EUROPEAN COMMISSION

Brussels, 20.7.2012
C(2012) 5302 final

Autorité de Régulation des Communications Electroniques et des Postes (ARCEP)

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France

For the attention of:
Mr Jean-Ludovic Silicani
President

Fax: +33 1 40 47 72 02

Dear Mr Silicani,

Subject: Commission Decision concerning Case FR/2012/1304: Voice call termination on individual mobile networks of Free Mobile, Lycamobile and Oméa Télécom in France

Decision to lift reservations pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC[1]

I. PROCEDURE

On 13 March 2012, the Commission registered a notification from the French national regulatory authority, *Autorité de Régulation des Communications Electroniques et des Postes* (ARCEP),[2] concerning the wholesale market for voice call termination on individual mobile networks of Free Mobile, Lycamobile and Oméa Télécom[3].

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[1] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

[2] In accordance with Article 7 of Directive 2002/21/EC of the Framework Directive.

[3] Corresponding to market 7 in Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 344, 28.12.2007, p. 65.

Three national consultations[4] ran from 8 September 2011 to 10 October 2011, from 9 December 2011 to 27 January 2012 and from 16 February 2012 to 2 March 2012, respectively.

On 20 March 2012, a request for information was sent to ARCEP and a response was received on 23 March 2012.

On 13 April 2012 and 19 April 2012, the Commission, pursuant to Article 7a(1) of the Framework Directive, informed ARCEP and the Body of European Regulators for Electronic Communications (BEREC), respectively, of the reasons why it believed that the draft measures would create a barrier to the internal market and its serious doubts as to its compatibility with EU law (the "Serious doubts letter").

On 4 May 2012 and on 7 May 2012, the Commission received five third party observations[5].

On 24 May 2012, BEREC delivered its opinion to the Commission[6].

On 8 June 2012, a meeting between ARCEP, BEREC and the Commission took place in order to identify the most appropriate and effective measure in line with Article 7a(4) of the Framework Directive.

On 4 July 2012, ARCEP sent to the Commission amended draft measures pursuant Article 7a(4) of the Framework Directive.

II. DESCRIPTION OF THE ORIGINALLY NOTIFIED DRAFT MEASURES

II.1. Background

The market for voice call termination on individual mobile networks in France was previously notified to and assessed by the Commission under case FR/2010/1128[7].

In this third round analysis, ARCEP designated three mobile operators (MNOs) in mainland France (Bouygues, Orange and SFR) and 8 MNOs in the French overseas territories (Orange Caraïbe, SRR, Digicel, Orange Réunion, Outremer Télécom, Dauphin Télécom, UTS Télécom and SPM Télécom) as having significant market power (SMP) on their own mobile network, and imposed on them the full set of obligations[8].

With regard to the price control, the current mobile termination rates (MTRs) in mainland France were notified to and assessed by the Commission under case FR/2011/1200[9]. ARCEP updated its Bottom-up Long Run Incremental Costs (BU-LRIC) model in accordance with the pure BU-LRIC model recommended by the Termination

4 In accordance with Article 6 of the Framework Directive.

5 In accordance with Article 7a(2) of the Framework Directive.

6 In accordance with Article 7a(3) of the Framework Directive.

7 C(2010)7138 and 7398.

8 ARCEP imposed the obligation of accounting separation and cost accounting only on the three metropolitan operators and as well on Orange Caraïbe and SRR.

9 C(2011)2977.

Rates Recommendation[10] and set a three-year glide path, which foresaw reaching the target level of 0.8 Euro cent as of 1 January 2013 and price symmetry as of 1 July 2011[11]. The Commission did not comment.

II.2. Market definition

ARCEP proposed to define three separate markets for voice call termination in the networks of the new MNO (Free Mobile) and the two full mobile virtual network operators (MVNOs) (Lycamobile and Oméa Télécom). It comprises all the call termination services provided to mobile numbers which are opened to interconnection, irrespective of the technology (GSM, UMTS, Wifi or other).

Based on the licensing conditions for exploiting mobile frequencies and the geographic coverage of the respective networks, ARCEP considers that the relevant geographic markets correspond to mainland France.

II.3. Finding of significant market power

ARCEP proposed to designate Free Mobile, Lycamobile and Oméa Télécom as having SMP on their individual networks. The main criteria considered by ARCEP in reaching its conclusion are: (i) 100% market share of each operator on its individual mobile network[12]; (ii) lack of potential competition and high entry barriers and (iii) lack of countervailing buying power both at retail and wholesale levels.

II.4. Regulatory Remedies

ARCEP proposed to impose the following obligations on Free Mobile, Lycamobile and Oméa Télécom: (i) access and interconnection; (ii) non-discrimination; (iii) transparency (i.e. publication of a reference offer) and (iv) price control based on cost orientation. Additionally, ARCEP proposed to impose the obligation of accounting separation and cost accounting only on Free Mobile.

II.4.1. Price asymmetry of MTRs in favour of Free Mobile, Lycamobile and Oméa Télécom

As regards the price control and cost orientation obligation, ARCEP justified its proposal of setting asymmetric MTRs for Free Mobile, Lycamobile and Oméa Télécom on the basis of Point 10[13] of the Termination Rates Recommendation by arguing that these operators:

- are 'new mobile entrants' since Free Mobile and Lycamobile were not active in the mobile market prior to their entry in January 2012 and July 2011,

[10] Commission Recommendation of 7 May 2009 on the regulatory treatment of fixed and mobile termination rates in the EU, OJ L 124, 20.05.2009, p. 67 (Termination Rates Recommendation).

[11] ARCEP took account of the Commission's comment made in case FR/2010/1039 and removed the asymmetry for Bouygues as of 1 July 2011.

[12] The full MVNOs own a location database infrastructure and are in possession and control of a unique operator code (Mobile network code) for the routing of calls to the numbers open to interconnection.

[13] Rather than Point 9 of the Termination Rates Recommendation. ARCEP considers that the criterion of an uneven spectrum assignment is not fulfilled as regards Free Mobile. As regards Lycamobile and Oméa Télécom, ARCEP considers that Point 9 of the Termination Rates Recommendation is not of application due to their lack of spectrum acquisition.

respectively, and Oméa Télécom currently only operates as a light MVNO rather than as a full MVNO;

- face 'impediments on the retail market to market entry and expansion' because of established MNOs' commercial strategies and the existing long commitment contracts and loyalty programmes that make switching operator increasingly difficult in the post-paid segment; and
- incur 'higher per-unit incremental costs' when terminating a call because of the charges for the wholesale service of national roaming[14] that they have agreed with their respective host MNOs for having access to the latter's mobile access network[15].

II.4.2. Implementation of the cost orientation obligation

ARCEP argued that MTRs for Free Mobile, Lycamobile and Oméa Télécom should be based on the incremental costs for call termination of a generic efficient new entrant which has access to a third party's network to provide such wholesale service (hereinafter, efficient new entrant) thereby resulting in MTRs which are higher than established MNOs' MTRs, that are based on the incremental costs of a generic efficient operator (hereinafter, efficient operator) as set in the Termination Rates Recommendation (i.e. pure BU-LRIC based termination cost).

ARCEP clarified in the response to the request for information that it calculates the incremental cost incurred by such an efficient new entrant for call termination as a weighted average incremental termination cost according to the following formula:

(Transmission cost + National roaming cost) * percentage of national roaming based terminating traffic + own network incremental termination cost * percentage of own network based terminating traffic.

Transmission cost

The transmission cost refers to the additional cost of switching and transmitting the call through the efficient new entrant's core network in those cases where a call is terminated while on national roaming. This cost amounts to 0.12 Euro cents per minute.

National roaming cost

The national roaming cost refers to the incremental cost of terminating the call by means of the wholesale service for national roaming that the host MNO provides.

According to its response to the request for information, ARCEP analysed the access

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14 For sake of simplicity, the wholesale service of national roaming denotes the service provided by the host MNO to either a new MNO (as Free Mobile) or a full MVNO (as Lycamobile and Oméa Télécom).

15 ARCEP explains that a new entrant incurs, at least, the same incremental costs as an efficient operator when it terminates the call in its own network but higher costs when it makes use of the host MNO's network due to the tariff conditions of the commercial access agreements. These access agreements are indispensable for full MVNOs (on a permanent basis) and also for the new MNOs whose own network's coverage is limited in the initial years of its deployment.

ARCEP further considers that given that the full MVNOs have had a possibility to acquire spectrum licences but have chosen not to, the costs taken into account cannot be higher than the costs of an operator having acquired the spectrum licence.

agreements signed by Free Mobile, Lycamobile, Oméa Télécom and NRJ Mobile[16] with the respective host MNOs[17] and concluded that the economic conditions obtained by […] can be regarded as the most advantageous that could be expected from new operators in commercial negotiations.

As […]'s access agreement accounts for […], ARCEP then made an additional adjustment to obtain the fixed and variable prices which would in its view correspond to the economic conditions of efficient access. ARCEP distinguished the costs which are strictly fixed (and hence independent of traffic volumes) and the variable costs which depend of the traffic volumes. ARCEP pointed out that the latter would reflect the incremental termination costs when using a third party's network (i.e. the host MNO's network) instead of its own network[18].

Table 1 shows the results relative to an efficient new entrant.

	Fixed Part in Million Euro	Variable part (National roaming based incremental termination cost) in Euro cents per minute		
		1st half 2012	2nd half 2012	2013
Incoming traffic	[…]	[…]	[…]	[…]
Outgoing traffic		[…]	[…]	[…]

Own network incremental termination cost

The own network incremental termination cost are, according to ARCEP, comparable for both new entrants and established MNOs, i.e., they are equivalent to the pure BU-LRIC rates of 0.8 Euro cents per minute.

Percentage of national traffic roaming costs

ARCEP considered the deployment pace contained in the spectrum assignment decision of Free Mobile to be efficient and set the respective percentages of traffic terminated in the own network and the host MNO accordingly.

Based on the above calculated parameters, ARCEP estimated the weighted average incremental termination cost of a new efficient operator in Euro cents/min as it is shown in **table 2.**

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16 Although NRJ Mobile has signed an access agreement, it is not providing termination services yet and thus ARCEP's proposal does not include NRJ Mobile in its present notification.

17 These contracts are heterogeneous […].

18 ARCEP outlines that such adjustment leads to costs for terminating traffic which are [15-30] % lower than the lowest costs which stem from the commercial access agreements.

	1 half 2012	2 half 2012	2013
Transmission cost	0.12	0.12	0.12
National roaming cost (incoming traffic)	[…]	[…]	[…]
National roaming based incremental termination cost	[…]	[…]	[…]
Own network based incremental termination cost	*0.8*	*0.8*	*0.8*
Percentage of national roaming based terminating traffic	[…]%	[…] %	[…]%
Weighted average termination incremental cost	[…][19]	[…]	[…]
Surcharge for national roaming[20]	[…]	[…]	[…]

II.4.3. Setting of MTR caps for Free Mobile, Lycamobile and Oméa Télécom

ARCEP set the MTR caps as the sum of the following three elements:

1. The weighted average termination incremental cost. It would comprise the own network based incremental termination cost (equivalent to the pure BU-LRIC based termination cost of 0.8 Euro cents/min) and the surcharge for national roaming;
2. The difference between the rates in the actual glide-path imposed on the established MNOs and the pure BU-LRIC rate[21].
3. The surcharge to compensate the efficient new entrant for traffic imbalances, which is aggravated (in cash-flow terms) by the above-cost MTRs of the established MNOs as set in the glide path. The compensation for traffic imbalance is set at […] Euro cents in the first semester 2012 and […] Euro cents in the second semester 2012 and will no longer apply in 2013[22].

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[19] For example the weighted average incremental cost in the first half of 2012 is calculated, applying the above mentioned formula, as: […] * […] + 0.8 * […] = […].

[20] The difference between the weighted average termination incremental cost incurred by the efficient new operators and the pure BU-LRIC based termination cost.

[21] In 2011, ARCEP set a three-year glide path towards the pure BU-LRIC termination rate, which reaches the target level of 0.8 Euro cents on 1 January 2013. On this basis, the three established MNOs as well as the new entrants will be able to benefit from the same surcharge of 0.7 and 0.2 Euro cents for the first and second semester 2012, respectively.

[22] According to ARCEP the ratio between incoming traffic and outgoing traffic for the efficient new entrant would amount to […] implying that the efficient new entrant receives […] incoming minute per […] outgoing minutes. In the case of Free Mobile this negative imbalance has been greater […] since its commercial launch. Nonetheless, ARCEP expects that it will decline as long as the volume of on-net traffic increase and the profile of the average customer changes.

Therefore, as the efficient new entrant's traffic is negatively imbalanced ARCEP calculates the additional financial loss that such operator incurs as a result of the above-cost MTRs set in the glide-path. ARCEP only compensates for […]% of the maximum possible asymmetry as it did for Bouygues

The **graph 1** shows the proposed MTRs for Free Mobile, Lycamobile and Oméa Télécom in Euro cents/min.

[…]

ARCEP further considers that as the generic efficient cost level will not be achieved in this market analysis, it is coherent (with the decision in case FR/2011/1200) to retain also the *connection capacities* component (in Euro/year), whose unit measure is the Primary Numeric Block (PNB), besides the per minute MTR.

Therefore, ARCEP proposes a symmetric glide path for Free Mobile, Lycamobile and Oméa Télécom as shown in **table 3.**

	Until 30 June 2012	From 1 July 2012 until 31 December 2012	From 1 January 2013 until 31 December 2013
MTRs (in Euro cents/min)	**2.4**	**1.6**	**1.1**
PNB (Euro per year)	**2 400**	**1 600**	**1 100**

III. SERIOUS DOUBTHS EXPRESSED BY THE COMMISSION WHEN INITIATING THE SECOND PHASE UNDER ARTICLE 7(A) OF THE FRAMEWEOK DIRECTIVE

The Commission examined the notification and the additional information provided by ARCEP and considered that ARCEP's draft measures concerning the wholesale market for voice call termination on individual mobile networks in France fall within Article 7a(1) of the Framework Directive.

The Commission considered that draft measures imposing regulatory obligations on undertakings with SMP in France may have an influence, direct or indirect, actual or potential, on the ability of undertakings established in other Member States to offer electronic communication services. The Commission considered that the notified draft measures fall under the Commission's powers of ensuring consistent application of remedies as set out in Article 7a of the Framework Directive, as the notified measures aim at imposing an obligation on an operator in conjunction with Articles 9 to 13 of the Access Directive.[23]

The Commission expressed serious doubts as to the compatibility with EU law of ARCEP's draft decision in its previously notified form, in particular with the requirements referred to in Article 8(4) and 13(2) of the Access Directive in conjunction with Article 8 of the Framework Directive and Article 16(4) of the Framework Directive. Furthermore, the Commission considered, at that stage, that the draft measures may

when it set its asymmetrical MTRs for the year 2010.

[23] Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, OJ L 108, 24.04.2002, p. 7, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37.

create barriers to the internal market.

The Commission agreed that given the competition problem identified by ARCEP in the wholesale market for voice call termination on the individual mobile networks of Free Mobile, Lycamobile and Oméa Télécom, consisting of the risk of excessive pricing, a price control remedy based on cost orientation was appropriate.

The Commission noted that the proposed MTRs for new entrant MNO and full MVNOs were not set at a symmetric level corresponding to the costs of an efficient operator (as those set for the established MNOs). The Commission considered, at that stage, that such asymmetry was not adequately justified by higher incremental unit costs of the new mobile entrant when compared to the modelled efficient operator, as explained below.

III.1. Compatibility with EU law

The Commission referred to Article 8(4) and 13(2) of the Access Directive which require the NRAs (i) to impose remedies which are based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive and (ii) in relation to the imposition of price controls to ensure that the chosen cost recovery mechanism serves to promote efficiency and sustainable competition and maximises consumer benefits. Moreover, the Commission referred to Article 16(4) of the Framework Directive which requires NRAs to impose on SMP undertakings appropriate regulatory obligations.

In addition, the Commission underlined that pursuant to Article 8(3) of the Framework Directive NRAs shall contribute to the development of the internal market by cooperating with each other, with the Commission and BEREC in a transparent manner to ensure not only the development of a consistent regulatory practice but also consistent application of the Framework Directive and the Specific Directives (together, the Regulatory Framework).

In this regard, the Commission pointed out that it may issue recommendations[24] on the harmonised application of the Regulatory Framework in order to further the achievement of the objectives set out in Article 8 of the Framework Directive. This right arises, in particular, where the Commission finds that divergences in the implementation by the national regulatory authorities of their regulatory tasks under the Regulatory Framework may create a barrier to the internal market. It is in this context that the Commission, in order to ensure a correct and coherent interpretation and application of the relevant provisions of the Regulatory Framework within the EU, adopted the Termination Rates Recommendation, setting out a consistent approach that the NRAs should follow regarding price control obligations for fixed and mobile termination rates.

The Commission considered that full MVNOs and their respective host MNOs provide the same termination service because both operators make use of the same mobile network on the basis of the wholesale service for national roaming. The same is also true for all calls of the new MNO Free Mobile that are terminated under the national roaming agreement. Consequently, the Commission noted that both Free Mobile and full MVNOs can benefit from the same economies of scale and/or scope as the host MNO and hence achieve the same unit costs irrespective of their actual market shares[25]. Furthermore, the

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[24] In accordance with Article 19 of the Framework Directive.

[25] See comment made by the Commission in case DK/2009/1013.

Commission pointed out that ARCEP itself argued that Free Mobile can generate the same efficiencies as the established MNOs when terminating calls *on its own network*. Therefore, the Commission stated that it could not at that stage identify any higher per unit incremental termination costs incurred when Free Mobile or full MVNO customers are receiving calls.

The Commission pointed out that in the present case any cost difference between a host MNO and operators purchasing national roaming would largely depend on the negotiated airtime rate. However, unless the wholesale market for access and call origination to mobile networks is not effectively competitive, termination rates under a national roaming agreement should not normally exceed those of the host MNO. If higher commercial rates were to materialise then this should not normally be encouraged by higher MTRs for those operators not owning a network. Much to the contrary, the Commission considered that full MVNOs/new MNOs may gain additional negotiating power if all operators knew in advance that the regulator would not grant asymmetric rates. Conversely, the granting of higher rates may give incentives not to negotiate too hard because the consumer would eventually foot the bill via higher regulated rates. The Commission expressed a view that when modelling the efficient new entrant it was therefore wrong and circular to conclude that incoming calls under national roaming will lead to higher MTRs because it is this regulatory approach that will induce higher commercial rates and consequently higher MTRs.

Further to that, the Commission noted that Point 10 of the Termination Rates Recommendation, which ARCEP itself invokes, would in any case require the NRA to demonstrate that a new MNO incurs higher per unit costs because it operates below the minimum efficient scale. The Commission pointed out that ARCEP itself had determined that the unit costs of the new entrant Free Mobile (when it terminates the calls on its own network) are the same or potentially lower than those of the established MNOs, despite its low market share. Further to that, the Commission noted that Point 10 should, not be applied to MVNOs because their MTRs would at all times be determined by negotiated national roaming rates, which may not be as scale sensitive as ARCEP suggests.

Against this background, the Commission had serious doubts whether the surcharge for national roaming that results in a price asymmetry between the MTRs of Free Mobile, the full MVNOs and the host MNOs was in compliance with the Regulatory Framework.

As to the surcharge for traffic imbalances, the Commission noted that according to ARCEP new entrants should be compensated because their traffic is imbalanced in the early years of activity, and the resulting financial loss is greater than what would be incurred if MTRs were already set at the level of pure BU-LRIC. In this regard, the Commission wanted to stress that traffic is not imbalanced because of the presence of small and large operators in a market *per se* but is often the result of a distinct commercial strategy of the new entrant (e.g. uniform vs. on-net/off-net price differentiation). According to the Commission, that should not normally justify higher termination rates of new entrants.

Moreover, the Commissions noted that ARCEP fails to establish the direct relationship between (i) the financial imbalance stemming from traffic exchange and (ii) the termination costs incurred by the operator subject to such imbalance. The Commission stated that this issue was relevant in the light of the retail prices in France, which are still well above MTR[26] and which raises the question whether operators should be

[26] According to the response of ARCEP to the request for information, the average revenue per minute

compensated in those instances where they are not incurring losses on off-net calls.

Therefore, the Commission had serious doubts whether both surcharges for national roaming and traffic imbalance would not be contrary to Articles 8(4) and 13(2) of the Access Directive in conjunction with Article 8 of the Framework Directive and Article 16(4) of the Framework Directive. Indeed, the Commission considered that such unjustified asymmetries would result in higher MTRs for full MVNOs and new entrant operators, which in turn will lead to higher retail prices and the associated loss in consumer benefit contrary to Articles 8(4) and 13(2) of the Access Directive in conjunction with Article 8 of the Framework Directive and Article 16(4) of the Framework Directive.

Furthermore, the Commission pointed out that the non-discrimination principle is a general principle of EU law, mandating equal treatment of similar situations and that in the context of the Regulatory Framework, Article 8(5)(b) of the Framework Directive imposes an obligation on NRAs to apply, *inter alia*, non-discriminatory regulatory principles to ensure that there is no discrimination in the treatment of operators in similar circumstances.

The Commission took a preliminary view that the price control remedy proposed by ARCEP would lead to a price discrimination of host MNOs *vis-à-vis* the respective full MVNOs and the new MNO because both operators provide the same termination service over the same mobile network and ARCEP did not provide an adequate justification as regards the objective cost differences that would warrant asymmetric MTRs, even when the new MNO terminates the calls on its own network.

III.2. Creation of barriers to the internal market

The Commission further noted that if the termination rates were set by one NRA above the cost-efficient level, the terminating operators in this Member State will be able, on the basis of the calling party pays principle, to benefit from this rate at the expense of the operators, and ultimately the consumers, in the Member State from which the call originates.

The Commission expressed a view that the measures proposed by ARCEP would very likely lead to the creation of a barrier to the internal market, as on the basis of the calling party pays principle, the terminating new MNO Free Mobile as well as full MVNOs in France would be able to charge higher wholesale terminating rates than their host MNOs for calls originated in those Member States, where as of 1 January 2013 (or later on in 2013) the recommended pure BULRIC rates are applied. The Commission noted that although host MNOs may in turn benefit from this via higher national roaming rates, operators and their subscribers in other Member States will still suffer from higher rates in France.

In addition, the Commission pointed out that in several Member States a symmetric price control remedy was imposed on the full MVNOs following their entry in the market[27]. It

was of [10-20] Euro cents in 2011.

27 For example, in Netherlands (cases NL/2005/0215, NL/2010/1080 and NL/2012/1285), Austria (cases AT/2005/0238 and AT/2010/1036), Sweden (case SE/2011/1221), Germany (case DE/2009/0947) Spain (cases ES/2007/0706, ES/2008/0819 and ES/2012/1291), NRAs have considered that the MTRs of full MVNOs should be equal to their host MNOs' MTRs. Even in Denmark where the NRA proposed asymmetric MTRs for full MVNOs the reasoning was based on the national law provision rather than on an economic assessment (case DK/2009/1013).

was the Commission's view that different regulatory approaches adopted by the NRAs within the EU would undermine the integrity of the internal market. Moreover, the Commission observed that MTRs set at an efficient level contribute to a level playing field not only at national but also at EU level, by eliminating competitive distortions between fixed and mobile networks.

IV. OPINION OF BEREC

In its opinion BEREC expressed the view that the Commission's serious doubts with regard to the asymmetry based on national roaming costs are justified while the serious doubts with regard to the asymmetry based on traffic imbalances are not justified. BEREC proposed that ARCEP amends its notified decision by removing the asymmetry based on national roaming cost.

Given i) ARCEP's conclusion that the efficient incremental network cost of a new entrant is not higher than that of an efficient operator and that this finding does not seem to be restricted to the French market, and (ii) the lack of appropriateness of taking higher roaming cost into account, BEREC considered that it was not clear when Point 10 of the Recommendation can be applied in practice and therefore proposed that the Commission gives further guidance on the applicability of Point 10 of the Recommendation.

As to national roaming cost, BEREC noted the Commission's view that ARCEP's regulatory approach will induce higher commercial roaming rates (effect 1) and consequently higher MTRs (effect 2). Taking effect 1 and 2 together, BEREC concluded that these effects are likely to occur to some extent if the hosting MNOs anticipate the asymmetry.

BEREC agreed with the Commission that it is doubtful whether roaming rates are scale sensitive and concludes that ARCEP did not sufficiently justify that the MVNOs operate below their minimum efficient scale. BEREC considered that it is doubtful whether an MVNO with a market share of below 20% is operating below the minimum efficient scale of an MVNO. The 20% market share mentioned in the Recommendation clearly seems to be relevant for an MNO and not for an MVNO.

As to traffic imbalance, BEREC referred to the ERG Common Position on symmetry of 28 February 2008[28] which gives a possible justification for asymmetry when MTRs are still above costs and there are traffic imbalances. BEREC noted that the Common Position mentions in its concluding part that asymmetries are justified where traffic imbalances are the result of operators' strategies.

BEREC points out that while the Commission criticises that commercial strategies cause traffic imbalances, ARCEP argues that new entrants need to engage in a specific commercial strategy of "abundance plans" to gain market share. BEREC therefore concluded that this part of the reasoning of the Commission does not address ARCEP's reasoning properly and therefore does not explain where the reasoning of ARCEP is incorrect.

Contrary to the Commission's view, BEREC found a clear relationship between the financial imbalance and the termination cost incurred and did not consider it relevant in this context that retail prices are still well above MTRs. According to BEREC, even if

[28] ERG's Common Position on symmetry of fixed call termination rates and symmetry of mobile call termination rates, adopted by the ERG-Plenary on 28 February 2008.

the retail prices are well above MTRs, this does not change the fact that new entrants have extra costs because of MTR's that are above cost and traffic imbalances. These extra costs affect the competitive relationship between existing operators and new entrants. The fact that new entrants may still earn a marginal profit on off-net calls does not change this competitive effect.

BEREC concluded that the Commission's serious doubts regarding the compliance with the non-discrimination principle are justified. BEREC shared the Commission's view that the national roaming part of the asymmetry does not comply with EU law, which is a sufficient condition to justify serious doubts according to Article 7a(1) of the Framework Directive.

BEREC agreed with the Commission that in this case the new entrants' higher MTRs will also be paid by operators and ultimately their subscribers in other Member States. However, BEREC noted that the Commission does not quantify this effect and that this effect seems relatively minor given the size of the asymmetry, the market shares of the new entrants and the percentage of traffic that is international.

V. CLOSE COOPERATION BETWEEN THE ARCEP, BEREC AND COMMISSION

ARCEP, BEREC and the Commission closely co-operated to identify the most appropriate and effective measure in line with Article 7a(4) of the Framework Directive. Before the end of three months period following the Commission's notification of its serious doubts, ARCEP notified an amended draft measure.

In the meantime the Commission received comments from five third parties. Three of them support the assessment of the Commission in the serious doubts letter and hence the opening of the Phase II investigation whilst the other two put forward a different view.

One of these two stakeholders indicates that to refuse any rate asymmetry, whose principle had been accepted in the Termination Rates Recommendation, would be detrimental to its interests. It explains that historically the incumbent mobile operators' networks were largely financed by call termination rates paid by fixed operators. As regards the surcharge on national roaming, it explains that it faced an oligopolistic market and, in the present case, a virtually closed market and the roaming price does not reflect the incremental costs of production but the full costs, most likely complemented by a comfortable margin. As regards the traffic imbalances, it is of the view that the commercial policies of incumbent operators are largely responsible for the traffic asymmetries that it suffers and it has no control over its competitors' commercial policies.

The other disagreeing stakeholder sets out similar arguments and adds that (i) it cannot compensate the losses in off-net calls with the sales in the retail markets, (ii) MVNOs, compared to the host MNO, incur additional costs when providing the termination service because they have to deploy their core networks, and (iii) the actual situation in France is not comparable to the situation in those EU countries where symmetry for full MVNOs was imposed.

VI. DESCRIPTION OF THE AMENDED DRAFT MEASURES

On 4 July 2012 ARCEP provided the Commission with an amendment of its draft measures. Whilst market definition, SMP assessment and the type of remedies remain unchanged, with regard to the details of the price control remedy ARCEP proposes to shorten the period of asymmetry until 30 June 2013.

Furthermore, ARCEP proposes that any full MVNO entering the market as of 1 July 2013 is to be regulated on the basis of symmetric MTRs, except in exceptional circumstances.

ARCEP sets out that the amended draft measures are in line with the regulatory framework, in particular, Article 13(2) of the Access Directive, which stipulates that the NRAs shall ensure that any cost recovery mechanism or pricing methodology that is mandated serves to promote efficiency and sustainable competition and maximises consumer benefit, and Article 8(2) of the Framework Directive, which stipulates that the NRAs shall promote competition in the provision of electronic communication networks and services by ensuring that users derive maximum benefit in terms of choice, price and quality and ensuring that there is no distortion or restriction of competition in the electronic communications sector. In addition, ARCEP considers that the amended draft measures contribute to the development of the internal market, promote the interest of the citizens of the European Union in line with Article 8(3) and (4) of the Framework Directive, and that the measures envisaged correspond to objective, transparent, non-discriminatory and proportionate regulatory principles in line with Article 8(5) of the Framework Directive.

As regards the duration of asymmetry, the asymmetric MTRs for the new entrants concerned by ARCEP's decision will be applicable as from the entry into force of the final measure until 30 June 2013. Therefore, ARCEP proposes the following glide path for Free Mobile, Lycamobile and Oméa Télécom as shown in **table 4**

	Until 31 December 2012	From 1 January 2013 until 30 June 2013	From 1 July 2013 until 31 December 2013
MTRs (in Euro cents/min)	**1.6**	**1.1**	**0.8**
PNB (Euro per year)	**1 600**	**1 100**	

As regards the level of asymmetry, ARCEP notes that the difference between the new entrants' MTRs and the established MNOs' MTRs would only be 0.6 Euro cents/min in the second semester 2012 and 0.3 Euro cents/min in the first semester 2013. Furthermore, ARCEP explains that this level of asymmetry should be put into context, and account be taken of low market shares of the new entrants within the relevant time period.

In this respect, ARCEP estimates that the average MTR, if an optimistic market share of 10% for the new entrants is considered, would amount to 1.06 Euro cents/min, compared to the regulated rate of 1.0 Euro cents/min in the second semester 2012, and 0.83 Euro cents/min, compared to the regulated (and pure BU-LRIC) rate of 0.8 Euro cents/min in the first semester 2013. ARCEP considers that these differences of 0.06 Euro cents/min in the second semester 2012 and 0.03 Euro cents/min in the first semester 2013 would not affect the ability of an operator to launch unlimited all-net offers to acquire or retain customers.

ARCEP also estimates that the savings of the established MNOs from dating the end of the MTR asymmetry back from 31 December 2013 to 30 June 2013 would amount to between EUR 5 million and EUR 20 million.

ARCEP finds that the level of asymmetry as proposed in the amended measures is not likely to distort or restrict competition and that the asymmetric rates contained in the amended draft measures are not likely to reduce consumers' benefit.

As regards the contribution to the development of the internal market and the promotion of the interest of the citizens of the European Union, ARCEP outlines the low level of MTRs in France on 1 January 2012 as well as the fact that MTRs will further decrease to reach the pure BU-LRIC rate as of 1 January 2013.

ARCEP sets out that the level of MTRs proposed for the new entrants and the resulting average MTRs are lower than (i) the MTRs in place in the majority of the Member States as of 1 January 2012 as well as (ii) the MTRs in those Member States which already announced to set them on the basis of the recommended pure BU-LRIC model by 2013.

ARCEP also stresses that (i) new entrants' market share is very small, (ii) the international calls represent, on average, 10% of the traffic terminated by the French mobile operators, and (iii) the foreign operators do not differentiate their rates according to the network of an operator called. ARCEP considers that the present asymmetry would not lead foreign operators to reconsider their tariffs for calling French mobile numbers from abroad.

VII. ASSESSMENT

Article 7a(5) of the Framework Directive entitles the Commission, after taking utmost account of the opinion of BEREC if any, to either issue a recommendation requiring the NRA concerned to amend or withdraw the draft measure, or to take a decision to lift its reservations indicated in accordance with Article 7a(1) of the Framework Directive.

VII.1. Compliance with the EU regulatory framework

The Commission welcomes ARCEP's proposal to shorten the duration of asymmetry from the originally foreseen end date of 31 December 2013 to the new end date of 30 June 2013. The Commission also welcomes that ARCEP states in its amended measures that, except in exceptional circumstances, any full MVNO entering the market as of 1 July 2013 is to be regulated on the basis of symmetric MTRs.

The Commission notes that asymmetric MTRs applicable to the new entrants concerned by ARCEP's decision will be applicable from the entry into force of ARCEP's final measure until 30 June 2013, and that therefore asymmetries are applied for a much shorter duration than previously foreseen, i.e., at least until December 2013. In this respect, the Commission points out that the originally notified measures only covered the time period until December 2013 and did not specify whether ARCEP planned to phase out the asymmetry in any follow-up regulatory decision, while this has been clarified and excluded in the amended measure. The Commission further notes that asymmetric rates will be in place only for six months beyond the deadline foreseen in the Termination Rates Recommendation for the implementation of cost-efficient and symmetric rates[29]

The Commission stresses that the amended measures eliminate any prospects of further

[29] Recommend 11 of the Termination Rates Recommendation states that NRAs should ensure that the termination rates are implemented at a cost efficient, symmetric level as of 31 December 2012.

asymmetry in MTRs and therefore exclude the possibility that the operators agree on high commercial access prices which could lead to higher MTRs, according to the circularity argument.

The Commission also takes note that the level of price asymmetry contained in the amended measures remains small. Under the assumption of a new entrants' market share of 10% the average MTR would only amount to 1.06 and 0.83 Euro cents/min in the second semester 2012 and in the first semester 2013, respectively (compared to the average MTRs of 1 and 0.8 Euro cents/min which would prevail in a context of full symmetry). Therefore, the average MTR would only increase by 0.06 Euro cents/min in the second semester 2012 and 0.03 Euro cents/min for the first half of 2013.

In the light of the small impact of the proposed asymmetry on the average MTRs, and the fact that the shortening of the glide path reduces the impact on operators and consumers to a considerable extent, the Commission considers that the amended draft measures now properly takes into consideration both consumers' welfare and reducing the disruptive impact the amended measures will have on the new entrant operators.[30]

As to consumer welfare, the Commission notes that operators' savings from the shortening of the MTR glide path could amount to between EUR 5 and EUR 20 million. As a consequence of such savings, the established MNOs would be in a better position to counter the increased competitive pressure exerted by new entrants and pass those savings on to consumers by way of sustainably lower retail call charges.

As to the impact on operators, the Commission is of the view that the proposed shorter glide path could mitigate the negative effect that an immediate removal of any price asymmetries and the associated loss in revenues could have on the viability of new entrants' business cases[31]. This is especially relevant in the French mobile market where the retail prices have dropped and all-net tariff plans have become more widespread since the entry of Free and the two MVNOs.

Provided the above mentioned improvements (i.e. the significant shortening of glide path setting asymmetric MTRs –between 6 months and potentially two and a half years- and the exclusion of any further asymmetry in MTRs for the future) and taking into account the fact that both the established MNOs and the new entrants are competing on the basis of the already signed agreements for access (i.e. retail prices depend on the current and future signed wholesale prices), the Commission is of the view that ARCEP's amended measures comply with Article 8(4) of the Access Directive because they are based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive.

Indeed, given the above assessment of the impact on consumers and operators, the Commission further concludes that the amended price control will ensure that the chosen cost recovery mechanism serves to promote efficiency and sustainable competition and maximises consumer benefits, as Article 13(2) of the Access Directive states.

Once the Commission finds that ARCEP's amended measures comply with Article 8(4) and 13(2) of the Access Directive, it is concluded that such amended measures also comply with Article 16(4) of the Framework Directive which requires NRAs to impose

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30 See also the Commission's reasoning in case ES/2012/1314.

31 The agreements signed by Free Mobile and the full MVNOs set the price conditions for originating and terminating calls on the MNOs' network from […].

on SMP undertakings appropriate regulatory obligations.

VII.2. Creation of barriers to the internal market

The Commission takes note of ARCEP's argument regarding the marginal difference between the average MTR, which would stem from the amended measures, and the regulated cost oriented symmetric MTR; i.e. 0.06 and 0.03 Euro cents/min in the second semester of 2012 and first semester of 2013, respectively. The Commission also refers to the fact that, according to ARCEP, international calls represent a low percentage of the incoming traffic (only 10%) and that foreign operators do not differentiate their rates according to the network of the called operator.

On this basis and provided the relatively small size of the new entrants, the Commission recognizes that such a small change in the average MTR would not lead foreign operators to reconsider their retail tariffs for calls to French mobile numbers and increase them accordingly. Consequently the impact on the internal market of a reduced asymmetry as proposed by ARCEP in its amended measure will also be rather small.

In this respect the Commission also takes account of the opinion of BEREC which considered the overall effect on the internal market of ARCEP's original draft measure to be already relatively minor.

Recognizing also that NRAs have a certain margin of discretion, which could, on the basis of arguments as set out above, allow them to delay to a limited degree the introduction of fully cost-efficient rates[32], the Commission concludes that it can lift its serious doubts also in this respect.

As a result of the above assessment concerning the compliance with the EU regulatory framework and the creation of barriers to the internal market, the Commission has decided, after taking utmost account of the opinion of BEREC, to lift its reservations pursuant to Article 7a(5)b) of the Framework Directive with immediate effect.

Within one month, ARCEP shall communicate to the Commission the adopted final measure.

The Commission’s position on this particular amended notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC[33], the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission[34] within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication[35]. You should give

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[32] See Case ES/2012/1314 and cases SK/2012/1313, BG/2012/1318, CZ/2012/1327, GI/2011/1248 and MT/2012/1330.

[33] Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC, OJ L 301, 12.11.2008, p. 23.

[34] Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32.2.298.87.82.

reasons for any such request.

Yours sincerely,
For the Commission,

Joaquín ALMUNIA
Vice-President

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[35] The Commission may inform the public of the result of its assessment before the end of this three-day period.