 above.

⁸ See s40 Communications Act 2006.

conduct an own initiative investigation and can refer to specific information contained in the ASR.

However, it is important to highlight that since the first Accounting SMP Obligations were imposed in 2008, the Authority has not required the assistance of any ASR during the course of any dispute or investigation. In fact, to date, minimal action has been instigated as a direct result of analysing the financial data contained in an ASR.

With this in mind, the Authority could either propose to amend the Accounting SMP Obligations or to remove them entirely so as to create a more proportional and reasonable approach.

One way of amending the obligations would be to only require SMP operators to submit an audited ASR upon request instead of on a recurring annual basis. This would alleviate the burden of having to produce such accounts every year. However, when needed, the SMP operator would still need to comply with its requirements to produce an ASR, perform an audit and publish it in such a manner and detail as specified by the Authority in accordance with the Access Regulations and Response to Consultation and Decision C05/16⁹. While amending the obligations lighten the regulatory requirement, the Authority is of the view that it would remain an onerous obligation for a local operator to submit such a document, given the level of granularity required to allow the regulator to perform intricate and thorough analyses of the accounting data contained within it.

In contrast, by removing the Accounting SMP Obligations, any SMP operator would no longer have the obligation to submit an ASR, as well as maintain separated accounts. This would ultimately mean that the Authority would have no readily available detailed accounting data should it be required for any regulatory assessment. However, in these situations, the Authority can still rely on other powers it has at its disposal to require accounting information as contained in the Act and the Access Regulations, thereby enabling it to demand precise and specific information relevant to any case it may handle (see Regulation 12(5) of the Access Regulations and s4 of the Act).

In light of the above, and in view of the Impact Assessment on the Removal of the Accounting SMP Obligations carried out (see next section), the Authority is of the view that the removal of the Accounting SMP Obligations pose no risk to the Authority or any operator, in respect of weakening the current regulatory regime in place. The Authority is also of the firm view that such measures would not in any way, restrict nor distort competition in the electronic communications markets.

⁹ See footnote 5 above.

6. IMPACT ASSESSMENT ON REMOVAL OF ACCOUNTING SMP OBLIGATIONS

The Authority has conducted an impact assessment on the removal of the Accounting SMP Obligations within the markets considered.

Wholesale Call Termination on Individual Public Telephone Networks Provided at a Fixed Location and Wholesale Voice Call Termination on Individual Mobile Networks

Gibtelecom is the only operator to have been designated with SMP in these two markets¹⁰ and as such, has been imposed with obligations of transparency, non-discrimination, accounting separation, access, cost accounting and price controls. Two alternative operators provide fixed call termination services, however, no competitor is active in the mobile termination market.

It should be noted that since the last fixed call termination market review in 2015, no formal complaints or disputes have been brought to the Authority nor has the Authority been engaged in an own initiative investigation regarding any issues in this market. This is also true for the mobile termination market.

The Authority, therefore, does not foresee any issues with its proposal to remove the Accounting SMP Obligations in these two markets given its regulatory inactivity.

The Authority further notes that the fixed and mobile voice call termination markets have been removed from the latest version of the European Union's ("EU") Commission's Recommendation on relevant markets¹¹. The Recommendation only includes product and service markets, which the EU Commission, after observing the overall trends in the EU, found to meet the three criteria¹².

Wholesale Terminating Segments of Leased Lines, Irrespective of the Technology Used to Provide Leased or Dedicated Capacity

Gibtelecom is currently the only operator designated with SMP in this market and as such, has been imposed with obligations of transparency, non-discrimination, accounting separation, access, cost accounting and price controls. Despite these strict regulatory controls, the Authority has not been involved in any complaint or dispute involving any pricing or similar issues which have required the analysis of accounting data to accurately assess any case at hand.

¹⁰ See footnote 3 above.

¹¹ Commission Recommendation (EU) 2020/2245 of 18 December 2020 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive (EU) 2018/1972 of the European Parliament and of the Council establishing the European Electronic Communications Code.

¹² See s40.(7A) of the Communications Act 2006.

Requiring an SMP operator to prepare and deliver to the Authority an audited ASR on a yearly basis is considered to be quite an onerous exercise and one which is disproportionate to the size of the operator and the local market. The Authority is therefore of the view that the removal of the Accounting SMP Obligations in this market will pose no threat to the level of competition.

Wholesale Broadband Access and Wholesale (Physical) Network Infrastructure Access (including Shared or Fully Unbundled Access) at a Fixed Location

These two wholesale markets are currently inactive in the sense that no alternative operator has entered into a wholesale agreement with Gibtelecom for the provision of services encompassed within these markets. This means that no wholesale broadband products or wholesale unbundled local loop services have been rented or purchased by any operator authorised to provide electronic communications networks and services.

Gibtelecom is currently the designated SMP operator in these two markets because at the time of reviewing this market¹³, it was the only operator with an extensive network in Gibraltar able to provide such services. Given that the alternative operators have since rolled out networks on the basis of their own infrastructure, they have not requested any wholesale services from Gibtelecom. Therefore, it is the Authority's view that the imposition of SMP obligations in these markets have not contributed to the provision of wholesale products and services in these two markets. Removing the Accounting SMP Obligations in these markets will therefore have no effect on these markets.

Conclusion of Impact Assessment

The Authority is of the view that the removal of Accounting SMP Obligations in the markets above will pose no threat to the level of competition or any competitive outcomes.

¹³ See footnote 5 above.

7. REMOVAL OF SMP OBLIGATIONS

The Authority proposes to remove the Accounting SMP Obligations as outlined in section 4.

It is the Authority's view that by removing the Accounting SMP Obligations, an appropriate balance will be achieved between significantly reducing the burden on SMP operators, and maintaining the ability to require relevant financial information on demand.

The proposed removal of the accounting obligations will affect all operators currently designated with SMP and will be taken into account when considering which obligations should be imposed on SMP operators in the future. This implies that the removal of such obligations may assist and benefit operators who are designated as having SMP in any market.

Following the consultation period, and in the event that the Authority decides to proceed with the removal of the Accounting SMP Obligations, Response to Consultation and Decision C05/16¹⁴ will cease to have effect.

¹⁴ See footnote 1 above.

ANNEX A

Q1. Please provide your views on the Authority's proposed removal of the Accounting SMP Obligations.

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