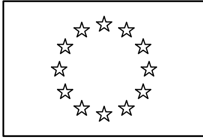

EUROPEAN COMMISSION

Brussels, 5/03/2012
C(2012)1541

SG-Greffe (2012) D/4105

Comisión del Mercado de las Telecomunicaciones (CMT)

Carrer de la Marina 16-18
E-08005 Barcelona
Spain

For the attention of:
Mr Bernardo Lorenzo
Presidente

Fax: +34 93 603 63 20

Dear Mr Lorenzo,

Subject: Commission decision concerning case ES/2012/1291: Voice call termination on individual mobile networks in Spain

Opening of Phase II investigation pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC

I. PROCEDURE

On 3 February 2012, the Commission registered a notification by the national regulatory authority of Spain, the *Comisión del Mercado de las Telecomunicaciones* (CMT), concerning the wholesale markets for voice call termination on individual mobile networks[1] in Spain.

The national consultation[2] ran from 5 December 2011 until 5 January 2012. The deadline for the EU consultation under Article 7 of the Framework Directive is 5 March 2012.

A request for information was sent to CMT on 17 February 2012 and the reply was received on 22 February 2012.

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[1] Corresponding to market 7 in Commission Recommendation 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. 65-69.

[2] In accordance with Article 6 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.

Pursuant to Article 7a(1) of the Framework Directive, the Commission may notify the national regulatory authority (NRA) and the Body of European Regulators for Electronic Communications (BEREC) of its reasons that the draft measure would create a barrier to the internal market or its serious doubts as to its compatibility with EU law.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Previous notifications

In its second round review of the markets for call termination on individual mobile networks in 2008[3], CMT designated the following operators with significant market power (SMP): the three largest operators, Telefónica Móviles España, S.A.U. (TME, operating under the brand name Movistar), Vodafone España, S.A. (Vodafone) and France Telecom España, S.A. (Orange); the later entrant and 3G only operator, Xfera Móviles (Xfera, operating under the brand name Yoigo) and nine full mobile virtual network operators (MVNOs)[4]. The applicable remedy of price control was differentiated in the following way: TME, Vodafone and Orange were obliged to set symmetric, cost-oriented mobile termination rates (MTRs). Xfera was required to set reasonable prices, whereby the prevailing margin of 48.82% with respect to the MTRs of the largest operators was supposed to be reduced. The full MVNOs were put under the obligation to set reasonable prices, whereby CMT considers MTRs reasonable which are equal to the MTRs of the host MNOs[5]. At the time, CMT maintained the existing price levels and notified to the Commission new price levels (incl. a new glide-path) in 2009[6]. Based on a top-down fully allocated costs (FAC) model which estimates costs on the basis of current cost accounting, MTRs for the three biggest operators were set at 6.25 €ct/min with a target rate of 4€ct/min by 16 April 2011 and for Xfera/Yoigo at 8.92 €ct/min with a target rate of 4.98 4ct/min by 16 April 2011. The price control obligation for the MVNOs continued as set in 2008 (i.e. in correspondence with the host network)[7].

II.2. The notified draft measure

The notified draft measures relate to the third round review of the wholesale market for voice call termination on individual mobile networks, which corresponds to Market 7 of the Recommendation on relevant markets.

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3 Notified to and assessed by the Commission under case ES/2008/0819, SG-Greffe (2008) D/207635.

4 Euskatel, ONO, R Cable, E-Plus, Telecable, BT, Jazztel, Fonyou, Best Telecom.

5 On all operators, the obligations to meet reasonable access requests as well as non-discrimination were imposed. Accounting separation and cost accounting were in addition imposed upon the three largest operators.

6 Notified to and assessed by the Commission under case ES/2009/0937, SG Greffe (2009) D/4426.

7 In its comment letter to CMT, the Commission highlighted the need for setting termination rates at the level of efficient costs, using a LRIC model, as recommended in the Commission's Recommendation 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, p. 67. In addition the Commission reminded CMT to ensure the application of symmetric MTRs by the 31 December 2012 at the latest, In this respect the Commission invited CMT to apply steeper reductions for Xfera's termination rates in order to avoid the need for sudden drops or unduly steep glide-paths at the end of the transition period provided for on the Termination Rates Recommendation.

II.2.1. Market definition

CMT proposes to define distinct markets for voice call termination on the networks of the active mobile network operators (MNOs) and full mobile virtual network operators (full MVNOs). Voice call termination is defined as a wholesale service provided by the MNOs and full MVNOs in their respective networks, regardless of the origin of the call, and does not apply to any data services (such as SMS or Voice over IP, VoIP, calls). The geographic scope of each market coincides with the geographic coverage of the network concerned and is determined as national.

CMT did not include in this analysis the networks of CLM and COTA, two operators, which recently had been awarded spectrum in the 2.6 Ghz band, as both these operators are not, as yet, offering termination services on their networks[8].

II.2.2. Finding of significant market power

CMT intends to designate the three incumbent MNOs[9], the latest entrant MNO Xfera Móviles, S.A. (Yoigo) as well as ten full MVNOs[10] as having SMP in the market for wholesale voice call termination on their respective individual mobile networks. The main criteria considered by CMT when reaching its conclusion are: (i) the market shares (each of the four MNOs and each of the ten MVNOs has a 100%-market share on the market for voice call termination on its individual network); (ii) barriers to entry and (iii) the lack of countervailing buyer power.

II.2.3. Regulatory Remedies

CMT proposes to impose the following sets of remedies on three different groups of SMP operators it has identified:

1. With respect to the three largest MNOs (TME, Vodafone and Orange): (i) access obligation consisting of obligations to meet reasonable requests for access; (ii) price control and cost accounting obligation which requires the MNOs to set fully cost-oriented termination rates following a new glide-path where the mobile termination rates (MTRs) will be symmetric; (iii) accounting separation obligation with respect to access and interconnection; (iv) a non-discrimination obligation and (v) a transparency obligation.
2. With respect to the fourth MNO, Yoigo, which entered the market in 2006: (i) access obligation consisting of obligations to meet reasonable requests for access; (ii) price control requiring Yoigo to set fully cost-oriented termination rates but follows a different glide-path than the one imposed for the three larger MNOs; (iii) a non-discrimination obligation and (iv) a transparency obligation.
3. With respect to the ten full MVNOs: (i) access obligation consisting of obligations to meet reasonable requests for access; (ii) price control which requires the full MVNOs

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[8] In response to the Commission's request for information, CMT confirmed that both CLM and COTA are not expected to provide voice telephony services over the awarded spectrum within the lifetime of this review.

[9] Telefónica Móviles España, S.A.U. (TME); Vodafone España, S.A. (Vodafone) and France Telecom España, S.A. (Orange).

[10] Euskaltel, S.A. (Euskaltel); Cableuropa S.A.U. y Tenaria, S.A. (ONO); R Cable y Telecomunicaciones Galicia, S.A. y R Cable y Telecomunicaciones Coruña, S.A. (R Cable); KPN Spain, S.L.U. (Simyo); Telecable de Asturias S.A.U. (Telecable); Jazz Telecom S.A.U. (Jazztel); Fonyou telecom, S.L. (Fonyou); Digi Spain Telecom, S.L. (Digi.mobil); Lycamobile, S.L. (Lycamobile); and SCN Truphone, S.L. (Truphone).

to set reasonable prices whereby the MTRs will be equal to the MTRs of the host MNOs; (iii) a non-discrimination obligation and (iv) a transparency obligation.

Cost model for the calculation of cost-oriented prices

The main difference between the obligations imposed on the different operators is how the applicable price control obligation is designed for each individual SMP operator. In essence it is CMT's objective, ultimately, to set the MTRs for all four MNOs based on a Bottom-Up Long-Run Incremental Cost (BU-LRIC) model, as requested by the Commission in its Termination Rates Recommendation. CMT's BU-LRIC model is based on the costs of an efficient operator as is stipulated in the Termination Rates Recommendation. Under CMT's BU-LRIC model the cost-oriented target level includes a mark-up of 0.35 €ct/min for interconnection commercial costs, which are, according to CMT, directly attributable to the termination services.

As a result, the target rate to be achieved at the end of a glide-path is at 1.09 €ct/min, which will be within the range of MTRs set by other NRAs already applying a BU-LRIC model[11].

Proposed glide-path and continued asymmetry of MTRs

However, CMT is proposing to apply the following glide-paths in order to minimise any disruptive impact a steeper reduction of termination rates might have on the operators:

Level of MTRs for TME (Movistar), Vodafone, and Orange

(prices in €c / min)

From 16/04/12 to 15/10/12	From 16/10/12 to 15/04/13	From 16/04/13 to 15/10/13	From 16/10/13 to 31/12/13	From 01/01/14
3.42	2.84	2.25	1.67	1.09

[11] The following countries have, so far, notified a pure LRIC cost model to set MTRs:

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

* It has to be noted, though, that in the Netherlands a national court required OPTA to set MTRs according to a different cost model, resulting in a target rate of 2.4 €ct/min, whereas in the UK, the Competition Commission, with 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 1/04/2013).

Level of MTRs for Xfera (Yoigo)

(prices in €c / min)

From 16/04/12 to 15/10/12	From 16/10/12 to 15/04/13	From 16/04/13 to 15/10/13	From 16/10/13 to 31/12/13	From 01/01/14
4.07	3.16	2.41	1.67	1.09

As can be seen the target rate of 1.09 €ct/min for all four MNOs will not be reached until 1 January 2014, i.e. one year after the deadline for the application of fully cost-oriented rates based on a BU-LRIC approach as stipulated by the Commission's Termination Rates Recommendation[12].

In addition, the different interim levels proposed for Xfera/Yoigo and the other three MNOs would result in an asymmetry of MTRs until 16 October 2013, i.e. just over ten months until after the deadline set by the Termination Rates Recommendation.

CMT justifies these two deviations from the Commission's Termination Rates Recommendation with the disproportionate and disruptive impact an earlier introduction of the fully cost-oriented rate (i.e. a steeper glide-path) would have on the MNOs in general (and Xfera/Yoigo in particular). The reduction from currently 4€ct/min (4.98 €ct/min for Xfera/Yoigo) to the target level of 1.09 €ct/min represents a reduction of almost 75% (80%), which would translate into reductions of termination incomes from […] €[13]. If put in relation to the CAPEX of the operators such immediate reductions would result in a decrease of MTR revenues equivalent to around 50% of CAPEX for the three established MNOs and approx. 100% for Xfera/Yoigo.

Although an introduction of the fully cost-oriented rate by January 2013 would most likely result in significant consumer benefits[14], CMT considers that the significant and disruptive impact on the main operators would not be proportionate[15] to the competition

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[12] See Recommends (1), (2) and (11) of the Termination Rates Recommendation.

[13] According to CMT the impact on the MNOs would be as follows:

(Data in millions of euros)	Movistar	Vodafone	Orange	Yoigo
Operating income	[…]	[…]	[…]	[…]
Annual investment (CAPEX)	[…]	[…]	[…]	[…]
Operating profit (EBIT)	[…]	[…]	[…]	[…]
Termination income (4 or 4.98 eurocents)	[…]	[…]	[…]	[…]
Termination income (1.09 eurocents)	[…]	[…]	[…]	[…]
Reduction in termination income	[…]	[…]	[…]	[…]
% reduction in relation to income	[…]	[…]	[…]	[…]
% reduction in relation to CAPEX	[…]	[…]	[…]	[…]

Source: Developed internally on the basis of information provided by the operators, CMT.

[14] In response to the Commission's request for information, CMT confirmed that the difference in total termination revenues between CMT's proposed approach and a reduction of MTRs to the target level by 1 January 2013 is approx. […]€ (i.e. […]€ under CMT's draft measure and […]€ if CMT followed the approach recommended by the Commission). This would result in a reduction of around […]%, which – judged by experience in similar cases – would translate, at least to a large degree, in significant lower consumer tariffs.

[15] In addition to the reasons cited above, CMT also points out that in the current economic climate in

problems identified in the markets as both the risk of excessive fixed to mobile prices[16] and potential price discrimination of off-net calls[17] could, in CMT's view, also be addressed with the proposed measure.

In addition, CMT believes that the impact of the remaining asymmetry for January – October 2013 will be low given Xfera/Yoigo's relatively low retail market share[18] and the low remaining level of asymmetry (11%) for 2013.

III. ASSESSMENT

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

Draft measures imposing regulatory obligations on undertakings with SMP in Spain 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. They comprise measures that have a significant impact on operators or users in other Member States, *inter alia* measures, which affect prices for users. Consequently, such draft measures may affect the patterns of trade between Member States[19].

The Commission has serious doubts as to the compatibility with EU law of CMT's draft decision concerning the wholesale market for voice call termination on individual mobile networks in Spain in its current form, in particular with the requirements referred to in Article 16(4) of the Framework Directive and Articles 8(4) and 13(2) of the Access Directive in conjunction with Article 8 of the Framework Directive. Furthermore, the Commission considers, at this stage, that the draft measures may create barriers to the internal market.

The Commission, therefore, expresses serious doubts in this regard for the following principal reasons:

Need for an appropriate price control ensuring that customers derive maximum benefits in terms of efficient cost-based termination rates

The Commission agrees with CMT that based on the competition problem

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Spain, the economic risk of too sharp a reduction of MTRs is even more prominent. It further outlines that the two operators most affected by steep reductions of MTRs (i.e. Vodafone in absolute and Xfera/Yoigo in relative terms) have important investment commitments for the next 3 years due to the last spectrum auction and refarming, amounting to 160 million and 60 million € respectively.

[16] According to CMT to current average level of retail price for fixed to mobile calls (ca. 15.2 €ct/min) when compared with the (at the time prevailing) wholesale MTR of ca. 5€ct/min leaves a sufficient margin for fixed operators to reduce the price of fixed to mobile calls even when applying the proposed glide-path.

[17] CMT pointed out that the price differential between on-net and off-net calls has already been considerably reduced in the period from 2004 to 2011 (falling from 10€ct/min to 3.9 €ct/min). In addition single price retail tariffs, not dependent on the operator called, have been a reality on the Spanish market for some time.

[18] Xfera/Yoigo's retail market share by lines in June 2011 was at 4.9% (compared with TME/Movistar, 41.1%; Vodafone, 28.2%; and Orange 20.2%)

[19] See Recital 38 of the Framework Directive.

indentified by CMT, consisting of the risk of excessive pricing for fixed to mobile calls and the potential price-discrimination of off-net mobile calls, a price control remedy is appropriate. The Commission further welcomes CMT's commitment to set regulated mobile termination rates (MTRs) on the basis of a pure BU-LRIC cost model, at a level of 1.09 €ct/min. However, the Commission has serious doubts as to (i) whether CMT's proposal to introduce the fully cost-oriented rate not before the 1 January 2014 and (ii) whether the proposed asymmetry of MTRs between the three established MNOs and Xfera/Yoigo until the 16 October 2013 are compatible with Community law. In addition, the Commission considers that the draft measures, if adopted, would create a barrier to the single market.

Compliance with 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

The Commission refers to Articles 8(4) and 13(2) of the Access Directive[20], which requires 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 refers to Article 16(4) of the Framework Directive which requires NRAs to impose on SMP undertakings appropriate regulatory obligations.

In addition, the Commission underlines 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 points out that it may issue recommendations[21] 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 a Recommendation on fixed and mobile termination rates in the EU ('the Recommendation')[22], setting out a consistent approach that the NRAs should follow regarding price control obligations for fixed and mobile termination rates.

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[20] Directive 2002/19/EC of the European parliament and the Council of 7 March 2002 on access to, and interconnection, of electronic communications networks and associated facilities, OJ L 108, 24.4.2002, p. 7 (the Access Directive).

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

[22] 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.

For this purpose, the Commission recommended that NRAs should ensure that the termination rates are implemented at a cost efficient, symmetric level as of 31 December 2012[23].

While the Commission recognises that the NRAs have a certain margin of discretion, which could allow them to delay the introduction of fully cost-oriented and the application of symmetric termination rates, the Commission underlines that any alternative approach has to be duly justified, in order to show that it fully complies with the policy objectives and regulatory principles of the Regulatory Framework. In particular, such alternative approach would have to take into account characteristics of the specific markets to be regulated and be appropriate in light of the policy objectives and regulatory principles enshrined in Article 8 of the Framework Directive.

Indeed, Article 13(2) of the Access Directive states that NRAs shall ensure that any cost recovery mechanism or pricing methodology serves to promote efficiency and sustainable competition and maximise consumer benefit. As is clarified in the Recommendation, the Commission considers that, given the characteristics of the wholesale mobile termination market, and the associated competitive and distributional concerns[24], a cost orientation remedy based on pure BU-LRIC methodology and symmetrical termination rates would best promote competition by, among other things, ensuring that that all users derive maximum benefit in terms of choice, price and quality, in line with Article 8(2) of the Framework Directive.

Moreover, the Commission observes that mobile termination rates, which are based on a BU-LRIC model, set at an efficient level contribute to a level playing field among operators, by eliminating competitive distortions between fixed and mobile networks in the provision of fixed-to-mobile and mobile calls, respectively, and between operators with asymmetric market shares in the provision of their on/off-net offers.

Whilst the Commission recognises a certain period of time is required for the transition to the relevant BU-LRIC cost model, it considered in its 2009 Recommendation that a period of transition until 31 December 2012 would be long enough, both for NRAs to put in place BU-LRIC models and for operators to adapt their business plans accordingly, whilst recognising the pressing need to ensure that consumers derive maximum benefits in terms of efficient cost-based MTRs[25].

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[23] Recommend 11 of the Recommendation.

[24] The accompanying Explanatory Note of the Commission Staff Working paper (SEC(2009) 600, 7.5.2009) sets out that due to the particular nature of the termination markets characterised on one hand by "two-way" interconnection and on the other hand by monopolies in each relevant market, which create the incentives of terminating operators to raise prices substantially above cost, cost-orientation obligations based on a BU-LRIC methodology are the most appropriate intervention to address productive- and allocative-efficiency concerns as well as maximising consumer welfare. As a result, in order to ensure compliance with the requirements of the regulatory framework, in particular Article 13(2) of the Access Directive, i.e. the requirements to promote efficiency and sustainable competition as well as to maximise consumer benefits, NRAs shall apply a BU-LRIC cost model when setting termination rates.

[25] Recital (21) of the Recommendation.

In this particular case, the notified measure does not appear to comply with the above principles and objectives set out in the regulatory framework.

CMT proposes to delay the introduction of MTRs based on pure BU-LRIC methodology without providing sufficient economic justification showing that an introduction of fully cost-oriented MTRs at the 1 January 2013 as stipulated in the Recommendation would not better serve the promotion of efficiency and sustainable competition and maximise consumer benefit. In fact, the Commission has serious doubts that the proposed glide-path would allow for the achievement of those objectives, as it may, unnecessarily, perpetuate competitive distortions between fixed and mobile markets and/or between operators with asymmetric market shares and traffic flows and, ultimately, unduly prolong the application of consumer tariffs, which are based on above-cost wholesale inputs.

The Commission does not share CMT's justification, that an earlier introduction of fully-cost oriented prices would have a disproportionate impact on Spanish mobile operators.

Whilst the Commission takes note of the considerable reductions in termination income, which could affect all mobile operators, it would like to point out that CMT failed to set out in sufficient detail why the potentially negative impacts on mobile operators are, indeed, so disruptive that a steeper than proposed decrease of MTRs would be disproportionate and not outweighed by the evident and significant consumer benefits resulting from lower mobile termination rates. On the contrary, CMT did not rebut arguments by one of the main mobile operators in Spain (which interests' are protected under CMT's proposal), which dismissed the need for such protection and called itself for the introduction of BU-LRIC based rates by 1 January 2013 as the alternative approach proposed by CMT would lead to market distortions and unjustified comparative advantages for a few operators and was not supported by convincing economic justifications. .

In its notification CMT merely set out that the envisaged decrease of MTRs from the current level of 4 €ct/min to the target level of 1.09 €ct/min would represent a reduction of almost 75%. In response to the Commission's request for information, CMT added that the aggravation of the economic crisis in Spain should also be taken into account.

However, CMT failed to provide convincing evidence in its notification or its response to the Commission's request for information why the envisaged reduction would lead to unacceptable disruptions for the mobile operators concerned. Moreover, CMT has not shown the relevance and the impact of the economic crisis on the calculation of MTRs and why this could justify a delay in the introduction of a cost methodology which is in line with the requirements of Article 13(2) of the Access Directive. On the contrary, it appears likely that the economic crisis may have a negative impact on the ability of Spanish consumers to pay for mobile telephony services. In the light of this, delaying the application of efficient MTR, likely resulting in excessive retail prices charged to Spanish consumers, for a longer period, would have the consequence of further reducing the volume of the mobile telephony services sold by Spanish operators[26]. In any

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[26] See also table 1 in the BEREC Common Statement on Next Generation Networks Future Charging Mechanisms / Long Term Termination Issues of June 2010, BoR (10) 24 Rev 1, which clearly shows the relation between lower MTRs and increased call volumes.

event, CMT has not shown why – even as a result of the economic crisis – Spanish operators need more protection than Spanish consumers, fixed Spanish operators or operators in other European countries (many of which equally face a severe economic crisis). CMT's proposal would therefore seriously jeopardise the objective to promote efficiency and sustainable competition and maximise consumer benefit in line with Article 13(2) of the Access Directive.

Furthermore, CMT did not explore further the positive effects its decision not to start reducing MTRs earlier (with a view to reach the target date of 1 January 2013) had on Spanish mobile operators. In other words, if it had started earlier the glide-path towards the BU-LRIC target level, mobile operators would have had to reduce earlier excessive revenues stemming from their termination rates. As a result, CMT's approach so far (even after the adoption of the Termination Rates Recommendation) has allowed Spanish mobile operators to earn higher (excessive) MTR revenues for a longer period compared with the situation which would have resulted from the application of a more appropriate glide-path.

In addition, the Commission would like to point out that NRAs and operators had since the adoption of the Recommendation in May 2009 to adapt their costing methodologies and business models in order to prepare for the introduction of fully cost-oriented MTRs by 1 January 2013. The Commission's view is that in light of the long transitional period any potential negative impact has been sufficiently mediated. In addition, in light of the huge consumer benefits deriving from the application of fully cost-oriented rates[27], the objectives of Article 8(2) of the Framework and the requirements of Article 13(2) of the Access Directive on balance mandate the introduction of MTRs based on a pure BU-LRIC model by 1 January 2013 at the latest.

Based on similar considerations, the Commission has serious doubts that the proposed continued asymmetry between the MTRs for Xfera/Yoigo and those for the three established mobile operators, would be in compliance with Article 8(2) of the Framework Directive and Article 13(2) of the Access Directive. The application of symmetric MTRs based on the cost incurred by an efficient operator[28] is paramount to ensure the promotion of efficiency and sustainable competition. Any exception to the recommended symmetry for new mobile entrants should be duly justified demonstrating that the new mobile operator operates below the minimum efficient scale and incurs higher per-unit incremental costs. The Commission is of the view that CMT failed to provide sufficient justification for continuing to treat Xfera/Yoigo differently. Whilst CMT set out that to reach the target level of 1.09 €ct/min Xfera/Yoigo's termination rates have to be reduced further than those of the established three operators, resulting in an, arguably, even stronger impact on Xfera/Yoigo's business model, it did not provide the Commission with sufficient evidence substantiating potential higher per-unit incremental costs. In any case, the

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27 The potential for huge consumer benefits to be achieved by the application of a BU-LRIC cost model for setting MTRs is not only set out in the Commission Staff Working Document accompanying the Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (SEC(2009)600) of 7 May 2009 but has also been recognised in recent economic literature. See, for example, David Harbord and Marco Pagnozzi, "Network-Based Price Discrimination and 'Bill-and-Keep' vs 'Cost-Based' Regulation of Mobile Termination Rates"; published by The Berkley Electronic Press, 2010.

28 Recommend 1 of the Recommendation.

Recommendation clarifies that such exceptional asymmetric treatment of new mobile entrants should not exceed a transitional period of four years after market entry. Given that Xfera/Yoigo entered the market in 2006, any asymmetry beyond 31 December 2012 cannot be justified, as the higher (asymmetric) termination rates would be maintained beyond the time needed by such operator to adapt to market conditions and become efficient over time (which could even discourage such operator from seeking to expand its market share).

As a result of the above, the Commission is of the view that CMT did not sufficiently justify that its proposed measures would allow achieving the regulatory objectives of Art. 8 of the Framework Directive nor that they would be in compliance with Art. 13(2) of the Access Directive.

Creation of barriers to the internal market

The Commission further notes that for the period termination rates are set above the efficient level (i.e. until 1 January 2014), terminating operators in Spain will be able, on the basis of the calling party pays principle, to benefit from this rate at the expense of operators, and ultimately consumers, in those Member State from which the call originates and which do apply fully cost-oriented MTRs in line with Article 8(2) of the Framework Directive and Articles 8(4) and 13(2) of the Access Directive. Hence, the considerable difference in absolute terms derived from a glide-path with an end date beyond the 1 January 2013 results in the application of significantly above-cost termination rates for 2013 in Spain[29] and would, thus, be incurred at the expense of the operators, and eventually consumers, in the Member States from where the fixed/mobile calls originate.

Any such considerable asymmetries in mobile termination rates within the EU not only distort and restrict competition but have a significant detrimental effect on the development of the internal market, i.e. create a considerable barrier to the single market, and, therefore, result in a violation of the principles and objectives of Article 8(2) and (3) of the Framework Directive. A harmonised approach in setting mobile termination rates is particular important to ensure that regulators do not favour their national operators at the expense of operators in other Member States by deliberately delaying the introduction of fully cost-oriented mobile termination rates for as long as possible.

It is exactly for that reason that the Commission has adopted the Recommendation to ensure a harmonised application of the Regulatory Framework in order to contribute to the development of the internal market and further the objectives set out in Article 8 of the Framework Directive.

Moreover, the Commission observes that mobile termination rates 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.

Conclusion

In this particular case, the Commission observes that CMT's notification does not provide sufficient justification of why the proposed approach for the wholesale

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[29] As has been set out further above, the proposed termination rates at the beginning of 2013 would be around three times higher than those in countries which apply a cost orientation obligation in line with Article 13 (2) of the Access Directive.

markets of voice call termination on individual mobile networks in Spain meets the policy objectives and regulatory principles enshrined in Article 8 of the Framework Directive, and can be considered to be in line with Articles 8(4) and 13(2) of the Access Directive. Hence, the Commission has serious doubts that CMT's proposal on mobile termination rates in Spain can be considered appropriate in the given wholesale termination markets within the meaning of Article 16(4) of the Framework Directive and justified in light of the objectives laid down in Article 8 of the Framework Directive, and, in particular, the objectives of promoting efficiency, competition and maximum user benefits pursuant to Article 8(2) of the Framework Directive and Article 13(2) of the Access Directive.

The Commission also believes, at this stage, that the draft measure would create barriers to the internal market.

The above assessment reflects the Commission's preliminary position on this particular notification, and is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

The Commission points out that, in accordance with Article 7a of the Framework Directive, the draft measure regarding the wholesale markets for voice call termination on individual mobile networks in Spain shall not be adopted for a further three months.

Pursuant to Recital 17 of Recommendation 2008/850/EC[30], the Commission will publish this document on its website, together with a notice inviting third parties to submit observations on this serious doubts letter within ten working days. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission[31] within three working days following receipt whether you consider that, in accordance with European Union and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication. You should give reasons for such request.

Yours sincerely,
For the Commission
Maroš ŠEFČOVIČ
Vice-President of the Commission

[30] 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.

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