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Gibraltar Regulatory Authority  
Europort Suite 811  
Gibraltar

For the attention of:  
Mr. Paul Canessa  
Chief Executive Officer

Fax: + 350 20072166

Dear Mr. Canessa,

**Subject: Commission decision concerning Case GI/2012/1334: SMS termination on individual mobile networks**

**Commission decision concerning Case GI/2012/1335: Voice call termination on individual mobile networks**

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

## **I. PROCEDURE**

On 30 May 2012, the Commission registered a notification from the Gibraltar Regulatory Authority (GRA)<sup>1</sup>, concerning the market for voice call termination on individual mobile networks<sup>2</sup> and the market for SMS termination on individual mobile networks in Gibraltar.

The national consultation<sup>3</sup> ran from 26 January 2012 to 27 February 2012.

On 7 June 2012, a request for information<sup>4</sup> was sent to the GRA and a response was received on 11 June 2012.

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<sup>1</sup> Under Article 7 of 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 L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

<sup>2</sup> Corresponding to 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 (Recommendation on Relevant Markets), OJ L 344, 28.12.2007, p. 65.

<sup>3</sup> In accordance with Article 6 of the Framework Directive.

<sup>4</sup> In accordance with Article 5(2) of the Framework Directive.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authority (NRA), the Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on the notified draft measures to the NRA concerned.

## **II. DESCRIPTION OF THE DRAFT MEASURE**

### **II.1. Background**

The third round review of the voice call termination market and the second round review of the SMS termination market in Gibraltar were previously notified to and assessed by the Commission under case numbers GI/2011/1248 and GI/2011/1249<sup>5</sup> respectively.

With regard to both markets, the GRA proposed to designate Gibtelecom and CTS as having significant market power (SMP) on their respective networks at the national level.

For the voice call termination market, the GRA proposed to maintain the obligations of (i) access; (ii) transparency; (iii) non-discrimination; (iv) accounting separation; and (v) cost accounting and price control for Gibtelecom. With regard to CTS, the GRA proposed to maintain the following obligations: (i) access; (ii) non-discrimination; and (iii) price control. With regard to price regulation, in view of the limited resources and the very small size of the market, the GRA proposed to implement an alternative methodology for setting the mobile termination rates (MTRs), i.e. benchmarking instead of the cost methodology recommended in the Termination Rates Recommendation<sup>6</sup>. The Commission issued a "comments" letter urging 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 encouraged 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 and practical support to overcome the GRAs' limitation of resources.

Regarding the SMS termination market, the GRA proposed to maintain the existing set of remedies — (i) transparency and (ii) non-discrimination — imposed on Gibtelecom and imposing non-discrimination alone on CTS. The Commission urged the GRA in its comments letter to impose cost orientation as the appropriate remedy in the SMS termination markets. To that purpose, the GRA was asked to use an appropriate benchmarking method and to implement 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-oriented level.

### **II.2. Market definition**

#### *Voice call termination on individual mobile networks*

The GRA identifies a national wholesale market for voice call termination on individual mobile networks provided by the new entrant Eazitelecom over its network.<sup>7</sup> The GRA finds that no viable competitive substitutes for the termination of mobile voice calls exist

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<sup>5</sup> SG-Greffe(2011)D/16432.

<sup>6</sup> Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (Termination Rates Recommendation), 2009/396/EC, OJ L 124, 20.5.2009.

<sup>7</sup> In its reply to the request for information, the GRA indicates that Eazitelecom plans to provide mobile services in Gibraltar before the end of year 2012.

at wholesale level, equally from the demand- and supply-side. The relevant market is national in scope.

#### *SMS termination*

In line with its previous market analysis<sup>8</sup>, the GRA defines a relevant wholesale market for SMS termination which warrants ex ante regulation and includes in it termination of SMS on the network of the new entrant Eazitelecom.

### **II.3. Finding of significant market power**

For both the mobile termination market and the SMS termination market, 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 Eazitelecom holds SMP on its network.

### **II.4. Regulatory remedies**

#### *Voice call termination on individual mobile networks*

The GRA proposes to impose the following obligations on Eazitelecom: (i) access; (ii) non-discrimination; and (iii) price control. The GRA considers that the accounting separation and transparency obligations are too burdensome and disproportionate for Eazitelecom, given its limited resources, the small scale of its operations in comparison with the largest SMP operator, Gibtelecom.

As to the price control, the GRA proposes to impose on Eazitelecom an obligation to provide voice call termination on non-discriminatory and fair and reasonable terms. This, according to the GRA, implies a principle of reciprocity under which Eazitelecom's termination rates shall be identical to the ones already set for Gibtelecom and CTS<sup>9</sup>.

Consequently, the GRA proposed the following symmetric glide-path, maximum per-minute rates:<sup>10</sup>

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

#### *SMS termination*

The GRA proposed imposing only non-discrimination on Eazitelecom, in line with what is currently imposed on the second operator in the market (CTS).

## **III. COMMENTS**

The Commission has examined the notification and the additional information provided

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<sup>8</sup> Notified to the Commission and assessed under case no GI/2011/1249.

<sup>9</sup> See GRA, Decision Notice No.10/11. The draft measure has been notified to the Commission and assessed under case no GI/2011/1248. The GRA set Gibtelecom and CTS's MTRs based on the BEREC MTR benchmark report of July 2010 according to which the average MTR amounted to €0.0596 (GIB£0.0525). Furthermore, the GRA observed that MTRs have been decreasing over the previous years at an average yearly rate of 16%, a trend which it expects to continue and set a glide-path accordingly.

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

by the GRA and has the following comments:<sup>11</sup>

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

The Commission notes that, in line with the price regulation previously imposed on the other mobile operators in Gibraltar, the GRA proposes to set Eazitelecom's rates on the basis of an alternative methodology for setting MTRs, i.e. benchmarking instead of the cost methodologies recommended in the Termination Rates Recommendation. In the reply to the request for information the GRA explains that in order to be consistent with the obligations already imposed on the other MNOs, it has decided to impose the same glide-path based on a benchmarking methodology taking into account various factors such as the BEREC snapshot report covering the period July 2010 - January 2011 and the level of termination rates in Gibraltar at the time.<sup>12</sup>

The Commission reminds the GRA that in order to comply with Recommend 12 of the Termination Rates Recommendation any other methodology used must result in outcomes consistent with the Recommendation as of 1 January 2013. Therefore, outcomes resulting from the application of an alternative methodology should not exceed the average of the termination rates set by those Member States which have implemented the recommended cost methodology as of 1 January 2013. Further to that, the rates used for benchmarking should represent the cost efficient target rates at the end of the respective glide paths,<sup>13</sup> but not the rates at a certain point along the glide-path. Such an approach has also been recently endorsed by BEREC<sup>14</sup>.

The Commission has already recalled this principle by way of comments addressed to GRA in October 2011, and indicated that the proposed benchmark and the resulting rates set by the GRA for the two main MNOs (Gibtelecom and CTS) were not appropriate.<sup>15</sup>

However, the Commission notes that the GRA has not modified its approach for setting MTRs in general and consequently the rates applicable to the new entrant Eazitelecom. GRA proposes to implement still the same methodology resulting in MTRs significantly above the average of MTRs set in Member States already implementing the pure BU-LRIC model, and this for a period extending well after January 2013, the deadline for implementing the Termination Rates Recommendation.

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<sup>11</sup> In accordance with Article 7(3) of the Framework Directive.

<sup>12</sup> The GRA refers to its Decision Notice 10/11.

<sup>13</sup> See case EE/2012/1305.

<sup>14</sup> See BEREC's opinion in Phase II investigation in cases NL/2012/1284 and NL/2012/1285 on fixed and mobile termination markets in the Netherlands.

<sup>15</sup> See case GI/2011/1248. In its comments, the Commission criticised the fact that the GRA based its glide-path solely on average MTRs as published in the BEREC MTR benchmark snapshot and stated that, to implement a properly designed benchmark, the GRA should instead 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. The Commission also encouraged 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.

The Commission is mindful of the specific competitive circumstances arising in Gibraltar given the very small size of the market (around 32,500 mobile subscribers only) and of the limited resources of the GRA. Furthermore, the Commission understands that at the time when the GRA was setting its benchmarking methodology only a few Member States had already implemented a pure BU-LRIC model as recommended.

Finally, the Commission understands that introducing a more adequate methodology only for Eazitelecom, which is the operator subject to the presently notified draft measure, would create in practice an asymmetry between the MNOs active in Gibraltar. This could undermine regulatory certainty and have an important and possibly negative impact on the market's developments with the ensuing negative impact on consumers.

However, the Commission underlines that, since the GRA has implemented its benchmarking methodology, several other Member States have implemented a pure BU-LRIC model<sup>16</sup> and that the Commission has stated in a number of cases that the correct benchmarking methodology should reflect the target rates applicable in those Member States.<sup>17</sup>

Against this background, and in order to bring more quickly the benefits of lower MTRs to consumers the Commission requests the GRA to revise its proposed benchmark and re-notify an adequate glide-path applicable to all MNOs including Eazitelecom before the end of 2012, so that cost efficient MTRs could be applied already as of 1 January 2013. The GRA may consider adopting interim measures for Gibtelecom and CTS before a revised glidepath is formally adopted.

Also, the Commission recalls that Article 7(5) of the Framework Directive imposes on NRAs the obligation to "*take the utmost account*" of the Commission's comments.

Furthermore, NRAs are bound to impose remedies that are appropriate within the meaning of Article 16(4) of the Framework Directive and justified in light of the objectives laid down in Article 8 of the Framework Directive, and, in particular, the objectives of promoting efficiency, competition and maximum user benefits pursuant to Article 8(2) of the Framework Directive and Article 13(2) of the Access Directive.

<sup>16</sup> The following countries have, so far, notified a pure BU-LRIC cost model to set MTRs:

Country	Target Rate (€/min)	Deadline
NL*	1.2	01/09/2012
BE	1.08	01/01/2013
FR	0.8	01/01/2013
PT	1.27	01/01/2013
IT	0.98	01/07/2013
ES	1.09	01/07/2013
UK**	0.85	01/04/2014

\* OPTA renotified MTR remedies following a National Court's judgment, which required to set MTRs according to a different cost model, resulting in a target rate of 2.4 €/min.

\*\* Adopted rate, following the Competition Appeal Tribunal's decision of 8 May 2012 (0.69 ppm with exchange 1 GBP = 1.23998 EUR).

<sup>17</sup> See EE/2012/1305, SK/2012/1313 and CZ/2012/21/EC.

The Commission therefore reminds the GRA that if it were to propose a new price remedy, which would deviate from EU law and the principles of the Termination Rates Recommendation, the Commission could proceed to opening a phase II investigation pursuant to Article 7a of the Framework Directive or any further procedural steps the Commission might want to take in order to ensure compliance with the above principles of EU law.

### **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. However, the GRA does not, in line with the NRA's previous decisions for Gibtelecom and CTS, propose imposing a cost-orientation obligation on Eazitelecom on the market for SMS termination.

The Commission reiterates the comments made in case GI/2011/1249. The three 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. Therefore, as already outlined in previous cases, imposing cost orientation is the most appropriate means to address the competition problems in this market over the medium term.<sup>18</sup> The Commission therefore asks the GRA to impose 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-oriented level.<sup>19</sup>

### **Need to impose the same non-discrimination obligation on all MNOs**

The Commission notes that the non-discrimination obligation is not phrased in the same way for Eazitelecom and for the other MNOs. The Commission stresses that no justification has been provided that would, a priori, explain a difference of treatment between the three mobile operators which have been found to have SMP on their networks and can similarly abuse their market powers. Against this background, the Commission calls on the GRA to ensuring the same level of non-discrimination in order to achieve a consistent regulatory approach.

Pursuant to Article 7(7) of the Framework Directive, the GRA shall take the utmost account of the comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measure; where it does so, shall communicate it 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/EC<sup>20</sup> 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 Commission<sup>21</sup> within three

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<sup>18</sup> See also Recital 7 of the Termination Rates Recommendation.

<sup>19</sup> See also the Commission's comments in Case DK/2010/1100.

<sup>20</sup> 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.

<sup>21</sup> Your request should be sent either by email: [INFSO-COMP-ARTICLE7@ec.europa.eu](mailto:INFSO-COMP-ARTICLE7@ec.europa.eu) or by fax:

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.<sup>22</sup> You should give reasons for any such request.

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

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<sup>22</sup> The Commission may inform the public of the result of its assessment before the end of this three-day period.