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8 June 2007

Gibraltar Regulatory Authority
Attn. Mr Stewart Brittenden
Suite 811
Europort
Gibraltar

Dear Stewart,

Market Analysis –Retail Fixed Markets

Enclosed please find Gibtelecom's response to the GRA's Market Analysis public consultation on the Retail Fixed Markets (Public Consultation 01/07).

Yours sincerely,

A handwritten signature in black ink, appearing to read "Dwayne Lara".

Dwayne Lara
Regulatory Executive
Corporate Affairs Unit

Enc





Gibtelecom response to Public Consultation 01/07

Retail Fixed Markets

8 June 2007

Gibtelecom Limited
Suite 942
Europort
Gibraltar

Gibtelecom Response to GRA Market Review for Retail Fixed Markets

In response to the public consultation on its market analysis of the retail fixed markets published by the Gibraltar Regulatory Authority (GRA) on 10 April 2007 (Public Consultation 01/07), Gibtelecom is pleased to present its comments.

Q1: Do you agree with the proposed market definitions?

Retail fixed access market

Yes

Retail fixed domestic call market

Yes

Retail fixed international call market

Gibtelecom agrees with the proposed market definition for retail fixed international call services (IDD) but is of the view that VoIP services should be separately identified. Gibtelecom believes that it should not be designated as having SMP for VoIP as it currently has less than 50% of this market.

VOIP is separate market

The GRA cites the Gibtelecom market share as 30% and concedes "*the provision of VOIP calls may be competitive in itself*" (at p. 21). Furthermore, in its Annual Report for 2005-2006, the GRA cites: "*The only area which is fully competitive is the provision of Voice Over Internet Protocol (VOIP) with three operators, Gibtelecom, EasyCall and Ad-Lib well established in the market. The number of minutes of calls using VOIP continues to grow and is taking over much of the international traffic which uses traditional network routing.*"

VoIP services form a separate market because they differ from PSTN call services in terms of essential characteristics. They are lower quality. They provide only outgoing call service. They do not qualify as publicly available telephone service (PATS) under Article 2(c) of the Universal Service Directive as they do not provide a customer with the same functionality, inter alia, access to operator services, emergency services, or fax services. Further, VOIP providers do not operate based on an interconnection facility. Other Member States have excluded VOIP from the scope of the retail fixed call market: Denmark (VOIP does not provide the same functionality as traditional retail fixed call services, see Commission Art. 7 letter dated 30 November 2005 for Cases DK/2005/268 & 269), the UK (VOIP excluded from narrowband call services market, see Ofcom Statement and further consultation on "Regulation of VOIP Services" dated 22 February 2006, Points 9.3-9.4 at pp.71-72), Italy (includes non-nomadic VOIP services provided it supplies real time bi-directional service with equivalent quality but therefore excludes one-way VOI services from retail fixed call market definition, see Commission Art. 7 letter dated 29 June 2006 for Cases IT/2006/0407-0408) and Spain (see Commission Art. 7 letter dated 27 January 2006 for Cases ES/2006/326-329. The CMT reasons that VOIP is excluded because, inter alia, the end-user, to make use of the VOIP service (which is broadband supported), must maintain a PSTN line.

A failure to distinguish between the IDD and VoIP markets could force Gibtelecom to eventually move all its international traffic to VoIP with consequential loss of a quality IDD service for Gibraltar. The new Gibraltar framework gives the GRA the discretion to set quality standards for the designated USO provider (Gibtelecom) but the GRA has, so far, not used this power. The 2006 USO Regulation 10 allows the GRA to set "performance targets" which, if there is a persistent failure to comply, may be enforced by the issuance of a direction. The Fixed Licence (Part 1, Clause 14 & Part 3, Clause 3 on USO services) also gives the Minister and the GRA the power to issue directions to Gibtelecom on quality of service indicators and measurement methods. However, to our knowledge, the GRA has not acted under this provision. This is not an absolute standard but only an "indicator" which can be published for public consumption.

Fixed Licence Part 6, Clauses (1)(b) and (8) require Gibtelecom to provide PATS of "good quality" subject to any directions from the Minister or the GRA but, again, neither the Minister nor GRA have issued directions on "good quality" and formally Part 6 (and all Parts other than Part 1) do not apply to Gibtelecom unless notified as "Additional Conditions" to the Fixed Licence (which, according to our information, has not yet happened under the procedures set out in the Fixed Licence).

Q2: Do you agree with the market analysis and proposed SMP designation of the retail fixed access market?

Gibtelecom accepts the positions outlined by the GRA in its market analysis and proposed SMP designation for the retail fixed access market subject to the following comment.

WiMax – Competitive constraint in future should not be discounted.

Gibtelecom believes that the GRA have not offered any evidence to support their conclusion that wireless access in the form of WiFi and/or WiMax will not present in the future, i.e. within the review's two year timeframe, a competitive constraint on Gibtelecom's market power in the narrowband access line market. WiFi / WiMax is an access technology which can be deployed in Gibraltar without a very large investment and the chances for its arrival in Gibraltar should not be discounted so lightly.

Q3: Do you agree with the market analysis and proposed SMP designation of the fixed domestic calls market?

Gibtelecom recognises that at this point it has SMP in the fixed domestic calls market, however with regards to the market analysis proposed, Gibtelecom does not consider the GRA has presented enough evidence to justify its views that competition will not have an impact on this within the two year review timeframe.

Recent significant change in the availability of numbers.

The implementation of the recent Trilateral Agreements has resolved the numbering problem in Gibraltar. Number resources should now be available to new entrants under the existing 5-digit fixed and the proposed 8-digit numbering plans. More weight should be placed on this factor in assessing the likelihood of more competition emerging in the retail fixed markets.

Carrier Selection / Carrier Pre-selection and threat of indirect entry.

In the SMP assessment, the GRA seems to ignore the threat of potential competition from indirect entry due to new entrants offering voice call service over carrier selection (CS) or carrier pre-

selection (CPS) facilities from Gibtelecom. It states that these indirect entry options are unlikely to exist absent regulation. In its comments on retail fixed international call market, the GRA states that wholesale CPS elements have not been available to date. Yet the GRA is preparing to impose a CS/CPS regulatory regime on Gibtelecom which will make the CS/CPS facility available to third parties wishing to provide retail fixed call services. Thus, regulation will not longer be absent and the GRA should not dismiss the prospect of more competition entering the call service market within the review's timeframe.

Q4: Do you agree with the market analysis and proposed SMP designation of the fixed international calls market?

Gibtelecom is of the view that VoIP services should be separately identified and the competitive impact of CS/CPS should be considered. Other than in this respect, the positions outlined by the GRA in its market analysis and proposed SMP designation for the retail fixed international calls services are accepted by Gibtelecom.

Separate VOIP market is competitive.

As indicated above, Gibtelecom takes the position that VOIP services form a separate market and it is a competitive market. The GRA cites the Gibtelecom market share as 30% and concedes "*the provision of VOIP calls may be competitive in itself*" (at p. 21). In its Annual Report for 2005-2006, the GRA is more affirmative: "*The only area which is fully competitive is the provision of Voice Over Internet Protocol (VOIP) with three operators, Gibtelecom, EasyCall and Ad-Lib well established in the market. The number of minutes of calls using VOIP continues to grow and is taking over much of the international traffic which uses traditional network routing.*" (emphasis supplied) The consequence of defining VOIP as a separate market is that, in such a market, there is effective competition and no VOIP provider can be designated as having SMP.

Factual correction on trend in international call traffic volume.

The GRA states on at point 3.6 (p. 19) that in the period of 2005-2006 international call traffic volume increased from 11.8m to 17.8m minutes. That is incorrect. It fell from 17.4m to 16.0m minutes. Why this is happening is unclear, particularly when the overall trend in the EU is increasing minute volume. Given that the GRA includes VOIP in the retail call markets, does this drop in volume actually mean that VOIP minutes are escaping detection or are simply not being registered? Does this mean that Gibtelecom's 35% market share (by minutes) of the VOIP call services market is actually lower, possibly markedly lower?

Carrier Selection / Carrier Pre-selection and threat of indirect entry.

The point made for the retail fixed domestic calls market also applies to the retail fixed international calls market.

Q5: Do you agree with the proposed SMP obligations?

The GRA proposes one set of remedies to cover all 3 defined retail fixed markets. Gibtelecom cannot accept the SMP obligations in this area, in particular retail price caps until tariff rebalancing is carried out. Gibtelecom also rejects the length of the elapsed times for advance publication of tariff changes.

Tariff Rebalancing

The GRA has proposed retail price control remedies in the form of (1) the imposition of a per-second billing requirement and (2) a cost-orientation requirement (this is imposed through the separate remedy of a cost accounting requirement designed to demonstrate compliance with cost-orientation). The per-second billing requirement directly affects the retail fixed calls market (i.e. both domestic and international calls markets). The cost orientation requirement affects all three retail fixed markets.

Gibtelecom accepts these remedies but sees them as incomplete. First, they neglect to resolve clearly the remaining inconsistency with the cost orientation obligation, that is, line rental charges (residential end-users £6 per month, business end-users £10 per month and Centrex end-users £12 per month) are significantly below cost (incurring losses of c£1,000,000 per year). Gibtelecom has made representations to the GRA setting out various tariff re-balancing proposals on 30 November 2004 and again on 24 August 2006.

Gibtelecom's line rental rate is among the lowest in Europe. Indeed, the GRA admits such in the Market Review when it raises the rebalancing issue (at p. 24):

- The GRA agrees that "*rebalancing is objectively justified*".
- It notes that "*Gibraltar's current line rental prices are amongst the lowest in Europe.*"
- The GRA "*accepts that there may be a need to increase retail access prices*".
- The GRA also considers that the impact of "*rebalancing on the average subscriber's bill should be minimal.*"

But rebalancing is not just a general goal of the EU telecommunications frameworks implemented in Gibraltar's laws since 2001. Gibraltar legislation, Gibtelecom's own Fixed Licence and the actions of the GRA regarding local loop unbundling (LLU) make the completion of rebalancing an obligation, not just an objective, and action here is long overdue.

- The 2001 Gibraltar telecommunications framework established rebalancing as the necessary counterpart to universal service obligations. The 2001 Competition Regulations (Regulation 12(1)) required rebalancing to be carried out by the designated USO provider.
- Gibtelecom's Fixed Licence provisions dealing with USO obligations (Part 3, Clause (1)(11)) emphasize, by direct reference to Regulation 12 of the 2001 USO Regulations, that rebalancing is an obligation, not an option. The Fixed Licence remains in force under the transitional provisions of the 2006 Gibraltar framework, in particular Regulation 39 (1)-(2) of the 2006 USO Regulations.
- The GRA's position as announced in the GRA's 2005-2006 Annual Report that "*...completion of the tariff rebalancing exercise has...now become a priority*".
- The GRA's position regarding the handling of line rental losses in Gibtelecom's third Accounting Separation Report (ASR) is stated in its letter of 6 April 2006 namely that it accepts "*the inclusion of access deficit charges pending Ministerial clearance to complete tariff rebalancing.*" This statement results from an exchange of letters in 2006 over the ASR and the Reference Interconnection Offer (RIO). In response to a GRA request, Gibtelecom transferred charges relating to line rental losses in the form of Access Deficit Charges (ADCs) from the Core Network to the Local Access Network business (see its letter to the GRA dated 16 March 2006 which generated a GRA reply letter of 6 April 2006 recognizing this). This change means that the GRA identified a category of costs (losses) related to the line rental which it held belonged in a rebalancing exercise and not as a cost element in the Reference Interconnection Offer (RIO).

Whilst the Company has not been permitted to complete rebalancing of tariffs, Gibtelecom cannot accept that per-second billing should not result in an overall increase in consumers' telephone bills to recover line rental losses.

The move to per-second billing is perhaps an opportunity to complete the rebalancing process. As an alternative to raising the monthly line rental rate (for example, for residential end-users from £6 to £10 per month) it could be possible for rebalancing to be achieved through a slight tariff rate increase plan that recovers the current losses on the local access network. If the GRA is in agreement with this, the Company would proceed in this manner.

Transparency – Deadlines for advance notice and advance publication.

Gibtelecom objects to the very long lead times for advance notice and advance publication of terms and conditions, in particular changes in tariffs. The GRA would require Gibtelecom (1) to notify it 60 days in advance of any changes to terms and conditions, including prices changes and (2) to publish (a) changes to terms and conditions 30 days in advance, and (b) changes to tariffs 30 days in advance for price increases and 14 days in advance for price decreases. Gibtelecom requests the advance notification period be reduced from 60 days to 45 days for changes in terms and conditions including tariff increases. It requests a reduction in the period for the advance notification to the GRA for a tariff reduction from 60 days to 30 days. This is in line with the GRA policy set down in a Notice, issued on 24 September 2001, entitled "Period of notice for tariff changes" (GRA 2001 Notice). A 60 day advance notification requirement is too burdensome in the context of normal business activity. Gibtelecom accepts the advance publication periods of 30 days for a tariff increase and 14 days for a tariff decrease. These are in line with the above-mentioned GRA 2001 Notice and Gibtelecom's Fixed Licence at Part 1, Clause 12(3).

Retail price cap - Retail Minus

Gibtelecom is of the view that a retail price cap should not be imposed until the re-balancing of tariffs is completed. Furthermore, the Company believes that the GRA may be acting in ultra vires as rebalancing is a process that should have been completed under the previous EU framework.

Closing remarks

Gibtelecom broadly accepts the SMP assessments in the designated markets but has some reservations on the underpinning analyses carried out. In addition, the Company is of the opinion that the rebalancing of tariffs is a precursor to any market analysis and subsequent SMP designation and remedies (Price control, Transparency and price cap proposal). This process should therefore not be excluded.

It also believes that the VoIP market should be separately identified to the retail fixed international market. Gibtelecom has a less than 50% share in the VoIP market and, as attested to in previous GRA announcements, is competitive in itself. Consequently, Gibtelecom should not be designated as having SMP in this particular market.