

Reaction to GNCC's document “Response to the Policy Report and Expert Opinion Prepared by Consulting Companies for Magticom Ltd”

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1 Introduction

This document reacts on the document titled “Response to the Policy Report and Expert Opinion Prepared by Consulting Companies for Magticom Ltd” (hereinafter “the Response”) issued by the Communications Commission (hereinafter “the Commission” or “GNCC”).

The aim of this document is not to address all GNCC comments delivered in the Response or to evaluate the benefits or risks of the entry of Mobile Virtual Network Operators (hereinafter “MVNOs”) on Georgian market as it was partially done in previous document.

The objective of this analysis is to concentrate on main issues raised by policy report and expert opinions which are the most relevant for the evaluation of the fact, if the GNCC’s resolution No. 20-9/156 on Wholesale Mobile Network Service Market concerning the results of the study and analysis of competition in the relevant segment of wholesale mobile network service market dated 31 December 2019 (the “Wholesale Resolution” or “MVNO regulation”) was prepared in line with the relevant national legislation and EU regulatory framework and common practice related to the ex-ante regulation of electronic communications.

This document summarises - based on the analysis of the Wholesale Resolution and the Response - main points where GNCC failed in justification of the above mentioned Wholesale Resolution and also shows that the Wholesale Resolution in the form as was prepared breaches the national legislation and relevant parts of EU regulatory framework and the Association Agreement between the European Union and Georgia.

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2 Response to the Commissions' Response

2.1 Summary of main arguments and conclusions delivered by Magticom

Crucial arguments provided in the Policy Report and Expert Opinion Prepared by Consulting Companies for Magticom Ltd touched upon the two major issues:

1. The Three-criteria test conducted by the Commission was carried out incorrectly, not in compliance with the law or best practices. Such incorrect test resulted in incorrect outcomes that, if implemented, will have detrimental effects on the Georgian electronic communications, specifically on the mobile services. Magticom's consultants provided detailed study supported by relevant and undisputable evidence using the data from the Commission's analytical portal that the Three-criteria test of the relevant market proves that the relevant market does not comply with the Three-criteria test and therefore does not fulfil the conditions for ex-ante regulation. The Commission does not address this Magticom consultants' conclusion in its Response, nor does it provide contradictory arguments;
2. Potential negative effects that the Wholesale Resolution which is based on erroneous approach to the Three-criteria test could have on the Georgian mobile market. The intention was to point to the most probable risks that the Wholesale Resolution can cause and to emphasize Commission's responsibility for any and all risks and negative effects that the Wholesale Resolution will cause on the Georgian mobile market and that the Wholesale Resolution didn't include any impact analyses of the Wholesale Resolution on the market.

The previous Policy Report and this document show, that the Wholesale Resolution is not in accordance with the relevant regulatory framework, best practice applied by National Regulatory Authorities in EU and EFTA countries and emphasized potential risks that the Commission shall take into consideration and analyse their potential negative effects on the Georgian mobile market prior to implementation of the Wholesale Resolution. These conclusions are in detail described in the legal analysis included in Section 3 of this document.

2.2 General remark to the credibility of so called "best practice" used in the Commission's Response

The Response states that *"In general, it should be noted that the opinions of the six consulting companies are not based on any study of the relevant segment of the Georgian telecommunications market and, consequently, the "risks" identified therein cannot be reasonable or convincing. Besides, the documents fail to consider or properly evaluate the global practices regarding MVNO regulations.*

All the arguments and assessments provided in the documents are “likely” and “possible” and, as requested by the client, the documents cover only the “likely negative aspects” of the matter, and without any substantiation at that. The Commission further states that “this document [the Response] addresses and provides answers to the questions identified by the consulting companies. The answers are backed up with research-based arguments and based on the best international practice.

The Commission’s main argument supporting its conclusions is to refer to articles (part of them also outdated) published on various internet portals (mostly also popular and news portal that are not specialized in electronic communications regulations) and uses them to present so called “best practices” and approaches used by National Regulatory Authorities (hereinafter “NRA”). While on the other side the Commission ignores established approach used in the European Union by NRA taken from the regulatory practice of NRAs of EU countries, the practice and decisions of the European Commission or guidelines of BEREC. This approach of the Commission is the main reason leading to its failure to issue legal and beneficial regulatory decisions having positive effect on the Georgian mobile market and consequently to end users.

2.3 Three-criteria test

2.3.1 Unprecedented approach to the Three-criteria test

Magticom consultants’ primary concern is related to the Commission’s approach to designation of operators with significant market power specifically to the approach that the Commission took towards identification of the relevant market susceptible to ex-ante regulation. Magticom’s consultants dedicated six pages in their reaction to the argumentation supported with the evidence that the Commission’s assessment of the Three-criteria test does not comply with the European best practice. The main concerns are described in the following chapters.

It is necessary to highlight that the failure to comply with the European regulatory framework and best practice when conducting the fundamental regulatory tool such as the Three-criteria test can lead to the wholesale regulation which is detrimental to the regulated market and as such could serve against the benefit of end users (as was mentioned, the impact analysis of the regulation was not conducted).

The approach to the Three-criteria test taken by the Commission compromises not only the Commission’s obligation to comply with the existing regulatory framework but it also compromises commitments of Georgia stipulated by Annex XV-B, Rules applicable to telecommunication services, of the EU-Georgia Association Agreement¹, which entered into force in July 2016 and which stipulates that Georgia undertakes to gradually approximate its legislation to the 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) as amended by Directive 2009/140/EC.)

Not only the Three-criteria test presented in the Wholesale Resolution did not take into account essential characteristics of the Georgian mobile market related to tested criteria, but the Commission did not even attempted to properly react to the arguments expressed in Magticom consultants’ reaction to the Wholesale Resolution. While these arguments were provided by several qualified experts with significant experience in the field of ex-ante market regulation and were based on the market data from

¹ https://eeas.europa.eu/sites/eeas/files/association_agreement.pdf -

the Commission's own analytical portal, the Commission ignored delivered arguments.

Concerning the evaluation of the criterion of the structural barriers to entry, the Response provided mere constataion that *"the entry of a new telecom operator to the Georgian telecommunications market is limited due to the fact that the frequency resource for the existing technologies is limited. Consequently, there is such structural barrier as a hard-to-double infrastructure, as an alternative authorized undertaking could develop such infrastructure only on a long-term basis."*

In the evaluation of the second criterion - competition trends on the market - the Commission insists on using the Herfindahl-Hirschman Index (hereinafter "HHI") as the sole indicator of the competitiveness of the Georgian mobile market. The Commission absolutely ignored the fact that the value of HHI itself (without reflection of relevant market situation) has no relevance for evaluation of the competitiveness of the market. In its approach, the Commission absolutely neglected the real market forces that are present in the Georgian mobile market.

The assessment which is provided in following chapters will show the main inaccuracies in the Commission's argumentation.

2.3.2 Assessment of the first criterion – structural barriers of entry

2.3.2.1 Lack of structural barriers to entry – available spectrum

Magticom's consultants in their response pointed to the fact that when evaluating structural and-or legal barriers to entry to the relevant market the Commission did not take into account the fact that there are frequency blocks in all four relevant radio spectrum bands (800 MHz, 900 MHz, 1800 MHz and 2100 MHz) that might be used by potential new entrant to mobile market. The following amount of radio spectrum is available:

- a) 2x10 MHz of radio spectrum in 800 MHz band
- b) 2x4,51 MHz of radio spectrum in 900 MHz band
- c) 2x5 MHz of radio spectrum in 1800 MHz band and
- d) 2x20 MHz of radio spectrum in 2100 MHz band.

The Commission in its response stated that *"When discussing the entry barriers, the same document states that the entry of a new telecom operator to the Georgian telecommunications market is limited due to the fact that the frequency resource for the existing technologies is limited."*

We would like emphasize here that the amount of the frequencies available to potential new entrant is comparable to the amount of frequencies used by the existing three mobile operators and provides an excellent opportunity to introduce the fourth mobile infrastructure based competitor. The comparison of frequencies assigned to the existing mobile operators and unused frequencies is in the following table:

	Silknet	Magticom	Veon	Unused
Frequencies below 1 GHz bands (800 and 900 MHz)	2 x 16,8	2 x 18,2	2 x 15,49	2 x 14,51
Frequencies above 1 GHz bands (1800 and 2100 MHz)	2 x 44,9	2 x 44,9	2 x 20	2 x 25,2

Regardless of the Commission's reluctance to provide any substantiated argumentation on the abovementioned Magticom consultants' statements, the fact that unused frequency spectrum available to a potential new entrant exists is strong and crucial argument undermining the Commission's conclusion on high structural barriers to entry to the market and – stand-alone - proves the fact that the relevant market does not comply with the Three-criteria test.

Above that, the Commission stated that *"Consequently, there is such structural barrier as a hard-to-double infrastructure, as an alternative authorized undertaking could develop such infrastructure only on a long-term basis. Even the illustration provided in the advisory document (for assigned and*

available frequency resources) makes it clear that the amount or band of available frequency resource has been developed quite intensively.”

The Commission’s statement on hard-to-double infrastructure is mere constatation and is not based on any substantiated arguments.

2.3.2.2 Lack of structural barriers to entry – commercial negotiation

Beside the potential entry of a new infrastructure competitor the Commission in Wholesale Resolution omitted the obvious fact that the current market consists of three mobile operators. This is the market layout which provides an opportunity for a potential MVNO to negotiate access with any of the three independent mobile network operators. If access negotiations between potential MVNO and any of the mobile operators fail the potential MVNO has opportunity to negotiate with another two mobile network operators.

This is another evidence, that there are no barriers to entry for potential MVNOs and therefore the relevant market does not comply with the Three-criteria test.

Magticom was not approached by any MVNO to commence negotiations on commercial basis. There is no actual demand for access to MNO’s networks. It is a basic principle of regulation to impose the “minimum required” regulation (as also confirmed by Section 21 par. 4 of the Georgian law on electronic communications). Imposing obligation to provide access to MVNOs, when no such MVNO demonstrated any such demand, is not only fully unwarranted and unjustified, it is also in breach of the law and best practices.

2.3.3 Second criterion – competition trends on the market

2.3.3.1 Incorrect use of the HHI

With regard to the use of HHI as the main indicator for assessment of the intensity of competition (behind the entry barriers) the Commission used this criterion inadequately for the following reasons:

1. The value of HHI as a standalone indicator does not have any significance for the assessment of intensity of competition. It is merely the indicator providing information of the market concentration. It is used mainly in assessment of the potential impact of planned mergers and acquisitions on the market structure. Assessing intensity of competition for the purpose of ex-ante regulation solely on the basis of comparison of actual HHI value with the theoretical value of HHI (the approach inadequately taken by the Commission) leads to regulatory decisions with detrimental effect on the relevant market. The Commission confirmed its oversimplified approach to assessment of level of competition by its following statement in the Response *“According to the international standard, any index higher than 2500 is indicative of high concentration, and it is 3900 for Georgia.”*
2. Commission used the HHI to assess the criterion “Evaluating potential competition **trends** on the market”. By definition of the Commission, this criterion addresses trends on the market and how they are changing in time. On the other hand, the HHI is completely different and only provides information on the state of concentration on the market at one moment in time. HHI cannot be used to assess trends on the market as standalone indicator. When looking on the outcome of the HHI in time, the value of HHI calculated (table N5 of the Reaction) on the basis of internet users decreased from the value of 3 404 in Q4 2017 to the value of 3 358 in Q3 of 2019 and the value of HHI calculated on the basis of internet revenues decreased from the value 3 940 in Q4 2017 to the value of 3 594 in Q3 of 2019. In fact the oversimplified and incorrect approach taken by the Commission leads to the opposite conclusion on the level of competition than the conclusion that the Commission presented in the Wholesale Resolution

and the Reaction. If the Commission insists on use of HHI for the purpose of assessment of competition in the relevant market, then we would recommend to assess the evolution of HHI in time rather than snapshot value of HHI. Nevertheless, the value of HHI shall never be used as a single indicator of competition trends on the market.

3. In the Reaction the Commission states the following *“The illustration shows clearly that the market environment when MVNO first entered such countries as the Netherlands, Denmark, Canada and Great Britain was more competitive by HHI (had a low HHI) than found by the 2019 study into the MVNO access in Georgia”*. We see another risk associated with assessment of competition on the basis of the value of HHI. Inclusion of market shares of MVNOs into overall relevant market HHI leads to overestimation of MVNOs impact on the market concentration. In fact the market share of MVNO and its influence on the value of HHI is determined by the ability of the host mobile network operator to perform in the market. Where a mobile network operator hosting one (or more) MVNOs exits the market such exit leads to withdrawal of all MVNO attached to this operator from the market and leads to significant increase of HHI.

2.3.3.2 Absurd outcomes of using the HHI as a sole indicator of market trends

To prove the high risk of using HHI for the assessment of intensity of competition behind the entry barriers for the purpose of the Tthree-criteria test, please see the following theoretical example. Let’s have a relevant market with three market participants. Their market shares are stated in the table below. the value of HHI for the given market structure is 3450, which indicates highly concentrated market. The situation which is very similar to the situation in Georgian mobile market.

	Market share (%)	Square value of market share
Operator A	40	1600
Operator B	35	1225
Operator C	25	625
HHI		3450

Few months later the market analysis discovers a change in the market as described in the following table.

	Market share (%)	Square value of market share
Operator A	25	625
Operator B	40	1600
Operator C	35	1225
HHI		3450

Despite the significant shift in the market shares of each market participant the value of HHI remains the same as in the previous situation. Nevertheless, the market position of each market participant changed significantly. Market share of Operator A dropped from 40% to 25%, Operator B increased its market share from 35 to 40% and Operator C’s market share grew from 25 to 35%. from which clearly indicates vital competition among the market participants.

It is obvious from the above example that assessment of intensity of competition only on the basis of HHI value, without taking into account real market situation and changes of market shares of relevant market participants leads to inaccurate conclusions.

2.3.3.3 Trends on the market are positive – number portability

In addition to the Commission's preference towards oversimplified groundless approach to assessment of intensity of competition through HHI the Commission totally ignored Magticom consultants' arguments supported by extensive analysis proving that the competition behind entry barriers is vital. The Commission did not provide a single counter-argument on Magticom consultants' evidence proving changes in market shares of individual mobile operators, changes in the retail prices of Magticom's service packages, the differences between service packages provided by all mobile operators and the effects of mobile number portability as one of the most important regulatory tools for improving the competitive environment. Instead of reflecting these facts which clearly lead to the conclusion that market is competitive and therefore does not comply with the Three-criteria test the Commission erroneously insists on using of HHI as the only indicator of level of competition in the market.

With regard to mobile number portability the Commission in the Reaction stated the following “*Further, one of the factors named in the advisory documents is a lower porting rate compared to other markets – as an indicator of the market stability and competition. However, the presumption further supports the reality: 1. The rate of customer flows between the operators on the retail market is low, as there is almost no competition for affordable tariffs. 2. Besides, the technical process of porting is relatively difficult and the Commission is working hard to streamline the process.”.*

By this statement the Commission provides us with another important argument supporting our conclusion on deficiency of the Three-criteria test conducted by the Commission. If the Commission is of the view that the technical process of number portability might represent a barrier for wider use of number portability by subscribers then the Commission should put in place all relevant and necessary measures that will contribute to streamlining of the number portability process. These measures shall have strong preference before the unprecedented access obligation imposed on mobile operators on the basis of arbitrary results of the Three-criteria test.

2.3.4 Conclusions on the Three-criteria test

As a conclusion of our position on the process and the outcomes of the Three-criteria test conducted by the Commission we would strongly recommend to the Commission to reassess its approach to identification of the relevant market. Rather than relying on unsubstantiated statements or using of inappropriate indicators which have no significance for the issue under scrutiny the Commission shall strictly stick to the best European practice and take into account all relevant national circumstances such as market structure and state of competition in the market.

Ignoring proper market assessment and impact analysis of the regulation the most likely leads to unprecedented negative consequences in the market with highly negative effect on end users and undermines the commitments of Georgia stemming from the EU-Georgia Association Agreement.

2.4 Other Commission's arguments disputing Magticom consultants' opinion

2.4.1 Price benchmark

The Commission engaged Strategy Analytics (hereinafter “SA”) to conduct a benchmarking study comparing the retail prices of mobile service packages in Georgia with retail prices in OECD countries. For this purpose SA provided benchmark study for the following three residential mobile voice and data packages:

- package with 100 calls and 0,5 GB of data
- package with 900 calls and 2 GB of data
- package with unlimited calls and 5 GB of data.

The results of the benchmark show that, in the case of the package with 100 calls and 0,5 GB of data, the cheapest mobile package provided by one of two biggest Georgian mobile operators placed 11th (Silknet), in the case of the package with 900 calls and 2 GB of data, the cheapest mobile package

provided by one of two biggest Georgian mobile operators placed 23rd (Magticom) and in the case of the package with unlimited calls and 5 GB of data, the cheapest mobile package provided by one of two biggest Georgian mobile operators placed 21st (Silknet) among mobile operators from all OECD member states (the benchmark includes 37 OECD member states + Georgia).

As a consequence of the benchmark results the Commission states that *“The study clearly demonstrated that the retail tariffs mobile services in Georgia are higher than average (among 37 OECD countries) for the most used services, and as the volume of consumption is increasing, Georgia’s position is downgrading in terms of the rate of tariffs offered by mobile operators.”*

Taking into account the presented benchmark results our view is as follows:

1. Benchmark does not take into consideration packages provided by the third Georgian mobile operator Veon. We believe that when these packages were taken into account the benchmark study would show that prices in Georgia are even lower and Georgia would achieve even better position in the benchmark than with the prices of the two biggest operators. Moreover, the benchmark is not in line with the standard methodology. The benchmarking presentation states that *“GNCC required at least 70% market share in at least 20 European countries, and to achieve this, pricing for additional operators in selected countries has been included. Countries with additional operators are Denmark, France, Italy, Spain and UK.”* This “modified” approach has two consequences for Georgia:
 - a) countries with more than two operators included in the benchmark reached better position than Georgia. For example, in case of package with 900 calls and 2 GB of data and package with unlimited calls and 5 GB respectively Danish operator Telia reached better position than Georgian operators. Nevertheless, according to BEREC document *“Termination rates at the European level January 2019”*² Telia Denmark’s market share based on number of subscribers was 15,19% which is significantly lower than market share of Veon (26%) stated in MVNO Regulation
 - b) use of Veon’s packages for benchmarking might provide even better results than benchmark reduced to Magticom’s and Silknet’s packages
2. Georgia’s 11th position in the overall OECD benchmark for the mobile package with 100 calls and 0,5 GB of data is astonishing and proves that level of competition in the Georgian mobile market is able to push retail prices below the benchmark levels in majority of European OECD member states.
3. We would strongly oppose the Commissions conclusion that the benchmark covers *“the most used services”*. According to data provided by Magticom the most used mobile package is the package of unlimited voice calls, unlimited SMS and 1000 MB with more than 87% of Magticom’s subscribers to tariff plans consisting of voice, SMS and/or data services.
4. Magticom placed 23rd for the mobile package with 900 calls and 2 GB of data or 21st for the mobile package with unlimited calls and 5 GB or data. In fact, Magticom or Silknet does not offer a package with such data allowances. Therefore, Georgian operators were naturally disadvantaged against states where such tariffs are available and more commonly used as in Georgia. The methodology for the OECD baskets (2017) (document DSTI/CDEP/CISP(2017)4/FINAL) on page 4 states as one of the general basket rules the following: *“For each service a range of baskets are defined. It is not the intention that all of these baskets shall be used for analysis of any particular market, as some of the basket may describe usage that is clearly not relevant for that market. Please use care in applying or reporting results that are based on baskets that are inappropriate for a particular market.”* It seems to us that use of the benchmark by the Commission contradicts with one of the general basket rules. The

² https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/8701-berec-report-on-termination-rates-at-the-european-level

basket with 900 calls and 2 GB is not relevant in the Georgian market as the most popular Magticom's baskets are basket with 1000 MB of data (used by more than 87% of Magticom's subscribers as described in point 3 above) followed by basket with 3000 MB of data with more than 5% of Magticom's subscribers.

Based on the abovementioned reasons the Commission shall not use the benchmark results as a basis for its assessment of mobile services' price levels for the purpose of ex ante regulation.

The Commission states (page 7) the following *"Nevertheless, high-price operators (Magticom and Silknet/Geocell) still continue to hold a substantial share of the market (over 70%). In June 2020, the Commission conducted a retail mobile voice service market study to find that competition on the mobile service market is limited: the tariff offers between the two key market players (Magticom and Silknet/Geocell) and the third operator (Veon Georgia) are radically different. However, despite that, there is no customer outflow between the operators, namely, no customer flow into the network of the low-price operator (Veon)."* We would recommend to the Commission to perform a comprehensive analysis of the situation in mobile number portability and identify reasons which are behind relatively low churn rates. The approach where before any ex-ante regulation based on SMP designation is introduced, less intrusive tools supporting competition, such as fully functional number portability should be put in place would be more appropriate and would comply with best European practice.

We would like to point to the contradicting arguments that the Commission used in the Response. On page 7 the Commission states that *"...the tariff offers between the two key market players (Magticom and Silknet/Geocell) and the third operator (Veon Georgia) are radically different..."*, but on page 8 the Commission states that *"The rate of customer flows between the operators on the retail market is low, as there is almost no competition for affordable tariffs."* We believe that the Commission shall provide proper explanation of how to understand these two statements. In our understanding the statement that the offers are radically different and despite such difference there is no customer outflow between operators indicates the situation where one operator differentiates its offer in order to attract subscribers of its competitors i.e. the operator competes with its rivals by offering services which are significantly different from services offered by its competitors. In this context it is therefore difficult to understand the Commission's statement that there is almost no competition for affordable tariffs.

Tables N1 and N2 do not provide any evidence and provide rather confusion than clarification. Based on these outcomes it is unclear how the Commission came to the conclusion that the competition in the retail market is limited. It is not clear as to why homogenous APPM for Silknet in Q1 2018 and Q1 2019 is zero, while in Q1 2020 it increased to 0,02.

On the other side the table N2 shows that homogenous, mixed and average APPGB of all three operators decreased in the given period which clearly leads to conclusion that competition leads to price decrease. This is another argument which goes against Commission's statement that *"...there is almost no competition for affordable tariffs..."* (page 8 of the Response).

The Commission's conclusion that retail prices are not near each other (page 7 of the Reaction) is clear evidence of vital competition and proves the fact that operators do not collude when setting prices of their services.

The Commission states that mobile termination rates decreased nearly 4 times between 2018 and 2020. Nevertheless, the decrease expressed in absolute numbers was from 0,0297 before July 2018 to 0,0075 from January 2019 which is the decrease by 0,0195 GEL per minute. The evolution of package prices provided in Magticom consultants' opinion showed clear evidence of price decreases.

With regard to removal of certain taxes on mobile services, the total annual value of tax removed from Magticom was roughly 8,5 million GEL. Dividing this amount by the number of Magticom's mobile subscribers the total value of potential price decrease per subscriber per month would be less than 0,5 GEL.

Concerning the mentioned price comparison of 1 GB of mobile data - being 31st out of 155 countries in the price of 1 GB of mobile data is something based on which the Commission should evaluate

Georgian market indeed as a price-competitive market. There are only four EU countries which ranked better than Georgia.

2.4.2 Misinterpretation of MVNO regulation in EU

The Commission's reference to ITU definitions and "recommendations" namely the following Commission's statement: *"Although the Access Directive (2002/19/EC) does not introduce a mandatory MVNO access regulation, the ITU document discusses situations where European regulatory authorities seek to facilitate the introduction of the MVNO regulation on the mobile network. As ITU recommends, if the EBITDA of the mobile network operators on the telecommunications market is very high (over 25%), national regulatory authorities introduce the MVNO access regulation."* flagrantly interferes with the best EU practice on ex-ante regulation. Best EU practice does not allow to impose ex-ante regulation on the basis of the sole criterion (such as EBITDA). The Commission neither provided any rationale as to how the level of EBITDA of a mobile operator relates and justifies the imposition of ex-ante obligations nor the Commission provided any justification for deviation from the established EU regulatory framework (such as the one stipulated by Access Directive). Giving regard to the mentioned ITU "recommendation" contradicts with the attempt of Georgia to introduce European regulatory framework for electronic communications. In this context Commission's conclusion that *"In analyzing the resolution introducing the MVNO access regulation, it is important to evaluate the EBITDAs for the operators with significant market power on the Georgian telecommunications market and give regard to the ITU recommendation stating that if the EBITDA of a mobile network operator on the telecommunications market exceeds 25%, European regulators may introduce the MVNO access regulation."* This sounds like total misunderstanding of the EU best practice on the Commission's side.

Magticom's consultants in their Response did not dispute the fact that there are many MVNOs active in the EU and in the world. However, Magticom's consultants disputed the way the Commission intends to impose access obligation on Georgian mobile operators.

When the Commission argues with the number of MVNO in different countries it ignores the fact that in the EU best practice there are the following four concepts of making mobile networks accessible to MVNOs:

1. Commercial agreement between MNO and MVNO – a voluntary act of the two parties of the contract where both parties expect some benefits brought by the contract. This is the most common way of MVNO introduction to the market;
2. Commitment of an MNO mostly in the case of merger – the entity created by the result of the merger makes commitment in order to get the merger approved by the competition authority;
3. An obligation/condition imposed in a radio spectrum licence – the radio spectrum holder acquires the radio spectrum knowing that the right to use the radio spectrum is accompanied with the obligation to offer access to MVNO;
4. An obligation imposed on the basis of ex ante regulation – based on the ex-ante market analysis NRA imposes on SMP operator the obligation to provide MVNO access.

The Commission totally ignored that the abovementioned concepts were mentioned also in the Cullen report to which the Commission refers in its Response. Instead the Commission presented the existence of MVNOs as the sole result of ex-ante regulation ignoring the information provided in Magticom consultant's expert opinion which stated that "there were only three NRAs (Cyprus, Norway and Spain) that came to the conclusion, that market 15 is not competitive in their national circumstances and identified SMP operator (operators) and imposed remedies."

Instead of thoroughly studying the results of the mentioned market analysis of market 15 and adjusting its Wholesale Resolution in order to reflect these analyses the Commission deviated to the application of dubious arguments collected from different sources not related to the issue of Three-criteria test.

This Commission's approach led to the regulatory decision which has nothing to do with the established EU regulatory framework. What is even worse the Commission did not even attempt to rectify the Wholesale Resolution on the basis of the evidence and recommendations provided in Magticom consultants' opinion.

With regard to hypothetical concerns expressed by Magticom's consultants regarding introduction of MVNO such as reduction of capital investment, reduction of end users' choice, value of radio spectrum, impact on state budget and other profit based payments and security risks these were used as potential negative consequences of MVNO introduction and negative market consequences of ignoring these risks are full responsibility of the Commission. It is necessary to highlight that the impact and risk analysis should be done as part of the regulation and this analysis is completely omitted in the existing Wholesale Resolution which is the important concern about the Wholesale Resolution.

3 Review of legal aspects of the GNCC's resolution No. 20-9/156 on Wholesale Mobile Network Service Market

3.1 Summary

The obligations imposed in the Wholesale Resolution are based on an incorrect definition of the affected retail market, no definition of any wholesale market on which these obligations are to be imposed, missing analysis of this wholesale market and no assessment of the alleged SMP by the designated authorised persons.

It seems that before even defining the market GNCC decided on the outcome of the analysis, which is referenced by multiple references to an alleged SMP of identified authorised persons already during the Three-criteria test.

This results in the imposition of access obligations that make at the first sight no economic sense. The imposed obligations, including the imposed price regulation, are not justified in any way as to their proportionality and suitability to address any alleged shortcomings in the effective competition on the wholesale market (which is moreover not identified in any way).

The Wholesale Resolution is not only in breach of the national legislation, but also Georgia's commitment to approximate its legislation with the EU under the Association Agreement from 2014.

3.2 Breach of national legislation

The Georgian national legislation sets out binding rules for the process of definition of the relevant markets, analysis of the defined relevant markets, identification of authorised persons with significant market power (the "**SMP**") on such relevant markets and imposition of specific obligations on such authorised persons with SMP (collectively as "**ex ante regulation**").

The *ex-ante* regulation rules are set out specifically in Sections 20, 21 and 22 of the Georgian Law on Electronic Communications (the "**ECA**") and the Resolution No. 5 of the GNCC on approval of the methodological rules for determination of relevant market segments and analysis of competitiveness dated 31 August 2007 (the "**Methodology**").

GNCC's resolution No. 20-9/156 on Wholesale Mobile Network Service Market concerning the results of the study and analysis of competition in the relevant segment of wholesale mobile network service market dated 31 December 2019 is not compliant with the ECA nor the Methodology with respect to the *ex-ante* regulations.

The *ex-ante* regulation process as set out in the ECA and the Methodology requires fulfilment of the following stages:

- (i) Definition of the relevant market; material and geographical,
- (ii) Analysis of competition on the relevant market,
- (iii) Identification of authorized persons with SMP,
- (iv) Imposition of obligations on authorized persons with SMP.

The Wholesale Resolution shows material shortcomings with respect to each of the above stages. We identify the main breaches below.

3.2.1 Non-compliance with the market definition

(a) No definition of the wholesale market

The Wholesale Resolution identifies the retail mobile data services. It mentions 2G, 3G and 4G services provided to subscribers. While such services are indeed provided on the retail level of the market, these are not services provided on the wholesale level.

The GNCC stipulates that it wishes to define the wholesale market, but the analysis strictly focuses on the retail market. The GNCC does not provide any explanation as to the nature of the relationship between the wholesale and retail markets.

Unclear and ambiguous definition of the relevant market leads to further issues, such as imposition of obligations that are not related to the defined market. Please see described in more detail in Section 3.2.4 below.

(b) Incorrect market shares on the wholesale market

The market shares of the identified SMPs are incorrect on the wholesale market. These market shares presume products on the retail market but do not in any way relate to products on the wholesale market, which is not even defined in the Wholesale Resolution.

(c) Non-substantiated definition of the affected retail market

In addition, the Wholesale Resolution does not adequately define the mobile data services market. It does not analyse substitutability of mobile data (2G, 3G, 4G) with any other services, for example with WiFi services or fixed internet services. The GNCC simply stipulates that the (retail) market service is defined as mobile internet services without any analysis or explanation.

The only attempt to define the market is when the GNCC “presumes” that mobile voice services are not substitutable for mobile data services based on a “SSNIP test”. GNCC does not make any other analysis as to comparing other services as potentially substitutable for mobile data services. Nor does the Wholesale Resolution explain why it defines a very narrow market of retail mobile data services, when subscribers often buy mobile services in bundles (typically including voice, data and SMS). Definition of the GNCC assumes that subscribers demand standalone mobile data packages (without voice and SMS), which is not common in other countries.

3.2.2 Non-compliance with market analysis

(a) Three-criteria test

After insufficient definition of the retail mobile data services market, the GNCC proceeds to apply the so called Three-criteria test. While this Three-criteria test is a widely used regulatory test in the European Union Member States to assess the level of competition in appropriately defined wholesale markets, it is not a regulatory process that is supported by the Georgian national legislation. As a public authority, the GNCC cannot use the Three-criteria test as a regulatory process that is not covered under the applicable and effective legislation. Neither the ECA nor the Methodology stipulate that the defined market shall be subject to analysis of the three criteria mentioned in the Three-criteria test.

In addition, GNCC incorrectly applies the Three-criteria test on the retail mobile data services market, and not to any wholesale market. This is evident for example from the evaluation of market shares “by subscribers”, a criterion irrelevant for analysis of wholesale market.

Evaluation of the concentration level, as the main reason used by the GNCC to show competition trends on the market, is also directly in breach of Section 19 of the Methodology. The numerical values of the Herfindahl-Hirschmann Index (HHI) used in the Wholesale Resolution differ from the values used in the Methodology.

It is thus rather obvious that the Three-criteria test is not compliant with the process of *ex ante* regulation, because it prematurely and repeatedly identifies Magticom LLC (as well as other operators) as “Authorized Persons with Significant Market Power” even before an analysis of the defined market is carried out. Identifying Magticom as having significant market power before analysing the defined market in detail indicates that the outcome of the analysis was determined by the GNCC before the market analysis and any Three-criteria test was carried out.

(b) Market Analysis

The market analysis is in breach of the ECA and the Methodology because it does not in any way relate to the relevant wholesale market. The GNCC only analyses the retail market. This is evident from the GNCC using the number of subscribers as the relevant parameter of analysing market shares. This is also supported by the fact that GNCC concludes “low or zero purchasing power” of subscribers as a secondary criterion evidencing the significant market power. On the wholesale market, the number of subscribers or their purchasing power has no direct effect.

3.2.3 Non-compliance when identifying authorized persons with SMP

The Wholesale Resolution simply stipulates that Magticom LLC, JSC Silknet and Vioni Georgia LLC have significant market power on the relevant market. It does not provide any justification other than general analysis of the retail market (as defined above). It does not clarify whether each of the identified companies has an individual SMP or if this is a joint SMP. It also does not substantiate the conclusion by any market shares in any products and services on the wholesale market, the dynamics of the market share development, purchasing power, economies of scale, vertical integration, or any other criteria standardly used to determine market shares in relevant wholesale markets.

3.2.4 Non-compliance with imposing proportionate obligations

The Wholesale Resolution lacks any justification why the imposed obligations were chosen by the GNCC. In particular, it lacks any reasons as to why access to MVNO is considered as proportionate and adequate obligations and how it will resolve the claimed insufficient competition on the wholesale mobile data services market.

The scope of the obligations is unclear and ambiguous. In particular, the Wholesale Resolution does not clarify the scope of the services that the authorized persons designated as SMPs must provide to the MVNOs. It must be assumed that only mobile data services are in the scope of the obligation because the relevant market is defined as “mobile network data services”. On other words, the

operators are not obliged to provide access to voice or SMS services, because these are not considered substitutable and thus cannot be regulated by the Wholesale Resolution. The GNCC does not justify how MVNOs can compete with MNOs on the retail level if they do not have access to voice or SMS services. This underlines the above shortcomings in the market definition and the practical consequences of the lack of a proper substitutability test by GNCC.

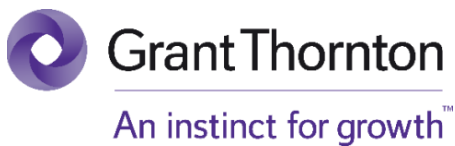
The Wholesale Resolution further stipulates a maximum price of the wholesale mobile data services, if the parties fail to reach a conclusion commercially. The GNCC does not provide any sufficient justification of the applied price regulation, why this specified retail-minus methodology was chosen, etc.

No obligations can be imposed without proper justification that is transparently explained and analyzed as the “minimum required regulation” (see Section 21 par. 4 of the ECA). The Wholesale Resolution does not provide any such justification and thus is in breach of the ECA and the Methodology.

3.3 Breach of the Association Agreement

Under the Association Agreement between the European Union and Georgia signed in June 2014, Georgia was obliged to approximate its legislation to the EU legislation, incl. the EC framework, until 2017.

The EC framework regulates, inter alia, the process of relevant market definition and SMP analysis. No Georgian legislation approximating EU legislation, and specifically relevant market definition and SMP analysis, was passed in time GNCC must take the standard EU processes into account when interpreting the ECA and must carry out the market definition, Three-criteria test and SMP analysis of “wholesale mobile network service” in a way that does not directly contradict well established rules and principles applied under the EU regulatory framework. While the GNCC used certain basic ideas from the EU regulatory framework (e.g. the Three-criteria test), it must be concluded that the European Union law stipulates further and more detailed requirements (e.g. guidance on the definition of relevant markets) which were not met by the GNCC.



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