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Ref: BoR (11) 68
Public Consultation on the Draft BEREC Report on Special Rate Services

Dear Madam, Dear Sir,

3StarsNet (<http://3starsnet.com/en/professional/products-and-services.html>) is a notified provider of electronic communications services in Belgium. We have been granted the right of use by the NRA (the B.I.P.T.) of number ranges to support Special Rate Services (SRS). A considerable part of our activity (+/- 50%) relates to facilitating the delivery of Value Added Services (VAS) by combining the capabilities of our uniquely sophisticated voice call processing platform and, being an interconnected operator, taking care of switching, forwarding/terminating calls at the right location, and generally taking care of all aspects of call handling for the SRS traffic of call centres, help lines, and various information and interaction services.

Ever since Belgacom (transit operator, competing provider of SRS/VAS, and mobile network operator) announced to us unilaterally in August 2009 that a new wholesale '*mobile service fee*' of 20 eurocents/min would be introduced for all mobile-originated calls to VAS (the exact same 20c wholesale '*mobile service fee*' being applicable for calls originated by all three mobile network operators), we have been in disagreement/dispute on this matter. We filed formal complaints with the Competition Council and with the B.I.P.T., which resulted in interim measures being adopted in 2009/2010, but which subsequently expired.

We are at present in a conciliation procedure (a procedure formally established under Belgian electronic communications law) facilitated by the B.I.P.T. relating to Belgacom's latest proposal on the matter. The Belgacom proposal which is the subject of the conciliation procedure is not in line with any of the possible regulatory approaches put forward in BoR (11) 68.

It is undisputed by 3StarsNet that the August 2009 Belgacom announcement, and various subsequent proposals, were motivated by: (i) a retail-level governmental intervention, in the form of a Royal Decree which required end-user retail tariffs for calls to VAS to become undifferentiated between fixed and mobile originated calls (a governmental measure which we have always considered was well-intended and beneficial to consumers, and in principle beneficial to the VAS ecosystem as a whole, but which caused major disruption to the VAS

market), and (ii) tax authority decisions profoundly affecting the payment flows across the VAS value-chain, which we do not dispute as such.

What was disputed, and remains disputed, are the wholesale charges that the mobile network operators, and on their behalf the transit operator, aim to levy for wholesale mobile call origination and for ancillary activities, and for revenue sharing.

In late-December 2011 (after 25 December)/early-January 2012, we have again been faced by demands introduced, through Belgacom as the transit operator, from the Belgian mobile network operators pushing for increased wholesale charges and one operator (KPN Group Belgium N.V. (commercial name BASE)) again explicitly threatening disconnection.

It will be seen from the above that we have a keen interest in BEREC's assessment of problems relating to SRS, and in particular mobile-originated calls to premium-rate VAS.

In this brief response to the BEREC consultation, we focus on flagging those points with which we clearly agree or disagree, as informed by the situation as we experience it in Belgium, and we ask BEREC to consider our comments carefully and to amend the Final Report to reflect legitimate points accordingly.

In case any of our points need further clarification or elaboration, we will be happy to provide these on simple request.

We hope and trust that BEREC's attention to this matter will help the NRAs constituting BEREC to reach real solutions, which reflect the objective reality, notably in terms of the costs genuinely incurred by mobile network operators in providing wholesale call origination and any ancillary activities legitimately applicable (these ancillary activities being in need of full scrutiny).

Yours faithfully,

Max Heilbron
Gedelegeerd-bestuurder 3StarsNet N.V.

Problems and their effects (Chapter 3)

Paragraph 24

We agree strongly with the preliminary observations made in this paragraph. Mobile OTRs are subject to anomalous pricing, which bears no relationship whatsoever to objective costs incurred by the mobile network operators or to mobile operators' role in the value-chain compared to fixed operators' role in the value-chain. The causation of this state of affairs requires investigation.

Paragraph 25

We would prefer that BEREC would not engage in speculation on the potential discontinuation of wholesale fixed call origination regulation. We are not aware of any NRA having found grounds for Market 2 not passing the three-criteria test, grounds for a no-SMP finding in Market 2, and/or for the withdrawal of remedies in Market 2. Nevertheless, we agree that there is a risk that problematic mobile market behaviour could in the future be extended to fixed market behaviour. BEREC's cautioning against that risk is valuable, and we encourage it being maintained in the Final Report, but it should not be prefaced by speculation/assumptions foreshadowing deregulation of wholesale fixed call origination.

Paragraph 28 and paragraphs 33-34

Assuming that the caller would switch to OO2, as is suggested in paragraph 28, is, in our view, completely unrealistic, given that mobile network operators do not readily publish retail call tariffs for the call types concerned, and practice identical or very similar retail call tariffs for calls to VAS. The international roaming debate provides an excellent parallel to this case (this is recognised subsequently in the document at paragraphs 33-34). It follows that the user not only suffers from a lack of retail price awareness, but also that OOs tend to price retail services at essentially the same level, and hence the caller would not gain anything by switching from one mobile OO to another mobile OO. We ask that these points be recognised in the Final Report.

Paragraph 30

We confirm, having discussed the matter with several of our customers after notifying them in writing each time we have been put under explicit threat of disconnection by one of the three mobile network operators, that essentially no SP can or would accept becoming unreachable from even one of the mobile network operators in Belgium. Note: KPN Group Belgium N.V.'s threat of disconnection was the subject of B.I.P.T. interim measures in 2010; these interim measures subsequently expired; the threat has been reiterated by KPN Group Belgium N.V. on the first working day of 2012.

Our impression that we have only been preserved from disconnection, thanks to us having provided exceptional quality and very competitively priced services to our customers, and that we have historically (prior to adoption of the Royal Decree which equalised fixed and mobile VAS retail prices) been lucky enough to manage to secure customers which are recognised as being important enough to the society/economy as a whole, such that mobile network operators could not readily risk disconnection. Given that the mobile network operators are also competing the VAS business themselves, and are actively pursuing VAS

customers of other operators, there is a real concern that they will try to go to great lengths or deploy temporary tactics, to secure selected key customers for themselves. Our concern is that once a critical mass of VAS customers is reached, mobile network operators may effectively proceed to disconnection of alternative operators at the wholesale level. It would not require much stretch of the imagination to consider that mobile network operators could consider/engage in a strategy in which key VAS accounts are being secured (possibly with discriminatory or even predatory pricing) to enable the mobile network operators to secure the entire SRS/VAS market for themselves in the long run.

Paragraph 31

We welcome BEREC's references made in Paragraph 31. We invoked OPTA's publication of the SEO study in the Belgian conciliation procedure prior to the publication of BEREC's consultation document. We fully agree (and we have actively argued) that its findings extend beyond Freephone (which was the focus of the SEO study) to other SRS/VAS and especially all categories of premium-rate services. The SEO study for OPTA validates the position that we took in our 2009/2010 competition law and regulatory complaints, in which we argued that each mobile network operator enjoys a monopoly on the individual market for origination of calls to VAS from its own subscribers. Furthermore, there is clearly a concern that mobile network operators may be behaving in a tacitly or explicitly co-ordinated manner with regard to the call origination market(s) in a manner which is severely detrimental to consumer interests and which is severely detrimental to competition. Our formal complaints in Belgium address these matters.

Paragraph 32

It is typically the case that OOs offer SRS themselves. The BEREC draft report understates this fact, and it should be corrected in the Final Report.

Paragraph 39

We do not think that any mobile OO uses revenues/profits generated by providing SRS to fund more aggressive competition on other call types or services.

We particularly welcome the last sentence of paragraph 39, but we caution against any suggestion or conclusion that practicing the standard retail call tariff would be 'efficient'.

Paragraphs 40-43

We agree. We have argued in our own Belgian complaints that the practices of mobile network operators are harmful to consumers, to businesses (especially those in the content production area), to innovation, and to competition. We agree also that the mobile OO's behaviour is ultimately to their own detriment, and that their charging practices result not only in content migrating away from their platforms and onto the Internet, but even help-desk and other customer-service moving away.

Pros and cons of different retail pricing models (Chapter 4)

We broadly agree with BEREC's considerations on the retail pricing models.

However, we regret that BEREC has included an assumption that there is a cost asymmetry between fixed-originated and mobile-originated communications, which leads to a further assumption that mobile is more costly than fixed, and tends to suggest that retail tariffs for calls to SRS would justifiably be differentiated between fixed and mobile originated calls.

We do not believe that the genuine underlying cost of originating a call, even if it were to differ somewhat between fixed and mobile, could justifiably result in differentiated retail tariffs for calls to SRS. The reason is that the cost of originating a mobile call to SRS is likely +/- 10x-100x lower than the mobile retail tariffs commonly practiced. We refer in this context to Figure 4 in Annex A.

Notwithstanding our comments above, we explicitly do not wish to exclude retail SRS regulation permitting differentiated retail tariffs between fixed and mobile. Indeed, in the Belgian case, it is the prohibition of such differentiation at retail level by means of a Royal Decree which is at the origin of the disagreement/disputes, as it led the mobile network operators to aim to introduce a wholesale '*mobile service fee*', presumably in addition to retail calling tariffs being applied by the mobile network operators for retail calls to SRS.

With regard to the C+S model introduced in Chapter 4, we would add that, given that the 'C' is the retail tariff for a call to a geographic number, and that this tariff surely comfortably covers the OO's call origination and call termination costs, the corollary is that there is no justification for the OO levying – in addition – on the other actors in the value-chain – a wholesale charge for originating the call. We ask BEREC to include this very important consideration in its Final Report.

Possible regulatory approaches (Chapter 5)

Paragraph 47

As discussed in our comments on Chapter 4 above, if the retail tariff is, for example, the same as the retail tariff for a call to a geographic number, or even higher (which is usually the case), call origination and call termination costs are surely comfortably covered. In such circumstances, we cannot see how an OWR higher than zero could be justified (unless the OWR would strictly concern only the applicable remuneration for the SP or OO billing/bad debt).

Paragraph 49

The last sentence and the table indicate BEREC acceptance of different retail prices from fixed networks and mobile networks for calls to SRS. As discussed in our comments on Chapter 4 above, we do not believe that the genuine underlying cost of originating a call, even if it were to differ somewhat between fixed and mobile, could justifiably result in differentiated retail tariffs for calls to SRS.

Paragraph 53

We welcome the suggestion that a cost-oriented price-cap should be used in the case of services where the retail calling tariff is zero. We also welcome the last sentence, in which BEREC usefully recognises that wholesale call origination involves less resources than a retail end-to-end call.

We disagree strongly with the suggestion that the retail ARPU on a downstream voice market, or a percentage thereof, would be 'reasonable' as a proxy for OWR, because it is clear to any expert in the telecommunications sector that there is no relationship between wholesale (mobile in particular) call origination costs and the retail (mobile in particular) prices being practiced. We call on BEREC to remove the profoundly unsound suggestion that retail ARPU would provide a justifiable basis for setting 'reasonable' OWR's.

Paragraph 55

This is exactly what the mobile network operators in Belgium are attempting to do since August 2009, by aiming to introduce a wholesale 'mobile service fee' to restore the extreme profitability they enjoyed prior to the adoption of the Royal Decree capping the retail mobile tariffs for calls to VAS at the same level as the retail fixed tariffs for calls to VAS.

Paragraph 57

We cautiously welcome the content of this paragraph, because it appears to accept the point we have made above, i.e. that in case the retail tariff (the 'C') is, for example, the same as the retail tariff for a call to a geographic number, or even higher, there is no justification whatsoever for an OWR to cover any alleged wholesale call origination costs. We ask BEREC to confirm this point in its final report.

The notion of a retail mark-up in the form of a percentage x of the S charge (as OWR) is acceptable in principle, insofar as it is restricted to reasonably covering the costs of the applicable remuneration for the SP or OO billing/bad debt, but not wholesale call origination.

Paragraph 60

We request the removal of the second sentence, and the revision of the paragraph, on the grounds that any cost asymmetry between fixed and mobile networks cannot, in our opinion, justifiably be translated into a different 'C', because the (in particular mobile) call origination costs are a fraction of the retail (in particular mobile) tariffs being practiced. This is especially the case for mobile network operators, for which it seems quite clear that there is no relationship between wholesale costs and retail tariffs being practiced. See also our comments on Paragraph 53.

Paragraph 62

In making this statement, BEREC has usefully underscored that BEREC's own suggestion in paragraph 53 (to the effect that adopting the retail ARPU on a downstream voice market as a proxy for OWR would be 'reasonable' as solution) is untenable in the mobile context.

Paragraph 64

We have important comments to make on these aspects, given that we are faced with a proposal from Belgacom for the x to be set at confidential% of the entire retail tariff for SRS calls, the underlying basis of which is not communicated, and we are in a conciliation procedure which includes this aspect.

The notion of a retail mark-up in the form of a percentage x of the S charge (as OWR) to cover legitimately incurred ancillary costs is acceptable in principle (although, as discussed above, it is not justifiable for wholesale call origination), but BEREC and its constituent members should avoid overestimating the ancillary costs to be recovered, and be wary of methods/formulae put forward by originating operators regarding cost-recovery.

Please find our observations below, on each cost category identified by BEREC:

a. Billing:

The investment in a billing system has traditionally been a long-term investment for an originating operator, which exhibits the characteristics of a sunk cost, and is likely to already have been depreciated completely, or to a very large extent over the past decades. If new billing systems were developed today, they would be using the latest available technology, i.e. be cloud-computing based and easy to reconfigure, and cost a fraction of what legacy systems have cost. Therefore, assessing either the historically incurred cost, as depreciated, or the cost of a modern equivalent asset, should result in rather low costs.

Originating operators use the ability to differentiate a large number of different tariffs not only for SRS. Indeed, mobile network operators in particular are known for offering a multitude of different retail tariffs/packages with different per-minute tariffs, different mixes of in-bundle and out-of-bundle calls, etc. Originating operators should not be allowed to inappropriately load costs for billing complexity onto the SRS value-chain.

A large proportion of mobile customers are on prepaid plans and do not receive bills. The reality of this should be reflected.

b. Cash collection:

The costs of cash collection should be made fully transparent (i.e. they cannot be hypothetical), and should be auditable, to enable verification that they are efficiently incurred.

A large proportion of mobile customers are on prepaid plans, i.e. there is no issue of cash collection at all for these customers. The reality of this should be reflected.

c. Bad debt (insurance):

A large proportion of mobile customers are on prepaid plans, i.e. there is no issue of bad debt/cash collection at all for these customers. The reality of this should be reflected.

We are open to considering a scenario in which certain sums are only paid as and when the originating operator has received them itself, but there should be assurance that the

originating operator will continue to make determined efforts to effectively collect the amounts due.

d. Customer information:

Mobile operators in particular are known for offering a multitude of different retail tariffs/packages with different tariffs, mixes and bundles. Staff has had to be deployed and trained to deal with customer requests relating to these complex product and tariff structures. Originating operators should not be allowed to inappropriately load costs for customer information complexity onto the SRS value-chain.

Companies such as Mobile Vikings (<https://mobilevikings.com/en/>) and Free Mobile (<http://mobile.free.fr/>) are turning away from unnecessary product complexity by offering one or two easily understandable offers, and are leveraging social networks (Facebook, Twitter, etc.) on the Internet, to assist users or potential users who have queries, reducing the need for call centres. In addition, they are enlisting their own user base to recruit and help new users by leveraging social media.

We ask BERC to reflect the above points in the Final Report, to ensure that signals are given to NRAs that they should be critical of originating operators' proposals for the value of 'x'.

Paragraph 65

We broadly agree with the contents of this paragraph, and we welcome footnote 15, which seems to validate the position we have taken throughout this response regarding the absence of justification for any wholesale call origination charge in circumstances where a retail tariff is applied at the same level as for calls to geographic numbers, or a higher retail tariff.

Paragraph 67

We are concerned that the reference made to 'the value added by the OO', if retained in BERC's Final Report, would open the floodgates for demands by mobile network operators for additional remuneration. Therefore, we recommend the deletion of this reference.

We do welcome the last sentence, to the effect that the NRA should be prepared to 'precise' the percentage of 'x'. Our experience since August 2009 suggests that such regulatory determination is precisely what is necessary to avoid over-charging which would be detrimental to consumers and to competition.

Paragraphs 69-71 (SfSm approach) and Paragraphs 73-74 (conclusion)

We wish to state very clearly here that we prefer the SfSm approach with cost-oriented wholesale call origination over the C+S approach, because the SfSm approach is the only approach which deals convincingly with excessive OWR's and which prevents discriminatory and potentially predatory behaviour by vertically integrated operators.

In paragraph 70, we request the removal in the first sentence of "*only differentiated depending on whether the call is placed from a fixed or mobile operator*". As discussed above, we do not believe that such differentiation at retail level is justifiable, given the lack of

correspondence between wholesale call origination costs and the retail tariffs being practiced, especially by mobile network operators.

As regards the ‘cons’ identified in paragraph 71, we observe that determining a cost-oriented OWR is also necessary in the C+S approach for Freephone calls, and therefore the burden on the regulator is NOT higher than in the C+S approach. This is the case because any OWR relating to the specific activity of wholesale call origination should clearly and unambiguously be the same for all mobile SRS call types, and be checked against cost-recovery on the related retail calls market (i.e. if costs are already recovered through the retail activity, a wholesale charge is not justifiable). Note: the fixed OWR is already determined, because all NRAs have found SMP on Market 2 and have adopted cost-orientation as a remedy.

Legal instruments (Chapter 6)

Having carefully studied the contents of this chapter, we hereby strongly express the view that the circumstances in which Article 5 of the Access Directive can be relied upon by an NRA are fulfilled in Belgium, and, based on our experience to-date (specific disagreement/dispute since August 2009), we express preference for use of this mechanism. We add that the Article 5 mechanism has already been proven in practice by other NRAs, which should enhance confidence in this mechanism.

Please allow us also to comment that we do not believe that reliance upon Part C of the Annex of the Authorisation Directive, or reliance upon articles 21 and 28 of the Universal Service Directive, would provide effective solutions to the problems we are facing.

If a decision would be made not to rely on Article 5 of the Access Directive, we would recommend a full market analysis, along the lines of ex-Market15bis, which was attempted by AGCOM in Italy, but abandoned. We believe that conducting such an analysis of the market for mobile access and call origination for SRS in Belgium would produce an outcome which would pass the three-criteria test, and would find each mobile network operator individually to hold SMP on this market.

Conclusion (Chapter 7)

Paragraph 100

This paragraph underscores again (see our comments on paragraph 69-71 and 73-74) that even in the C+S approach, there is a requirement to establish a cost-oriented OWR, making the SfSm approach NOT more complex than the C+S approach. We also reiterate that the ‘reasonable level’ approach being suggested by BEREC is untenable (see our comments on paragraphs 53 and 62, among others).

Paragraphs 101-102

We reiterate (see our comments on paragraph 69) that we prefer the SfSm approach with cost-oriented wholesale call origination over the C+S approach, because the SfSm approach

is the only approach which deals convincingly with excessive OWR's and which prevents discriminatory and potentially predatory behaviour by vertically integrated operators.

Paragraphs 106-107

We reiterate (see our comments on Chapter 6) that we prefer the Article 5 Access Directive approach, or failing that, a full market analysis, and that we consider this necessary and urgent in the Belgian context.