GOVERNMENT OF MALTA

Government response to the Consultation on Proposed Change to Regulation 51 of the Electronic Communications Networks and Services Regulation (ECNSR) (S.L. 399.28 of the Laws of Malta)

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Introduction and overview

In an increasingly joined-up, high speed digital environment where take-up of Cloud-based services, among others, is ramping up steeply, reliance on always-on, electronic communications networks can no longer be dependent on best-effort provision. Thus, networks increasingly require a reasonable level of ongoing redundancy. It is therefore necessary to place additional emphasis on the provision of adequate fail-safe back-up when connectivity problems arise.

Within the context outlined above, the relevant consultation document proposed an amendment to regulation 51 of the ECNSR. The intention of the proposed amendment is to clarify further the provisions of the mentioned regulation 51.

This clarification was proposed in relation to geographical areas of the Maltese Territory where inadequate redundancy in electronic communications networks might raise problems with regard to ongoing connectivity and therefore service provision. This is in line with the requirement in regulation 51(1) on undertakings providing publicly available electronic communications services over public communications networks, to **"take all necessary measures to ensure the fullest possible availability of such service in the event of catastrophic network breakdown or in cases of force majeure".**

The consultation document was published by the MCA on the 5th December 2019 and the consultation period closed on the 9th January 2020. As intimated above, the consultation addressed a proposed change to Regulation 51 of the Electronic Communications Networks and Services Regulation (ECNSR) (S.L. 399.28 of the Laws of Malta)

This consultation sought views on the proposed change to regulation 51(3) of the ECNSR. The existing regulation, in providing for the taking of all necessary measures to ensure the fullest possible availability of such service in the event of catastrophic network breakdown or in cases of force majeure [reg 51(1) of the ECNSR], already provides adequate leeway for necessary action to be taken in particular circumstances.

The inclusion of relevant wording in regulation 51(3) of the ECNSR places further clarity on the Authority's powers to specify obligations to be complied with by (electronic communications) undertakings where particular redundancy measures are warranted as per regulation 51(1).

The amendment to regulation 51(3) is meant to provide further clarity to the Authority's powers 'to specify obligations to be complied with by undertakings for the purpose of ensuring compliance with this regulation'.

At the same time it allows the necessary lee-way for the MCA to intervene as necessary and to apply proportionate measures on a case-by-case basis. The current and proposed legislation may be seen in the table below:

The text of the amendment entails changes to regulation 51(3) of the ECNSR.

The table below shows the previous and new versions of regulation 51(3), whilst showing also regulation 51(1) and (2), which remain unchanged, for a better interpretation of the changes involved.

51. (1) An undertaking providing publicly available electronic communications services over public communications networks, shall take all necessary measures to ensure the fullest possible availability of such service in the event of catastrophic network breakdown or in cases of force majeure. **(2) An undertaking providing a publicly available telephone service shall take all necessary measures to ensure uninterrupted access to emergency services.**	
Previous 51(3)	**New 51(3)**
The Authority may specify obligations to be complied with by undertakings for the purpose of ensuring compliance with this regulation.	**The Authority shall have the power to specify obligations to be complied with by undertakings for the purpose of ensuring compliance with this regulation:** **Provided that in doing so the Authority shall also factor any particular characteristics, such as insularity, where the consequences of catastrophic events or of *force majeure* are likely to cause severe and, or prolonged service deterioration or disruption:** **Provided further that the Authority shall, after considering the nature and extent of the services provided and any attendant relevant circumstances, require undertakings, in line with the principles of reasonableness and proportionality, to adopt such resilient and secure solutions as it shall consider appropriate, in such a manner that connectivity as specified in sub-regulation (1) is best ensured.**

Responses to the consultation, process used to seek stakeholder views

The consultation closed on 9th January 2020. The consultation document was available online and responses were accepted electronically and on paper. In total, there was one joint response from the three main electronic communications network operators, namely GO, Melita and Vodafone.

The joint response is reproduced integrally from PDF below:

2 Responses to the MCA

The operators would primarily like to thank the Authority for the opportunity to provide feedback on the proposed changes to Regulation 51(3).

While the industry recognises the need for availability of services, we feel that the amendments still lack clarity in terms of what particular characterises the Authority shall factor in and what the resilient and secure solutions required might be. Furthermore, given that the redundancy measures are driven by public policy, we believe that the industry should not bear the costs of any imposed measures on its own.

Even though the principles of reasonableness and proportionality shall be taken into account, we are of the view that the proposed provision is unclear, wide-ranging and generic. Our concern is that this may lead to the measures being mandated on operators which require time, effort and costs. This results in putting operators in a position wherein they face costs and expenses which cannot be justified and which in return will jeopardise overall investment plans. Moreover, the said measures that could be mandated by the Authority would not necessarily be the same measures and actions that an operator would deem best to implement in the event it is affected by a catastrophic event or force majeure.

Undertakings are already being charged high prices for the Malta-Gozo connectivity by the Government State-owned entity. In fact prices that are being proposed for the new Malta-Gozo submarine cable by another State-owned entity are significantly lower. If the undertakings are not protected from unnecessary costs that are not in line with commercial conditions in a competitive market, the consequences of the changes in Regulation 51 may strengthen the scope for such unfair practices at the expense of the undertakings. This is more pressing when the suppliers of such undersea cables are state-owned entities that may have benefitted from state aid to build their infrastructure. As such, we believe that just like suppliers of international undersea connectivity are obliged by law to be proportionate and reasonable in their dealings with others that are subject to redundancy obligations, the same should apply to suppliers of national undersea connectivity.

The industry is respectfully of the opinion that measures are first consulted upon and discussed between the Authority and the operators, for the benefit of all parties involved, and ultimately for the benefit of the end users. For the continued benefit of our subscribers, any imposed decisions and measures should be material and economically justified and feasible, so that in parallel investment in networks and new services is not hampered. It should also be considered that implementation requires time and effort hence schedules and realistic timeframes ought to be agreed to bilaterally with the operator involved. Any decisions and measures should be agreed to on the basis of discussion and as a common feasible solution and not as a means used to mandate use of third-party infrastructures without due analysis first.

Summary of responses and decisions

The above response has been assessed and comments have been raised with respect to each section as follows:

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>
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Comment: The text is meant to form part of subsidiary legislation and is therefore not meant to include exhaustive and technical discussion or technology specific references. This does not preclude discussion at the level of guidelines or consultations by the Authority at a later stage. The reference to principles of reasonableness and proportionality is included in the text of the draft 51(3), among others as an indication that any intervention as contemplated in the regulation is based on an '*a priori*' fair assessment of the situation. Any determination as regards related conditions would plausibly be carried out on a case by case basis following consultation with stakeholders. Thus, principles of reasonableness and proportionality would need to apply with respect to any determined course of action.

Ultimately there is the over-riding need to ensure that necessary measures are in place, particularly in instances where the inherent risk of prolonged disruption is high, so that the end user can enjoy an un-interrupted service as of right.

> Even though the principles of reasonableness and proportionality shall be taken into account, we are of the view that the proposed provision is unclear, wide-ranging and generic. Our concern is that this may lead to the measures being mandated on operators which require time, effort and costs. This results in putting operators in a position wherein they face costs and expenses which cannot be justified and which in return will jeopardise overall investment plans. Moreover, the said measures that could be mandated by the Authority would not necessarily be the same measures and actions that an operator would deem best to implement in the event it is affected by a catastrophic event or force majeure.

Comment: The amendment actually serves to place more clarity on the current long-standing regulation, which is partly transposed from a corresponding EU article in the current code and subsists in the new European Electronic Communications Code (EECC)[1].

In the previous version of regulation 51(3) of the ECNSR it is stated that the Authority may specify obligations to be complied with by undertakings for the purpose of ensuring compliance with the regulation. Thus the existing regulation is wide ranging and generic. The amendment provides further

[1] Article 23 of the current Universal Services Directive (DIRECTIVE 2002/22/EC), now Article 108 of the new EECC (DIRECTIVE 2018/1972/EC).

clarity in respect of criteria that the Authority would need to factor in, in justifying such obligations. Moreover, any determination would need to be in line with principles of reasonableness and proportionality. Players have recourse to appeals processes in respect of decisions made by the regulatory authority.

Any determination under regulation 51(3) on the part of the Authority does not preclude operators from choosing a particular solution as long as it serves the purpose of best ensuring the necessary redundancy in a particular situation.

> Undertakings are already being charged high prices for the Malta-Gozo connectivity by the Government State-owned entity. In fact prices that are being proposed for the new Malta-Gozo submarine cable by another State-owned entity are significantly lower. If the undertakings are not protected from unnecessary costs that are not in line with commercial conditions in a competitive market, the consequences of the changes in Regulation 51 may strengthen the scope for such unfair practices at the expense of the undertakings. This is more pressing when the suppliers of such undersea cables are state-owned entities that may have benefitted from state aid to build their infrastructure. As such, we believe that just like suppliers of international undersea connectivity are obliged by law to be proportionate and reasonable in their dealings with others that are subject to redundancy obligations, the same should apply to suppliers of national undersea connectivity.

Comment: Respondents make reference to a particular instance that presents the characteristics to which the proposed changes refer. However, there may be other circumstances where it would be necessary to invoke regulation 51(3). Ultimately it is necessary for all service-users to enjoy continuity of supply irrespective of location. Proportionality in the application of regulation 51(3) is inherently linked to the risk of a service outage.

There is a non-discriminatory requirement for continuity and consistent quality of service provision to users. This requirement increases proportionately in importance with the advent of gigabit speeds. As a result, great reliance is placed on ultra-high-speed broadband networks by the general public, government bodies and individual businesses. Sensitive applications requiring 100% uptime will increasingly run on such networks. These factors place a far greater pressure on service continuity than ever before. The pressure will continue to increase.

In the particular instance being referred to, the MCA is unaware of any formal complaint having been raised in any particular forum by any one of the operators involved.

Electronic communications operators currently connect to Gozo via third-party dark fibre as their main means to supply Gozo. Operators also use microwave links as back-ups. Thus, a degree of redundancy already exists via these two long-standing arrangements. In both instances, operators are subject to costs of investment and/or operation for both main fixed link and the microwave back-ups. Any proposal concerning alternative redundancy measures in the case of Gozo is not departing from a green-field scenario.

The industry is respectfully of the opinion that measures are first consulted upon and discussed between the Authority and the operators, for the benefit of all parties involved, and ultimately for the benefit of the end users. For the continued benefit of our subscribers, any imposed decisions and measures should be material and economically justified and feasible, so that in parallel investment in networks and new services is not hampered. It should also be considered that implementation requires time and effort hence schedules and realistic timeframes ought to be agreed to bilaterally with the operator involved. Any decisions and measures should be agreed to on the basis of discussion and as a common feasible solution and not as a means used to mandate use of third-party infrastructures without due analysis first.

Comment: It is presumed that the reference to consultation on measures is forward looking and is not in reference to the consultation with respect to this proposed amendment. The Authority wishes to clarify that well ahead of this public consultation it submitted a copy of the proposed changes to the three signatories making up this response. We also understand that in the case of the second Gozo cable, to which respondents make reference in their response, there have been ample discussions between operators and the Government entities concerned on terms of use. These discussions are ongoing.

The Authority will continue applying the principle of consultation as is its duty, in line with the relevant legal provisions. The MCA's track record in this respect should attest to the extent to which consultation is at the centre of its relationship with all stakeholders, operators included.

The proposed regulation does not preclude any of the principles that the respondents invoke, namely consultation, economic justification, due analysis and adequate implementation timeframes. On the contrary, it reinforces them. These principles have to be seen in tandem with other related principles, such as continuity and quality of service, to which all users have a right.

Assessment and decision

The response to consultation raises concerns which, for the reasons outlined in detail above, have not provided any fresh insight or raised issues that necessitate changes to the proposed amendment. In the circumstances the proposed changes to the Electronic Communications Networks and Services Regulation (ECNSR) (SL. 399.28 of the Laws of Malta) have been confirmed as proposed.

Implementation

The relevant changes to the Electronic Communications Networks and Services (General Regulations) were published and brought into force on the 15th May 2020 via Legal Notice 197 of 2020.

Contact Details

If you have any questions regarding this response, please contact:

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Annex A: List of respondents

Organisation
Melita Ltd
GO Plc
Vodafone (Malta) Ltd.

Note: The three respondents submitted one joint response.