Brussels, 30/04/2012
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SG-Greffe (2012) D/7685

Comisión del Mercado de las
Telecomunicaciones (CMT)

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

For the attention of:
Mr Bernado Lorenzo
Presidente

Fax: +34 93 603 63 20

Dear Mr Lorenzo,

Subject: Commission decision concerning Case ES/2012/1314: Voice call termination on individual mobile networks in Spain

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

I. PROCEDURE

On 30 March 2012, the Commission registered a notification from the Spanish national regulatory authority, the *Comisión del Mercado de las Telecomunicaciones* (CMT)[1], concerning the wholesale markets for voice call termination on individual mobile networks in Spain[2].

The national consultation[3] ran from 5 December 2011 to 5 January 2012.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), the Body of European Regulators for Electronic Communications (BEREC) and

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 In accordance with Article 6 of the Framework Directive. This consultation covered however the draft measure with a longer glide path (i.e. as proposed in the withdrawn notification (see section II.1.2. of the letter).

the Commission may make comments on notified draft measures to the NRA concerned.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

II.1.1. Second round review

In its second round review of the markets for call termination on individual mobile networks in 2008[4], 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)[5]. 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[6]. At the time, CMT maintained the existing price levels and notified to the Commission new price levels (including a new glide-path) in 2009[7]. 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)[8].

II.1.2. Third round review and opening of Phase II investigation pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC

On 3 February 2012, the Commission registered a notification by CMT, concerning the third round review of the markets for voice call termination on individual mobile networks in Spain, which was identical to the present notification with the notable exception of the design of the glide-path leading to fully cost-oriented (and symmetric) termination rates.

The Commission at the time welcomed CMT's commitment to set regulated mobile termination rates (MTRs) on the basis of a pure BU-LRIC cost model. However, the

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

[5] Euskatel, ONO, R Cable, E-Plus, Telecable, BT, Jazztel, Fonyou, Best Telecom.

[6] 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.

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

[8] In its comments 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.

Commission had serious doubts as to (i) whether CMT's proposal to not introduce the fully cost-oriented rate before 1 January 2014 and (ii) whether the proposed asymmetry of MTRs between the three established MNOs and Xfera/Yoigo that would continue until 16 October 2013 were compatible with EU law. In addition, the Commission considered that the draft measures, if adopted, would create a barrier to the single market.

On 5 March 2012 the Commission, pursuant to Article 7a(1) of the Framework Directive, notified CMT and the Body of European Regulators for Electronic Communications (BEREC) of its reasons as to why it had serious doubts as to the compatibility of the draft measure with Community law and why it considered that the draft measure would create a barrier to the single market (the serious doubts letter)[9].

On 30 March 2012 CMT withdrew its draft measures.

II.2. Market definition

The notified draft measures relate to the wholesale markets for voice call termination on individual mobile networks and are, in relation to the market definition, unaltered compared with the proposals notified under case ES/2012/1291.

II.2.1. Market definition

In summary, 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.

II.3. Finding of significant market power

In relation to its SMP assessment, CMT also did not amend the previous proposals submitted under case ES/2012/1291. As a result, it intends to designate the three incumbent MNOs[10], the latest entrant MNO Xfera Móviles, S.A. (Yoigo) as well as ten full MVNOs[11] as having SMP in the market for wholesale voice call termination on their respective individual mobile networks.

II.4. 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 at the end of which the mobile termination rates (MTRs) will be symmetric; (iii) accounting separation

[9] See ES/2012/1291 (SG-Greffe (2012) D/4105).

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

[11] 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).

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 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 provided in the 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.

Proposed glide-path and continued asymmetry of MTRs

The only difference to the proposals submitted under ES/2012/1291 is the design of the glide-path to reach fully cost-oriented rates for all operators (and, consequently, also the period of time it takes to have symmetric MTRs). Under its new draft measures CMT proposes to end the glide-path for all operators 6 months earlier, i.e. on 1 July 2013 while maintaining a period of asymmetry between Xfera/Yoigo and the other MNOs until 1 July 2013. The revised glide-path is now proposed to be designed as follows:

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

(prices in c€/min)	**16/04/12 - 15/10/12**	**16/10/12 - 29/02/13**	**01/03/13 - 30/06/13**	**from 01/07/13**
Movistar, Vodafone y Orange	3.42	3.16	2.76	1.09
Yoigo	4.07	3.36	2.86	1.09

Although CMT amended its original proposals to take account of the Commission's serious doubts expressed in case ES/2012/1291, the draft measures still deviate from the Commission's Termination Rates Recommendation[12] in two respects. First, the fully cost-oriented MTRs are not introduced by 1 January 2013 and, second, CMT continues to apply asymmetric MTRs until 1 July 2013. CMT justifies these deviations with the disproportionate and disruptive impact any earlier introduction of the fully cost-oriented rate would have on the MNOs in general (and Xfera/Yoigo in particular).

In addition, CMT believes that the impact of the remaining asymmetry for January – July

[12] 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.

2013 will be low given Xfera/Yoigo's relatively low retail market share[13] and the low remaining level of asymmetry for 2013.

III. COMMENTS

The Commission has examined CMT's notification and has the following comments:[14]

Need for a consistent European approach for termination rates

The Commission agrees with CMT that based on the competition problem 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 notes that the proposed glide-path for the introduction of fully cost-oriented MTRs in Spain will result in reaching the LRIC target level only by 1 July 2013, which is not fully in line with the Commission's Termination Rates Recommendation, according to which NRAs should ensure that termination rates are implemented at a cost-efficient (LRIC) level by the end of 2012.

Whilst the Commission takes note of CMT's argument that any earlier introduction of MTRs based on LRIC would result in a disproportionately disruptive impact on the Spanish mobile industry, the Commission reminds CMT that the timeframe for implementing the Recommendation aims to ensure not only the sustainability of the sector but also maximum benefits to consumers as soon as possible. Having said this, the Commission appreciates that regulators are confronted with the need to strike a balance between protecting consumer welfare and avoiding a disruptive impact on the operators. To that end, the Commission acknowledges that NRAs have a certain margin of discretion, which could allow them to delay to a degree the introduction of fully cost-oriented rates.

Against this background, and based on the information available to the Commission, a delay – if very limited - in the implementation of the cost-oriented rates is acceptable, taking account of the need to minimise business and regulatory uncertainty in the Spanish markets flowing from an important decrease in MTRs. The Commission considers that, in the light of particular national circumstances[15], a small deviation of a few months is sufficiently justified (i) given that the revised measures set a level of rates which tend towards the pure BU LRIC rates which are to be implemented by 31 December 2012 by all NRAs, (ii) due to the fact that pure BU-LRIC rates will be achieved much earlier than under the previously notified draft measure, and (iii) due to the fact that the proposed measure now strikes an appropriate balance between the increased consumer welfare on one hand and the risk of disruptive impacts on the sector (through too short a glide-

[13] 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%)

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

[15] CMT justifies the deviation 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 Spanish operators affected by the measure, have important investment commitments in the next three years linked to the recent spectrum tender and reframing procedures. In particular, Vodafone's network investment commitments amount to 160 million € and Yoigo's to 60 million €.

path) on the other hand.

Therefore, the Commission considers that the application of MTRs at a level of 1.09 €ct/min based on a BU-LRIC costing methodology as of 1 July 2013 at the latest would still sufficiently address the pressing need to ensure that consumers derive maximum benefits in terms of efficient cost-based termination rates as soon as possible after the 1 January 2013 by eliminating competitive distortions associated with above-cost termination rates.

Moreover, the Commission takes note that CMT indicated that the consumer surplus of the draft measures relative to those previously notified will increase by around 80 million €.

Nevertheless, the Commission notes that the proposed glide-path would maintain MTRs in Spain at relatively high levels in its first stages (16 April 2012 to 29 March 2013) while leading to a very steep and sudden decrease in its last stage (1 March to 1 July 2013). Against this background, in order both to bring more quickly the benefits of lower MTRs to the consumers and avoid excessively steep glide-paths at the end of the transition, the Commission asks CMT to reconsider the individual steps of the proposed glide-path in order to reduce termination rates in Spain earlier and more gradually.

Need for cost-oriented, symmetric termination rates

The Commission notes that CMT's decision also leads to a period until 1 July 2013 during which asymmetric MTRs on Xfera/Yoigo continue to be applied.

The Commission recalls that, given that Xfera/Yoigo entered the market in 2006, in principle any asymmetry beyond 31 December 2012 should not 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).

However, the Commission acknowledges that the proposed timeframe for ending such asymmetry – only 6 months beyond the recommended deadlines - would have a limited impact on competition. This is due, in particular, to the fact that the impact of the remaining asymmetry for January – July 2013 should be low given Xfera/Yoigo's relatively low retail market share.

Nevertheless, the Commission invites CMT to take full account of the Termination Rates Recommendation and to consider setting symmetric cost-oriented termination rates for all Spanish MNOs already as of 1 January 2013 in order to bring more quickly to Spanish and EU end-users the full benefits of low MTRs in Spain.

Pursuant to Article 7(7) of the Framework Directive, CMT 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[16] the Commission will publish this

[16] 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

document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission[17] 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.[18] You should give reasons for any such request.

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

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

17 Your request should be sent either by email: INFSO-COMP-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

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