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Gibraltar Regulatory Authority
Europort Suite 811
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For the attention of:
Mr Paul Canessa
Chief Executive Officer

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Dear Mr Canessa,

Subject: Commission decision concerning Case GI/2011/1248: Voice call termination on individual mobile networks

Commission decision concerning Case GI/2011/1249: SMS termination on individual mobile networks

Comments pursuant to Article 7(3) of Directive 2002/21/EC¹

I. PROCEDURE

On 7 September 2011 the Commission registered a notification from the Gibraltar Regulatory Authority (GRA) concerning the market for voice call termination on individual mobile networks and SMS termination on individual mobile networks in Gibraltar.

The national consultation² ran from 11 May 2011 to 28 June 2011.

On 12 September 2011 a request for information (RFI)³ was sent to the GRA. A response was received on 15 September 2011.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), BEREC and the Commission may make comments on notified draft measures

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, OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC (Better Regulation Directive), OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12 (Framework Directive).

² In accordance with Article 6 of the Framework Directive.

³ In accordance with Article 5(2) of the Framework Directive.

to the NRA concerned.

II. DESCRIPTION OF THE DRAFT MEASURES

II.1. Background

The market for voice call termination on individual mobile networks in Gibraltar was first notified to and assessed by the Commission under Case GI/2007/0723.⁴ The GRA defined the relevant product market for termination of voice calls on the individual mobile network of each operator in Gibraltar and proposed designating Gibtelecom, which at that time was the sole mobile network operator in Gibraltar, as having significant market power (SMP) and imposing the following remedies: (i) transparency; (ii) non-discrimination; (iii) accounting separation; and (iv) price control and cost accounting. Because the mobile termination rates (MTRs) proposed were above the European Union average, in its comments the Commission invited the GRA to revisit its analysis once a common approach on a coherent cost-accounting method is established at European Union level.

In 2009, the GRA notified to the Commission a supplement to its first-round market analysis (GI/2009/0977)⁵ in which it proposed designating CTS Gibraltar (CTS), a new market entrant, as having SMP and imposing the following remedies: (i) non-discrimination; and (ii) price control and cost accounting, requiring CTS to provide termination services on fair and reasonable terms. In its comments, the Commission called on the GRA to impose an access obligation on CTS and to implement *ex ante* price control with efficient termination rates for both operators. Following the Commission's comments, the GRA imposed both an access and a price control obligation on CTS.

The market for SMS termination on individual mobile networks in Gibraltar was first notified to and assessed by the Commission under Case GI/2007/0724.⁶ The GRA defined the relevant product market for SMS termination of each operator in Gibraltar and proposed designating Gibtelecom, which at that time was the sole mobile network operator in Gibraltar, as having SMP and imposing the following remedies: (i) transparency; and (ii) non-discrimination. The Commission did not comment.

II.2. Market definition

II.2.1. Voice call termination on individual mobile networks (Case GI/2011/1248)

The GRA identifies a national wholesale market for voice call termination on individual mobile networks⁷ provided by Gibtelecom and CTS over their respective networks. The GRA finds that no viable competitive substitutes at a wholesale level for the termination

⁴ SG-Greffe(2007)D/207396.

⁵ SG-Greffe(2009)D/7283.

⁶ SG-Greffe(2007)D/207396.

⁷ Listed as market 7 in Commission Recommendation 2007/879/EC 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, OJ L 344, 28.12.2007, p. 65 (Recommendation).

of mobile voice calls exist, equally from the demand- and supply-side, and defines the relevant markets as national in scope.

II.2.2. SMS termination (Case GI/2011/1249)

The GRA defines a relevant wholesale market for SMS termination which is not listed in the Recommendation. The GRA concludes that there are no adequate substitutes, on either the demand- or the supply-side, for wholesale SMS termination to subscribers of a specific network and therefore includes in its market definitions termination of SMS on the respective networks of Gibtelecom and CTS. Further, the GRA includes in its market definitions only SMS originated on another mobile network and defines the relevant markets as national in scope.

The GRA considers that the relevant market fulfils the ‘three criteria’ test⁸ set out in the Recommendation and is therefore susceptible to *ex ante* regulation.

II.3. Finding of significant market power

For both the mobile termination markets and the SMS termination markets, the GRA assesses SMP in the light of (i) 100% market shares; (ii) barriers to entry; (iii) lack of countervailing buying power; and (iv) pricing behaviour. The GRA finds that Gibtelecom and CTS hold SMP on their respective networks.

II.4. Regulatory remedies

II.4.1. Voice call termination on individual mobile networks (Case GI/2011/1248)

The GRA proposes to maintain the following obligations on Gibtelecom: (i) access; (ii) transparency; (iii) non-discrimination; (iv) accounting separation; and (v) cost accounting and price control.

The GRA proposes to maintain the following obligations on CTS: (i) access; (ii) non-discrimination; and (iii) price control. The GRA considers that the accounting separation obligation is too burdensome and disproportionate for CTS, given its limited resources, the small scale of its operations in comparison with Gibtelecom and its recent entry into the market.

As regards the price control obligation proposed for Gibtelecom and CTS, the GRA notes that calculating MTRs in accordance with an LRIC cost model would provide exact target MTRs which closely reflect the specific characteristics of the local market and the underlying networks. The GRA compares the benefits of such a model with the corresponding costs, in terms of resources and length of the data collection process. The GRA concludes that it is not in a position to complete such a model in the framework of current market analysis and hence proposes setting interim prices based on benchmarking.

The GRA proposes to calculate MTRs based on the BEREC MTR benchmark report of July 2010,⁹ according to which the average MTR amounted to €0.0596 (GIB£0.0525). Furthermore, the GRA observes that MTRs have been decreasing over the previous years

⁸ In order to decide whether a market is susceptible to *ex ante* regulation, an NRA will assess: (i) whether a market is subject to high and non-transitory entry barriers; (ii) whether a market does not tend towards effective competition within the relevant time horizon; and (iii) the insufficiency of competition law alone to address the market failure.

⁹ BoR (10) 45 MTR benchmark snapshot.

at an average yearly rate of 16 %, a trend which it expects to continue.

Consequently, the GRA proposes the following symmetric glide-path, maximum per-minute rates:¹⁰

Currently	From 1 January 2012	From 1 January 2013	From 1 January 2014
GIB£0.075 (€0.085)	GIB£0.055 (€0.062)	GIB£0.04 (€0.045)	GIB£0.03 (€0.034)

II.4.2. SMS termination (Case GI/2011/1249)

The GRA proposes maintaining the existing set of remedies — (i) transparency and (ii) non-discrimination — imposed on Gibtelecom and imposing non-discrimination alone on CTS. The GRA does not propose imposing a cost-orientation obligation on Gibtelecom and CTS on the grounds that the SMS termination rates applied by those two operators are in line with the 2009 EU average. Furthermore, the GRA considers that imposing transparency would be too burdensome and disproportionate for CTS given its limited resources, the small scale of its operations in comparison with Gibtelecom and its recent entry into the market.

III. COMMENTS

On the basis of the notification and the additional information provided by the GRA, the Commission has the following comments:¹¹

Imposition of the price control mechanism and the need for efficient cost-oriented mobile termination rates

The Commission notes that, in view of the limited resources and the very small size of the market (32,546 mobile subscribers), the GRA would like to implement an alternative methodology for setting MTRs, i.e. benchmarking instead of the cost methodologies recommended in the Termination Rates Recommendation. The GRA must nevertheless bear in mind that in order to comply with Recommend 12 of the Termination Rates Recommendation any other methodology used must result in outcome consistent with this Recommendation as of 1 January 2013.

This outcome could be achieved by following the glide-paths set in those Member States which will arrive at a final BU-LRIC rate by 31 December 2012. On the contrary, an outcome consistent with the Termination Rates Recommendation is unlikely to be achieved if the GRA bases its glide-path solely on average MTRs as published in the BEREC MTR benchmark snapshot. First, the GRA would have to identify the Member States implementing a pure BU-LRIC model in such a manner that rates compliant with the Termination Rates Recommendation are actually achieved on 1 January 2013. This could require a more thorough analysis of the finally adopted measures in the Member States

¹⁰ The rates in EUR were provided by the GRA. The exchange rate was GIB£ 1 = €1.135 in March 2011.

¹¹ In accordance with Article 7(3) of the Framework Directive.

concerned. Second, the BEREC benchmarking snapshot reports published until present do not report figures on a forward-looking basis. The NRA may find it difficult to implement rates in line with the Termination Rates Recommendation on 1 January 2013 if the relevant benchmark rates are published only on or even after that date. In order to implement BU-LRIC-based rates by 1 January 2013, an NRA may again be required to analyse finally adopted measures and to set MTRs on a forward-looking basis.

Against this background, the Commission urges the GRA to reconsider the proposed glide-path, in particular the MTRs applicable as of 1 January 2013, in order to be able to comply with the Termination Rates Recommendation by that date. To this end, the Commission encourages the GRA to start working together with BEREC and related working groups in order to receive appropriate guidance on the correct MTR data to use for benchmarking purposes. Alternatively, BEREC might be able to provide other practical support and guidance to overcome the GRA's limitation of resources and, in particular, the cost of implementing the recommended methodology.

Need to impose a cost-orientation obligation in the SMS termination markets and to set a glide-path towards the cost-oriented price

The Commission notes that the GRA identifies competition problems in the SMS termination market in Gibraltar which are similar to those identified in the mobile termination markets.¹² However, the GRA does not propose imposing a cost-orientation obligation on the operators having SMP on the market for SMS termination.

As stated in the Explanatory Note to the Recommendation, the NRAs may define a market for SMS termination where they establish a market failure similar to those identified on the markets for mobile voice call termination.¹³ The two mobile operators in Gibraltar are monopolists for SMS termination on their networks and normally have both the ability and the incentive to raise termination rates above costs. Commercial agreements cannot normally address this potential market failure on termination markets. Imposing cost orientation is therefore the most appropriate means to address the competition problems in this market over the medium term.¹⁴ The Commission therefore urges the GRA to impose cost orientation as the appropriate remedy in the SMS termination markets. Furthermore, in order to ensure legal certainty for market players, cost orientation should be implemented by imposing a glide-path, preferably aligned with the voice call termination glide-path in terms of price-cap reduction milestones, in order to reduce the current SMS termination rate towards the cost-

¹² In its document for the national consultation of 11 May 2011 (Public Consultation 03/11, p. 32) the GRA states that there is no wholesale operator or group of operators that can effectively constrain SMS termination rates to a level equal to a competitive outcome.

¹³ Commission staff working document SEC(2007) 1483 final: Explanatory Note: Accompanying document to the Commission Recommendation 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 (Second edition), pp. 42 and 44.

¹⁴ See also Recital 7 of the Termination Rates Recommendation.

oriented level.¹⁵

Given the similarities of the market failure in the markets for termination of mobile voice calls and SMS termination, the implementation of cost orientation should, in principle, be based on the BU-LRIC costing methodology.¹⁶ However, the Commission recognises that given the small size of the mobile operators in Gibraltar, imposing a cost-accounting obligation could create an undue administrative burden and may therefore be considered disproportionate. Alternatively, the GRA may rely on appropriate benchmarking against the costs of the operators who have implemented a BU-LRIC cost model for SMS termination.

Finally, the Commission emphasises that the reference used by the GRA to assess the level of the SMS termination rates is unsuitable given that the EU average to which the GRA refers does not appropriately show costs of SMS termination and, for this reason, does also not provide a basis for not imposing cost orientation. The Commission therefore calls on the GRA to use a more appropriate benchmarking method when reassessing the need to impose cost orientation and setting a glide-path.

Pursuant to Article 7(7) of the Framework Directive, the GRA shall take the utmost account of comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measures and, where it does so, shall communicate them to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC¹⁷ the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission¹⁸ within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication.¹⁹ You should give reasons for any such request.

¹⁵ See also the Commission's comments in Case DK/2010/1100.

¹⁶ All NRAs (e.g. France in Case FR/2010/1094, Denmark in Cases DK/2010/1100 and DK/2010/1181 and Poland in Case PL/2010/1125) which have notified draft measures for the SMS termination markets have proposed to impose cost orientation, although only France will arrive at that level. In the other two cases, the Commission commented on the need to impose an appropriate glide-path with a view to arriving at cost-oriented prices.

¹⁷ Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 301, 12.11.2008, p. 23.

¹⁸ Your request should be sent either by email: INFSO-COMP-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

¹⁹ The Commission may inform the public of the result of its assessment before the end of this three-day period.

Yours sincerely,
For the Commission,
Robert Madelin
Director-General