EUROPEAN COMMISSION

Brussels, 21/06/2012
C(2012)4360

Malta Communications Authority (MCA)

Valletta Waterfront — Pinto Wharf
FRN 1913 Valletta
Malta

For the attention of:
Mr Philip Micaleff
Executive Chairman

Fax: 356 21 336 846

Dear Mr Micaleff,

Subject: Commission decision concerning Case MT/2012/1330: Voice call termination on individual mobile networks in Malta

Comments pursuant to Article 7(3) of Directive 2002/21/EC

I. PROCEDURE

On 21 May 2012, the Commission registered a notification from the Maltese national regulatory authority, the Malta Communications Authority (MCA),[1] concerning a modification of remedies on the markets for voice call termination on individual mobile networks in Malta.[2]

The national consultation[3] ran from 30 March 2012 to 30 April 2012.

On 25 May 2012, a request for information (RFI)[4] was sent to MCA and a response was received on 30 May 2012. An addendum to the response was received on 8 June 2012.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities

1 In accordance with Article 7 of 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 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.

3 In accordance with Article 6 of the Framework Directive.

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

(NRAs), the Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on notified draft measures to the NRA concerned.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

The second review of the market for voice call termination on individual mobile networks in Malta was previously notified to and assessed by the Commission under case MT/2008/0790,[5] and updated in case MT/2009/0926.[6] In 2009, MCA imposed on operators with significant market power (SMP) a set of obligations including price control based on benchmarking. The Commission, in its comments, urged MCA to select objective criteria and to clearly justify why they provide the most suitable basis for comparison.

Amendments to the price control remedy were introduced in 2010 and 2011 (cases MT/2010/1096[7] and MT/2011/1241[8]). In 2010, MCA (i) modified its benchmarking approach by choosing as the baseline the average of the lowest 75 % of MTRs in the EU Member States as presented in the 15th Implementation Report by the European Commission, which resulted in a reduced rate of 6.17 eurocents, (ii) expressed its intention to shift to a benchmarking approach using data from NRAs that already use a pure LRIC methodology as soon as reliable data are available. The Commission reiterated its comments from case MT/2009/0926, stressing the issue of proper implementation of a benchmark and application of the cost model recommended by the Commission by the end of 2012.[9]

In its final measure of 6 August 2010, MCA, taking account of comments received during the consultation process, decided to use the snapshot report of the Body of European Regulators in Electronic Communications (BEREC) instead of the European Commission’s Implementation Report as its data source for the benchmarking methodology for the forthcoming MTR review.

In 2011, as a result of the August 2010 decision, MCA based MTRs on the average of the lowest 75 % of MTRs in the EU as presented in the BEREC snapshot report published in January 2011, which resulted in MTRs of 4.18 eurocents. MCA also stated that once 25 % of Member States had adopted a pure LRIC methodology, MCA would apply an alternative benchmarking based on pure LRIC rates prevailing in those countries and carry out a review before the expiry of the one-year period. MCA reiterated its commitment that by December 2012 it would produce its own BU-LRIC model. In its comments letter, the Commission (i) noted that MCA had not set out why the proposed benchmarking against 75 % of Member States appropriately reflects conditions in Malta and (ii) invited MCA to already start benchmarking those Member States that had introduced or have been working towards pure LRIC rates.

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5 SG-Greffe(2008)D/205261.

6 SG-Greffe(2009)D/3837.

7 SG-Greffe(2010)D/11456.

8 SG-Greffe(2011)D/14205.

9 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.

II.2. The notified draft measure

The notified draft measure concerns a change in the level of MTRs in Malta, with a view to a transition towards pure BU-LRIC rates. Although MCA is committed to introducing the two BU-LRIC models (for fixed and mobile call termination) as soon as possible, it expects to have developed the model for mobile call termination only by 2013. In its response to the RFI and the subsequent addendum to the response, MCA underlined its absolute commitment i) to have in place the BU-LRIC model not later than June 2013[10] and ii) to replace the interim rate with the results of the model by June 2013.[11]

Meanwhile (and despite the fact that the threshold[12] of 25 % of Member States having adopted a pure LRIC methodology has not been reached), MCA proposes to continue using a benchmark approach and to set a new interim MTR price cap of 2.32 eurocents as of 1 July 2012. This level represents an interim rate[13] between MCA's 2011 MTR level of 4.18 eurocents and the indicative LRIC target rate of 1.29 eurocents. The latter is calculated as the simple average of the pure LRIC targets,[14] as disclosed in the January 2012 BEREC MTR snapshot report (including those rates set on a glide path towards pure LRIC rates), which NRAs would achieve by the end of 2013.

MCA states that the indicative target rate of 1.29 eurocents is only calculated in order to derive the interim rate of 2.32 eurocents. MCA does not consider it appropriate to introduce the benchmarked target rate as early as January 2013 or prior to the results of the BU-LRIC model. MCA fears that the benchmarked rate might be below the actual modelled rate, due to particular circumstances in Malta.[15]

MCA further explains that it has limited resources, preventing it from working in parallel on fixed[16] and mobile termination models. MCA also stresses that its proposed interim rates are within the EU average even taking into account rates based on pure LRIC models during 2012.

Nonetheless, MCA still expects to meet the objectives set out in the Termination Rates Recommendation by ensuring that the interim rate does not deviate disproportionately from the average of those rates set in 2013 by Member States adopting the pure LRIC methodology.

10 Subject only to unforeseen procurement-related delays, outside the control of MCA.

11 Malta plans to carry out the next MTR review in Q2/early Q3 of 2013. The third-round review of the market is also planned for 2013.

12 Set in MCA's 2011 decision.

13 The interim rate is 45 % lower than the current MTRs. It is also 45 % higher than the indicative target MTRs of 1.29 eurocents, resulting from international benchmarking based on pure LRIC rates.

14 MCA takes into consideration Belgium, France, Hungary and the United Kingdom. Also, for comparison, MCA uses the Cullen International (March and April 2012) MTR report, which shows that Cullen's average MTR based on pure LRIC is the same as the MCA's proposed 'pure' indicative LRIC target rate of 1.29 eurocents. The Cullen International report includes those EU Member States that have calculated a pure LRIC rate irrespective of whether the rate has been overturned or appealed in court: i.e. Belgium, Denmark, France, Hungary, Italy, the Netherlands, Portugal, Romania, Slovenia, Spain, and the United Kingdom.

15 Mainly due to limited economies of scale.

16 MCA states that the fixed model is well underway and the technical consultation on its parameters/outputs is expected to be launched during the first week of June 2012.

III. COMMENTS

The Commission has examined the notification and the additional information provided by MCA and has the following comments:[17]

Need for a timely price control obligation ensuring efficient cost-oriented termination rates

The Commission notes that for the period from 1 July 2012 until the adoption of the pure BU-LRIC model (expected before 30 June 2013), MCA proposes to set MTRs on the basis of a benchmarking method.

While acknowledging the reasons why MCA is not in a position to conclude the development of a BU-LRIC model for mobile call termination by 31 December 2012, the Commission underlines that the purpose of Recital 22 and of Recommend 12 of the Termination Rates Recommendation is to enable NRAs, in the event of limited resources, to arrive at a cost-efficient rate without having to finalise a pure BU-LRIC model in a timely manner. Therefore, as indicated by the Commission in similar cases,[18] if the alternative methodology chosen is benchmarking, it should be performed by taking into account the average MTRs of those Member States which have implemented the recommended cost methodology. Furthermore, the rates used for benchmarking should represent the cost-efficient target rates at the end of the respective glide paths,[19] but not the rates at a certain point along the glide paths. Such an approach has also been recently endorsed by BEREC.[20]

In the present case, the Commission observes that the proposed benchmarking method does not seem to be consistent with the Termination Rates Recommendation.

First, the Commission notes that the rates to apply as of 1 July 2012 and until the BU-LRIC model is applied are interim rates between the current and the target rate so cannot correspond to the target rate as such.

Secondly, the Commission notes that, for calculating the target rate, MCA does not benchmark the cost-efficient rates at the end of the respective glide paths, but rather the intermediate rates applying on 31 December 2013.[21] Furthermore, MCA bases its benchmark on information disclosed in the BEREC MTR snapshot report of January 2012. The Commission notes that this report does not contain information — which is reliable and readily available — on all rates in the Member States that have adopted the recommended pure BU-LRIC methodology.[22]

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[17] In accordance with Article 7(3) of the Framework Directive.

[18] See Commission comments in cases IE/2008/0746, IT/2008/0779, SK/2012/1313 and BG/2012/1318.

[19] See case EE/2012/1305.

[20] See BEREC's opinion in Phase II investigation in cases NL/2012/1284 and NL/2012/1285 on fixed and mobile termination markets in the Netherlands.

[21] Unless the rates on that date coincide with the rates at the end of the glide path, they do not represent the target rates but only a step on the glide path towards cost-efficient rates compliant with the Recommendation.

[22] The following countries have so far notified a pure BU-LRIC cost model for setting MTRs:

As a consequence of the method chosen by MCA, the calculated MTRs to be applied until the BU-LRIC model is implemented will be set above the average of the MTRs set in Member States implementing the pure BU-LRIC model.

The Commission also takes note of MCA's strong commitment to implement its BU-LRIC model for mobile call termination by 30 June 2013 at the latest, subject only to unforeseen circumstances related to the procurement process.

Against this background, in order both to bring the benefits of lower MTRs more quickly to consumers and to avoid excessively steep drops in MTRs at the end of the transition, the Commission calls upon MCA to modify its benchmarking method in such a way that it would lead to reduced MTRs, in line with the Termination Rates Recommendation, already in the period preceding the implementation of its BU-LRIC model. To this end, MCA would have to include all readily available and reliable information on effective target MTRs, as calculated by all NRAs that have developed the recommended cost methodology, and apply such a target rate, rather than an interim rate on a glide path, as of 1 January 2013 at the latest, the deadline in the Termination Rates Recommendation.

The Commission reminds MCA that, should its price control remedy for the period following 1 July 2013 deviate from EU law and the principles of the Termination Rates Recommendation, the Commission could open a phase II investigation pursuant to Article 7a of the Framework Directive.

Pursuant to Article 7(7) of the Framework Directive, MCA shall take the utmost account of the comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measure; where it does so, shall communicate it to the Commission.

The Commission's position on this particular 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[23] 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[24] within three

Country	**Target Rate (€ct/min)**	**Deadline**
NL*	1.2	01/09/2012
BE	1.08	01/01/2013
FR	0.8	01/01/2013
PT	1.27	01/01/2013
IT	0.98	01/07/2013
ES	1.09	01/07/2013
UK**	0.81	01/04/2014

* OPTA renotified MTR remedies following a national court judgment requiring MTRs to be set according to a different cost model, resulting in a target rate of 2.4 €ct/min.

** Adopted rate. The UK's Competition Commission, by decision of 9 February 2012, endorsed Ofcom's use of a BU-LRIC cost model but asked Ofcom to shorten the glide path by one year (with a new target date of 1 April 2013).

23 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 of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 301, 12.11.2008, p. 23.

24 Your request should be sent either by email: INFSO-COMP-ARTICLE7@ec.europa.eu or by fax:

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.[25] You should give reasons for any such request.

Yours sincerely,
For the Commission,
Robert Madelin
Director-General

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