

27 February 2012

Gibraltar Regulatory Authority
Attn. Mr Gavin Santos
Electronic Communications Officer
Suite 603
Europort
Gibraltar

Dear Gavin,

Public Consultation 01/12 – wholesale voice call termination on individual mobile networks and wholesale SMS termination on individual mobile networks

Enclosed please find Gibtelecom's response to the Authority's market review public consultation 01/12 on wholesale voice call termination on individual mobile markets and wholesale SMS termination on individual mobile networks.

Yours sincerely,



Kayleigh Buhagiar
Regulatory Officer

Enc.

Gibtelecom response to GRA market review for wholesale voice call termination on individual mobile networks and wholesale SMS termination on individual mobile networks.

Introduction

1. Gibtelecom is presenting its comments in response to the Authority's public consultation 01/12 published on 26 January 2012 on its proposed designation of Eazitelecom as an SMP operator in the wholesale mobile voice termination and SMS termination markets.

2. Gibtelecom agrees with the Authority's proposals to designate Eazitelecom with SMP status (and therefore obligations) on its own individual network. More information is being supplied below. However, the Company feels that the Authority's judgement in a previous market review appears to be at odds with its current reasoning for proposing to apply SMP designations and obligations on Eazitelecom. According to EU guidelines, every operator should effectively command a 100% market share in its own particular network, and that therefore this is indicative of dominance¹. This rationale is what primarily drove the existing SMP status assignments on Gibtelecom and then CTS in their respective networks. In addition, related EU guidelines mention that market reviews are to be prospective in nature². It is for these reasons that the Authority proposes to apply SMP status to Eazitelecom, despite the fact that this operator is not yet fully operational.

In keeping with these principles, the Company believes that the Authority could extend SMP status to **all** currently authorised local operators, particularly if there is an expectation that any "inoperative" operator will offer communication services within the lifetime of the market review (usually three years). Gibtelecom made this point in its response to the Authority's public consultation 02/11 on wholesale fixed markets. Gibtelecom enquired why Sapphire Networks was not being included in that review, especially since Gibtelecom and Sapphire Networks were already interconnected and transporting voice telephony traffic between their respective networks. Based on the contents of the Authority's decision notice 09/11, as well as on the publication of this consultation 01/12, can Gibtelecom therefore take it that Sapphire Networks is not expected to offer services to the wider public within the next three years or so?

3. The Authority should note that following the public consultation document 01/12 has been confusing. There appears to be some errors in the numbering of the questions, as well as inconsistencies in Annex A containing a summary of these questions. In the latter, aside from the numbering errors, there also seem to be additional questions that are not present in the main consultation document (e.g. Q5 under Annex A is not in the main document) and duplication of identical questions (e.g. questions 9 and 11). The Authority will appreciate that this has led to Gibtelecom wondering whether it is the questions in the main document that are correct (in total number and content) or whether in fact the Annex is correct and some questions are missing from the main document. In submitting this response, Gibtelecom assumes that it is the former and that, notwithstanding the numbering errors, no questions or content are missing from the main document.

Specific GRA questions

Q1: Do you agree with the Authority's definition of relevant product markets? If No, please give reasons for your answer

Gibtelecom agrees with the product definition of the relevant markets for voice call termination on the individual mobile network of Eazitelecom Ltd, and SMS termination on the individual mobile network of Eazitelecom Ltd. These definitions have been discussed and set previously through the various preceding market review public consultations and GRA decision notices.

¹ Section 4.2, page 10 of public consultation 01/12

² Section 2.2, page 6 of public consultation 01/12

Q2: Do you agree with the Authority that countervailing buyer power does not and would not militate against market power in wholesale termination markets in Gibraltar? If No, please give reasons for your answer

Gibtelecom agrees that countervailing buyer power from the Company or any other operator does not and would not militate against Eazitelecom's market power in wholesale termination markets in Gibraltar.

Q3: Do you agree with the Authority's designation of SMP in the relevant markets? If No, please give reasons for your answer

Gibtelecom agrees with the Authority's designation of Eazitelecom as an SMP operator in the relevant markets.

Q4: Do you agree with the Authority's proposed SMP designation of non-discrimination on Eazitelecom in the relevant market? If No, please give reasons for your answer [Gibtelecom comment: this question is shown as "Q7" in the main body of the public consultation]

Gibtelecom agrees with the Authority's proposed SMP designation of non-discrimination on Eazitelecom in the wholesale mobile voice call termination market.

Gibtelecom would nevertheless like to comment on the subtle differences between the non-discrimination obligations being proposed on Eazitelecom (and also CTS) and those of Gibtelecom.

According to the proposed non-discrimination SMP remedy text for Eazitelecom, the non-discrimination obligations are as follows

"Eazitelecom shall not unduly discriminate between customers. Eazitelecom shall apply equivalent conditions in equivalent circumstances to other authorised operators providing equivalent services. Eazitelecom shall provide services and information to other authorised operators under the same conditions and of the same quality as provided for its own services".³

In contrast, the text (numbers removed) of Gibtelecom's existing equivalent SMP obligation is set out below.

*"Gibtelecom shall not unduly discriminate **in matters related to mobile voice call termination services**. Gibtelecom shall apply equivalent conditions in equivalent circumstances to other **persons** providing equivalent services. Gibtelecom shall provide services and information to **others** under the same conditions and of the same quality as provided **to itself or subsidiaries and partners**. **Gibtelecom shall not discriminate in tariffs between calls arriving from other national authorised fixed or mobile networks.**"*

The Authority will see that there are differences in wording and sentiment (bold text) as well as a sentence that does not exist in the proposed Eazitelecom obligation (bold red text). A similar point was made by the Company, in reference to the non-discrimination obligations imposed on CTS at the time, in its response to the Authority's public consultation 03/11. Gibtelecom continues to query the need for such differences within the same general SMP obligation. Since, according to EU competition theory, each operator exerts influence over its own individual network, the possibility of dominance problems arising within that specific network therefore

³ Section 5.4, page 14 of public consultation 01/12

exists. Using this argument, the Company consequently believes that within a specific SMP obligation, the same rules and therefore wording should be applied to all operators, as the level of "control" in each network will be the same for all.

The Company also further directs the Authority to the Company's response to public consultation 03/11 for applicable comments related to inconsistencies in the application of other SMP obligations such as transparency and price control requirements on operators in the wholesale mobile markets.

Q5: Do you agree with the Authority's proposed SMP obligation access [sic] on Eazitelecom in the relevant market? If No, please give reasons for your answer [Gibtelecom comment: this question is shown as "Q8" in the main body of the public consultation]

Gibtelecom agrees with the Authority's proposed SMP obligation of access on Eazitelecom in the wholesale mobile voice call termination market. In this case, identical Access obligations are being imposed on all operators.

Q6: Do you agree with the Authority's proposed interpretation of the 'fair and reasonable' obligation as a requirement for Eazitelecom to adhere to the principle of reciprocity? If No, please give reasons for your answer [Gibtelecom comment: this question is shown as "Q9" in the main body of the public consultation]

To the extent that the principle of reciprocity is applied, Gibtelecom has no objection to the Authority's proposal to have a fair and reasonable interpretation of a price control and cost accounting obligation on Eazitelecom.

Q7: Do you agree with the Authority's proposed interpretation of the 'fair and reasonable' obligation applying to Eazitelecom in 2012? If No, please give reasons for your answer [Gibtelecom comment: this question is shown as "Q10" in the main body of the public consultation]

Gibtelecom does not agree with the Authority's proposal to have a different interpretation of the fair and reasonable rule applicable to Eazitelecom for 2012 for the following reasons.

1. The EU Commission itself recommends the use of reciprocity for the setting of termination rates.

In the consultation document, the Authority refers back to comments previously received from the Commission on the subject. These are as follows

"the Commission itself held that termination rates should be set at the level of costs incurred by an efficient operator and therefore should normally be symmetric."⁴

In fact, it appears that parts of this view guided the Authority to recently set the mobile voice call termination rates of Gibtelecom (and CTS) on a decreasing glide path for three years commencing 1 January 2012. The Authority stated that it was necessary to impose the rates, rather than allow the introduction of true cost-based termination rates calculated by Gibtelecom's complex accounting separation report, to provide certainty to the market, as well as to ensure operators met the EU recommended "efficient operator" mobile termination rates.

⁴ Question 7 (10), page 16, public consultation 01/12 and Commission Comments pursuant to Article 7(3) of Directive 2002/21/EC on cases GI/2009/0976 and GI/2009/0977

As such, Gibtelecom believes the Authority should apply the same logic in this market review and not allow Eazitelecom to deviate from the "efficient operator" rates already imposed on Gibtelecom starting January 2012.

2. Having asymmetrical rates could distort the market.

The Authority should note that allowing an operator to set different rates to those of the interconnecting operator will only incentivise the latter to correspondingly have differential retail calling rates. For instance, should operator A unilaterally decide to increase the termination rates it charges operator B, then it will invariably be more expensive for operator B to land calls on operator A's network. In an effort to recover these additional costs, operator B may have little choice but to pass these on to its own retail customers in the form of higher charges for calls made to Operator A's network. The Authority will see how this scenario may make it more difficult for operator B's customers to call operator A's customers.

3. It is not clear how Eazitelecom would establish a case for different termination rates.

Since the Authority is not proposing to impose cost orientation obligations on Eazitelecom, the Company finds it difficult to understand how any difference in rates would be substantiated and justified. Gibtelecom cannot accept that charges be higher for Eazitelecom without the Authority being clear what Eazitelecom would need to do to prove its claim.

Q8: Do you agree with the Authority's proposed SMP obligation of non-discrimination on Eazitelecom in the relevant market? If No, please give reasons for your answer. [Gibtelecom comment: this question is shown as "Q11" in the main body of the public consultation]

Gibtelecom agrees with the Authority's proposed SMP designation of non-discrimination on Eazitelecom in the wholesale SMS termination market.

Gibtelecom would nevertheless again like to comment on the differences between the non-discrimination obligations being proposed on Eazitelecom and those of Gibtelecom.

The text of the proposed non-discrimination obligations on Eazitelecom in the wholesale SMS termination market are set out below.

"Eazitelecom shall not unduly discriminate between customers. Eazitelecom shall apply equivalent conditions in equivalent circumstances to other authorised operators providing equivalent services. Eazitelecom shall provide services and information to other authorised operators under the same conditions and of the same quality as provided for its own services".

The same non-discrimination obligation on Gibtelecom reads as follows.

*"Gibtelecom shall not unduly discriminate **in matters related to SMS termination services**. Gibtelecom shall apply equivalent conditions in equivalent circumstances to other **persons** providing equivalent services. Gibtelecom shall provide services and information to **others** under the same conditions and of the same quality as provided **to itself or subsidiaries and partners**."*

The Authority will again see that there are differences in wording and sentiment (bold text) between the two sets of equivalent obligations. Furthermore, unlike the differences in mobile voice call termination non-discrimination obligations, no such differences exist in the SMS non-

discrimination obligations between CTS and the Company. Gibtelecom therefore finds it odd that a different set of principles are being considered for Eazitelecom.

The Company also directs the Authority to its comments under Q4(7) for other relevant information.

Q9: Do you agree with the scope of this review? If No, please give reasons for your answer. [Gibtelecom comment: this question is shown as "Q12" in the main body of the public consultation]

Gibtelecom generally agrees with the scope of this review, although the Company has some views on the tests used by the Authority to determine whether and when an SMP review should be carried out on any particular operator. These views are set out under point 2 of our "Introduction" section above.

End of submission