

Our ref. DIS 63

4th October 2010

Mr. David Kay
Chief Executive Officer
Mobisile Communications Limited
Spencer Hill
Marsa MRS 1950

Dear Mr. Kay,

Re: Decision following warning of imposition of administrative fine as contained in this Authority's decision dated 10th August 2010 entitled "Decision further to the Complaint against Mobisile Communications Limited ("GO Mobile") alleging excessive delays in the porting process".

Reference is made to the warning by the Malta Communications Authority ("the Authority") contained in Part 3.3 entitled "Conclusion" of the Authority's decision dated 10th August 2010 entitled "Decision further to the Complaint against Mobisile Communications Limited ("GO Mobile") alleging excessive delays in the porting process", and to GO Mobile's submissions dated 14th September 2010 in response to the aforesaid warning and to this Authority's letter dated 16th September 2010 and GO Mobile's response dated 22nd September 2010 to that letter.

Background

Vodafone Malta Limited ("Vodafone") lodged a complaint against GO Mobile with the Authority alleging excessive delays in the porting process involving a foreign representation in Malta.

In its complaint Vodafone alleged breach by GO Mobile of the Mobile Number Portability Ordering Process Specification when a foreign representation in Malta requested port-outs to Vodafone. The Authority investigated the complaint and after requesting submissions from GO Mobile on the 10th August 2010 issued a decision entitled "Decision further to the Complaint against Mobisile Communications Limited ("GO Mobile") alleging excessive delays in the porting process" (hereinafter "10th August 2010 Decision").

In that decision¹ the Authority issued a warning to GO Mobile informing GO Mobile that an administrative fine of fifteen thousand euros (€15,000) may be imposed for the incorrect and unjustified rejection of six (6) porting requests in direct breach of the Mobile Number Portability Specifications. GO Mobile was given up to the 14th September 2010 to reply to this warning. GO Mobile replied on the 14th September 2010 contesting the imposition of the aforesaid administrative fine.

¹ The 10th August 2010 was sent to both Vodafone as the complaining party and to GO Mobile as the party complained against.

In support of its argument GO Mobile stated that subsequent to its receipt of the Authority's 10th August 2010 Decision, GO Mobile "conducted a comprehensive review of its records and processes, particularly where the 6 port outs over which the MCA wishes to fine it (GO Mobile) are concerned."

GO Mobile informed the Authority that following this "comprehensive review" it resulted that the six (6) numbers in question were in fact subject to a two (2) year contracts with GO Mobile², contending also that it was misled by Vodafone in this regard. GO Mobile argued that once the six numbers were subject to a two year contract the term of which had not expired, then on the basis of an agreement made during a meeting dated 28th April 2006 between GO Mobile and Vodafone and approved by the Authority (hereinafter "28th April 2006 Agreement"), any port out requests for mobile numbers still subject to a running contract that includes the price of a mobile handset could be considered as invalid porting requests. GO Mobile said that it expects the Authority to inform it of what concrete measures the Authority would be taking to "penalise Vodafone for misleading a competitor and inflicting damages in the process, and damaging that competitor further by filing a complaint on an inexistent breach."³

GO Mobile subsequently at the Authority's request provided under confidential cover copies of the six contracts in question.

Decision on the warning of the administrative fine notified as per the 10th August 2010 Decision

In the first instance the Authority notes that the warning issued to GO Mobile as per its 10th August 2010 Decision whereby GO Mobile was told that an administrative fine of €15,000 may be imposed because of GO Mobile's incorrect and unjustified rejection of six (6) porting requests in breach of the Mobile Number Specifications ("MNP"), **was based on the facts made known to it and on submissions to it by GO Mobile and by Vodafone up to that date.**

The Authority notes that the information concerning the two (2) year period of duration of the contracts made between GO Mobile and the foreign representation with regard to the six (6) numbers in question was communicated to the Authority only **AFTER** the issue of the 10th August 2010 Decision when GO Mobile made its submissions dated 14th September 2010 in response to the warning that an administrative fine may be imposed as communicated in its 10th August 2010 Decision. In those same submissions for the first time GO Mobile also argued that on the basis of the 28th April 2006 Agreement to which Vodafone was party to, GO Mobile could consider the six (6) porting requests as invalid. The Authority in this regard notes that given that these particular submissions were only made on the 14th September 2010, it obviously could not factor these in its 10th August 2010 Decision.

² The contracts in question were entered into in 2009 and therefore were still current when the complaint against GO Mobile was made.

³ See GO Mobile's submissions dated 14th September 2010.

The Authority deplores the fact that GO Mobile belatedly after the issue of the 10th August 2010 Decision, brought to the Authority's attention material facts and arguments relevant to the complaint it was investigating. It is evident even from GO Mobile's own submissions that GO Mobile prior to the issue of the 10th August 2010 Decision had in its possession the relevant information which it belatedly communicated to the Authority only on the 14th September 2010. **GO Mobile is requested to ensure that in future there is no repeat of similar incidents.** The Authority reserves the faculty in similar cases as may arise in future, to take such regulatory measures as it may consider appropriate according to the specific circumstances of the case under consideration. The Authority is in the present case limiting itself to a verbal reprimand, but will consider more forceful measures if there similar unjustified occurrences in the future.

With regard to the final decision whether the administrative fine as notified in the aforesaid warning should be imposed or not, or whether it would be imposed in a lesser amount, the Authority refers to Section 3.3 entitled "Conclusion" of the 10th August 2010 Decision, subsection (a) under the caption "[Alleged breach by GO Mobile as described in section 3.2.1]" thereof, where the Authority warned GO Mobile that it was considering the imposition of an administrative fine of €15,000 on the grounds that GO Mobile had committed a serious breach of the Mobile Number Portability specifications.

The Authority in this regard notes that:

- a) the contracts between GO Mobile and the foreign representation relating to the six (6) numbers in question were still current when the porting application took place, and
- b) on the basis of the 28th April 2006 Agreement any port out requests for mobile numbers still subject to a running contract that include the price of a mobile handset could be considered as invalid porting requests;

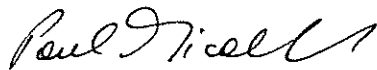
Given such circumstances the Authority considers that GO Mobile was not required to accede to the aforesaid six porting requests and consequently GO Mobile was not required to port the six numbers in question. The Authority therefore **determines that the aforesaid administrative fine of €15,000 communicated to GO Mobile in the Authority's warning included in the 10th August 2010 Decision, shall not be imposed on GO Mobile.**

Taking of sanctions against Vodafone

GO Mobile in its submissions of the 14th September 2010 also remarked that given the submissions and facts brought to attention of the Authority in those submissions, it expected the Authority to inform GO Mobile of the "concrete measures" that the Authority would be taking "to penalise Vodafone for misleading a competitor and inflicting damages in the process and damaging that competitor further by filing a complaint on an non-existent breach".

The Authority notes that GO Mobile did not indicate the provisions at law on the basis of which the Authority can take such punitive measures against Vodafone. The Authority furthermore notes that no provision of any laws administered by the Authority was cited to indicate precisely the basis on which the Authority can award damages in favour of GO Mobile for damages allegedly suffered by GO Mobile as a result of Vodafone's complaint. The Authority reserves its position if and when a formal complaint in line with the established procedures and guidelines is made, whereby the provisions at law upon which the Authority can take action are clearly indicated for the Authority's consideration.

Yours,



Paul Edgar Micallef
Chief Legal Adviser

Cc.

1. *Mr. Inaki Berroeta - Chief Executive Officer, Vodafone Malta Limited*
2. *Mr. Stefan Briffa - Senior Manager Regulatory Affairs, Mobisle Communications Limited*
3. *Dr. Melanie Borg - Legal Counsel, Vodafone Malta Limited*