



EUROPEAN COMMISSION

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Commission for Communications
(COMREG)

Block DEF — Abbey Court — Irish
Life Centre, Lower Abbey St.
Dublin 1
Ireland

Mr Alex Chisholm
Chairperson of the Commission

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Dear Mr Chisholm,

Subject: Commission Decision concerning: Case IE/2012/1371 — Voice call termination on individual mobile networks in Ireland; Case IE/2012/1372 — Call termination on individual public telephone networks provided at a fixed location in Ireland — Remedies; and Case IE/2012/1373 — Voice call termination on individual mobile networks in Ireland — Remedies.

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

I. PROCEDURE

On 11 and 12 October 2012, the Commission registered notifications from the Irish national regulatory authority, Commission for Communications (ComReg),¹ concerning (i) the review of the market for voice call termination on individual mobile networks in Ireland, including remedies,² and (ii) remedies related to the market for call termination on individual public telephone networks provided at a fixed location³ in Ireland.

¹ Under 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 (Recommendation on Relevant Markets), OJ L 344, 28.12.2007, p. 65.

³ Corresponding to market 3 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 (Recommendation on Relevant Markets), OJ L 344, 28.12.2007, p. 65.

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The national consultation⁴ on the first issue ran from 23 May 2012 to 19 July 2012, and on the second issue from 28 June 2012 to 10 August 2012.

On 19 October 2012, a request for information⁵ (RFI) was sent to ComReg and a response was received on 24 October 2012. The deadline for the EU consultation under Article 7 of the Framework Directive is 12 November 2012.

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

Fixed termination

The market for call termination on individual public telephone networks provided at a fixed location in Ireland was previously notified to and assessed by the Commission under cases IE/2005/0191,⁶ IE/2007/0701,⁷ IE/2009/0917⁸ and IE/2011/1220.⁹

In the previous market review, ComReg defined seven relevant markets and stated that all fixed telecommunication operators providing call termination services had significant market power (SMP) in their networks. ComReg proposed to impose on Eircom the obligations of access, transparency, non-discrimination, accounting separation, cost orientation and cost accounting. Alternative network operators (ANOs) were made subject to transparency, non-discrimination and price control obligations. The specific obligation imposed on Eircom was to ensure that FTRs were calculated using a forward-looking, long-run incremental costs (FL-LRIC) model. ANOs designated with SMP were exempt from cost orientation until they reached a 5% share of total direct access paths. If the ANO did not reach the 5% share of the market within five years, ComReg would impose a price control regulation. ComReg has not yet decided whether any FSP has reached this 5% threshold and, accordingly, the FTRs charged by ANOs have not to date been subject to any price control obligations.¹⁰

In its comments on the 2007 market reviews, the Commission considered ComReg's approach to alternative operators as inconsistent with EU practice and invited ComReg to revisit its market analysis. The Commission then invited ComReg to align its forthcoming review with the Commission's Termination Rates Recommendation and set FTRs for all SMP operators at the level of costs incurred by an efficient operator to

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 (Recommendation on Relevant Markets), OJ L 344, 28.12.2007, p. 65.

⁴ In accordance with Article 6 of the Framework Directive.

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

⁶ SG-Greffe (2005)D/202695.

⁷ SG-Greffe (2007) D/207013.

⁸ C(2009)4570.

⁹ C(2011)4377.

¹⁰ In Case IE/2011/1220, ComReg intended to revise the current FL-LRIC cost-accounting model in 2012.

achieve symmetric price control remedies on the relevant market. The Commission also underlined the need for a coherent European approach regarding the cost accounting method.

Mobile termination

The market for voice call termination on individual mobile networks in Ireland was previously notified to and assessed by the Commission under cases IE/2008/0746, IE/2005/0216 and IE/2004/0073.¹¹ Furthermore, ComReg specifies in the response to the RFI that some recent MTR reductions (not notified to the Commission) were made in Ireland on the basis of a voluntary glide path approach. According to ComReg, these reductions were not the result of a draft measure under Article 7(3) of the Framework Directive and, accordingly, would not require notification to the Commission under the Article 7 consultation procedure.

In its 2008 Decision, the Commission underlined the need for a coherent European approach regarding the cost accounting method.

II.2. Market definition

Regarding mobile call termination, ComReg concludes that the product market consists of the provision by a mobile service provider¹² of a wholesale service to other undertakings for the purpose of terminating incoming voice calls to mobile numbers in respect of which the MSP is able to set MTRs.

ComReg defines six separate wholesale markets on the networks of Hutchison 3G Ireland Limited (H3G), Lycamobile Ireland Limited (Lycamobile), Meteor Mobile Communications Limited (Meteor), Telefónica Ireland Limited (O2), Tesco Mobile Ireland Limited (TMI), and Vodafone Ireland Limited (Vodafone).

As regards fixed call termination, a new market review is currently on-going and expected to be notified in Q1 2013. The currently imposed remedies relate to the previous market review.

II.3. Finding of significant market power

ComReg proposes to designate all six MSPs as having SMP in their respective markets. The main criteria considered by ComReg are (i) market share, relative strength of existing competitors and pricing behaviour, (ii) control of infrastructure not easily duplicated, (iii) barriers to entry and potential competition and (iv) countervailing buying power.

ComReg considers that the two MVNOs, TMI and Lycamobile, are the only virtual operators able to set their own MTRs.¹³

¹¹ SG-Greffe(2008) D/200677, SG-Greffe(2005)D/204274 and SG-Greffe(2004) D/203078.

¹² Mobile service providers are either mobile network operators (MNOs) or mobile virtual network operators (MVNOs). While the level of network access provided under MVNO arrangements can vary, MVNOs in Ireland are similar in that they have neither an allocation of spectrum nor any radio access network (mast, antennae, etc.) infrastructure.

¹³ Two other MVNOs, Postfone and Blueface, were not deemed to fall within the scope of the relevant market given they do not charge, nor do they currently have the ability to set, an MTR. However, if they (or any other new entrant) begin to do so, ComReg intends to carry out a market analysis according to the EU consultation procedure.

II.4. Regulatory remedies

ComReg intends to impose the following obligations on SMP operators in both fixed and mobile termination markets: (i) access, (ii) non-discrimination, (iii) transparency, and (iv) price control.

ComReg considers that the long-run, incremental costs methodology is the most appropriate approach for calculating FTRs and MTRs. However, while FTRs will be based on a bottom-up long-run incremental cost (BU-LRIC) model, MTRs will be based on a BU-LRIC benchmark approach.

ComReg is of the view that there should be the same implementation dates in both markets in order to minimise distortions and to ensure consistent application. Consequently, implementation of the FTRs and MTRs resulting from the proposed methodologies is planned for 1 July 2013.

Fixed Termination

ComReg explains that, for the current FTRs in place from 1 July 2012, the industry expects that reduced FTRs will remain in place for at least 12 months, i.e. up to 30 June 2013. ComReg considers that an implementation date of 1 July 2013 will give providers sufficient time to adjust their forecasts and other relevant data.

ComReg proposes that all SMP operators be made subject to the cost-orientation obligation. Eircom's costs would no longer be calculated according to a FL-LRIC model but be based on a pure BU-LRIC methodology. For the other SMP operators, the current price control imposed on them (such as explained in II.1) will be amended to cost-orientation, also based on a pure BU-LRIC methodology.

The proposed BU-LRIC-based FTRs are set out in the table below:

BU-LRIC FTR		
Start date	Cent per minute (blended rate¹⁴)	Efficient network technology¹⁵
1 July 2013	0.098	TDM
1 July 2014	0.085	TDM/NGN
1 July 2015	0.072	NGN

Eircom's national termination rates include primary, tandem and double tandem termination rates. The majority of traffic is exchanged between the other SMP operators and Eircom at the primary level. ComReg specifies that, for the purposes of the current draft measure, only the primary FTR is relevant.¹⁶

¹⁴ Blended rate per minute of the cost per minute and the cost per call, where the average call duration is 2.66 minutes.

¹⁵ Taking into account the Commission's guidance that the cost model should be based on the most efficient technologies, subject to their availability in the timeframe considered by the model, ComReg's model for FTRs is based on a mix of PSTN and NGN as the incumbent and ANOs have confirmed that they have not yet procured an NGN voice solution for 2013 and will gradually introduce the upgrade, possibly from 2014. At this stage, ComReg therefore believes that the most efficient means of terminating fixed calls for 2013 and 2014, in the absence of a fit-for-purpose NGN solution, is the current network in place, i.e. TDM equipment, albeit with a transition to a NGN solution envisaged in 2014. However, given the incumbent has made it known that it is procuring a NGN voice solution, ComReg has modelled a full NGN voice network in the pure BU-LRIC cost model for 2015.

¹⁶ The tandem and double-tandem termination rates are defined as 'transit' and currently subject to the regulatory regime applicable to the wholesale market for call transit services. Tandem and double-

Mobile Termination

Maximum MTRs will be based on a benchmark approach, following a glide path¹⁷ reduction towards a target MTR of € 1.02/min to be achieved as of 1 July 2013.

MTRs changes towards benchmarked rate	
<u>Start date</u>	<u>Cent per minute</u>
1 July 2012	4.15
1 January 2013	2.58
1 July 2013	1.02

All six MSPs will be subject to a symmetric MTR as of 1 January 2013 and will, as of 1 July 2013,¹⁸ charge rates that are not higher than the benchmarked pure BU-LRIC MTR.

The maximum target MTR of € 1.02/min was calculated using a benchmark based on the countries that have notified pure BU-LRIC models for MTRs to the European Commission, i.e. UK, Belgium, Portugal, Spain, France, Denmark and Italy.¹⁹ The benchmark will therefore be visible to ComReg and industry on the Commission website and in the updated BEREC snapshot reports published bi-annually.

ComReg stresses that, due to *inter alia* limited resources, it is not at this stage in a position to develop a pure BU-LRIC model. Therefore the benchmark approach for setting MTRs will apply until a pure BU-LRIC model for MTRs is available in Ireland. ComReg intends to make this model available for review as soon as possible, but no later than July 2014, i.e. the maximum timeframe allowed for in the Recommendation for using an alternative approach. However, ComReg intends to conduct a market review on a six-monthly basis after 1 July 2013 in order to ensure that the MTRs in Ireland reflect the current average of all notified MTRs. ComReg further stresses that the review may lead to a revision of the benchmark MTR and consequently of the maximum permitted MTR in Ireland. In that case, i.e. if a change to the rate of 1.02 cent per minute is considered necessary prior to the completion of the BU-LRIC model, ComReg would act

tandem termination rates will be considered in further detail in ComReg's upcoming consultations as part of the review of the wholesale call origination, wholesale call transit, and wholesale call termination markets.

¹⁷ The starting point of the glide path is the weighted average of the current MSP rates in Ireland (such as published in the most recent BEREC snapshot). MTRs are generally differentiated by peak, off-peak and weekend usage.

¹⁸ The current voluntary glide path in place for the four MSPs in Ireland previously designated with SMP runs until the end of 2012. As a result of the proposal to implement the benchmark approach from 1 July 2013, ComReg also considers it necessary to extend the current glide path approach from 1 January 2013 to 30 June 2013 by making a step change to the existing MTRs. It is proposed that this step change would be a straight line cut from the MTR on 1 January 2013 to reach the compliant pure LRIC MTR by 1 July 2013. As regards the two additional MSPs that ComReg proposes to designate with SMP for the first time (i.e. TMI and Lycamobile), ComReg proposes that they would be subject to the same MTR as those applicable to the four other SMP MSPs as of 1 January 2013.

¹⁹ Initially, ComReg considered basing its benchmark on all those countries where final and binding BU-LRIC decisions were in place. However, given that at the date of publication of ComReg's consultation, France was the only Member State where this decision was not challenged by operators, ComReg amended its approach and based its MTR benchmark on those countries (except the Netherlands) which had notified their models to the Commission.

in accordance with the consultation requirements set out in Articles 6 and 7 of the Framework Directive.

III. COMMENTS

The Commission has examined the notification and the additional information provided by ComReg and has the following comments.²⁰

Need for a consistent European approach for termination rates

Implementation date

ComReg proposes to implement termination rates consistent with the outcome of a pure BU-LRIC model only as of 1 July 2013. This is not in line with the Commission's Termination Rates Recommendation,²¹ according to which, NRAs should ensure that termination rates are implemented at a cost-efficient (BU-LRIC) level by 31 December 2012.

As regards mobile termination, for the period from 1 July 2013 until the adoption of a pure BU-LRIC model (expected by 1 July 2014 at the latest), ComReg proposes to set MTRs in Ireland on the basis of a benchmarking method. Recital 22 and of Recommend 12 of the Termination Rates Recommendation exceptionally allow NRAs, in the event of limited resources, to apply cost-efficient termination rates consistent with the Recommendation using an alternative approach. However, even in those circumstances, NRAs must comply with the deadline of 31 December 2012 set out in Recommend 11 of the Termination Rates Recommendation.

Regarding fixed termination, ComReg argues that a delayed introduction of cost-efficient FTRs by 1 July 2013 would better match business expectations. The Commission would like to stress that the Recommendation was issued in 2009 and that therefore market players are aware of the implementation dates. The timeframe set out in the Recommendation aims not only to ensure the sustainability of the sector but also to maximise consumer benefits as soon as possible. In its 2007 decision on the market review,²² the Commission invited ComReg to revisit its analysis as soon as a common costing approach for fixed termination is established at EU level. This would have allowed ComReg to ensure a more gradual transition towards BU-LRIC-based rates and to meet the implementation date set in the Recommendation.

Against this background, the Commission considers that ComReg should review its proposed glide paths for both fixed and mobile termination rates. The Commission proposes to call upon ComReg to implement the target MTR and FTR levels (€ 1.02/min and € 0.098/min respectively) by 31 December 2012, thus aligning the implementation dates with the deadline set in the Termination Rates Recommendation.

However, the Commission acknowledges that bringing in cost-efficient MTRs as of 1 January 2013 would result in a steep reduction over a very short time period.

²⁰ In accordance with Article 7(3) of the Framework Directive.

²¹ Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (Termination Rates Recommendation), 2009/396/EC, OJ L 124, 20.5.2009.

²² SG-Greffe (2007) D/207013.

The notified draft measure also proposes to impose cost-efficient FTRs on alternative operators that were not previously subject to cost-orientation. ComReg is of the view that there should be the same implementation dates in both markets in order to minimise distortions and ensure consistent application. Against this background, the Commission considers that a short delay in implementing the cost-oriented fixed and mobile termination rates, which in no circumstances should last beyond 1 July 2013, may exceptionally be acceptable in this case.

Benchmarking approach

According to ComReg, its benchmark is based on rates in the Member States that have *notified* pure BU-LRIC models to the Commission (with the exception of the Netherlands).

On this point, the Commission would like to underline that, for the purpose of benchmarking, an average of termination rates set by the NRAs by way of final decisions in the Member States should be applied.²³ This is without prejudice to an appeal pending against a final decision, as far as the rates adopted therein are implemented, i.e. in force.

The Commission acknowledges that in this particular case, the proposed MTR (€ 1.02/min) appears to be consistent with the EU simple average of the Member States that have implemented a pure BU-LRIC model by a way of a final decision, and that therefore the outcome of ComReg's benchmarking is in line with the Commission's recommended approach. The following table, also cited by ComReg in its notification,²⁴ lists all the Member States that have *adopted* the pure BU-LRIC model by a way of a *final decision* and a simple arithmetic average of the adopted rates in those countries yields € 1.02/min:

Country (Case number)	Target rate €/min)	Deadline
BE (BE/2010/1086)	1.08	01/01/2013
FR (FR/2011/1200)	0.80	01/01/2013
PT (PT/2012/1312)	1.27	01/01/2013
IT (IT/2011/1219)	0.98	01/07/2013
ES (ES/2012/1291)	1.09	01/07/2013
DK (DK/2012/1342)	1.07*	01/01/2013
UK (UK/2010/1068)	0.86**	01/04/2013

* DKK 0.08/min — corresponds to the exchange rate on 20 June 2012.
 ** Adjusted rate by Ofcom following the Competition Appeal Tribunal's judgment, according to which the MTRs glide-path would target 0.67ppm (2008/09 prices) on 1 April 2013. This corresponds to the exchange rate on 24 July 2012.

In view of future reviews of the benchmark rate, the Commission would therefore like to invite ComReg to clarify in its final decision that it includes in its benchmarking exercise all pure BU-LRIC MTRs notified to the Commission, at the target level, and as specified in the *final decisions taken* by the NRA.

²³ See Commission comments in cases EL/ 2012/1343 and LV/2012/1356.

²⁴ With one difference, the UK rate of 0.083 €/min was used as it corresponds to the exchange rate of 9 October 2012.

Pursuant to Article 7(7) of the Framework Directive, ComReg 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/EC²⁵ 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 Commission²⁶ 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.²⁷ You should give reasons for any such request.

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

²⁵ 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.

²⁶ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2298 87 82.

²⁷ The Commission may inform the public of the result of its assessment before the end of this three-day period.