



EUROPEAN COMMISSION

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Autorità per le Garanzie nelle  
Comunicazioni (AGCOM)  
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Italy

For the attention of  
Mr. Angelo Marcello Cardani  
President

Fax: +39 06 696 44 933

Dear Mr Cardani,

**Subject: Commission Decision concerning Case IT/2016/1885: Dispute resolution concerning voice call termination on individual mobile networks in Italy**

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

## 1. PROCEDURE

On 29 June 2016, the Commission registered a notification from the Italian national regulatory authority, Autorità per le Garanzie nelle Comunicazioni (AGCOM)<sup>1</sup>, concerning termination rates in the market for wholesale call termination on individual mobile networks<sup>2</sup>. In particular, AGCOM notified a draft decision settling, under the provisions of Article 5 of the Access Directive<sup>3</sup> in conjunction with Article 20 of the

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<sup>1</sup> 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.

<sup>2</sup> Corresponding to market 2 in Commission Recommendation 2014/710/EU of 9 October 2014 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 295, 11.10.2014, p. 79.

<sup>3</sup> Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, OJ L 108, 24.04.2002, p. 7, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37.

Framework Directive<sup>4</sup>, three disputes between a new mobile virtual network operator (MVNO), PosteMobile, and mobile operators with significant market power (SMP), namely H3G, Fastweb and Telecom Italia.

The concerned parties presented their written submissions. In addition, two oral hearings were held with H3G on 13 January 2015 and on 27 November 2015. Fastweb and Telecom Italia were heard in the oral hearings of 15 December 2014 and 27 November 2015.

On 5 July 2016, a request for information (RFI)<sup>5</sup> was sent to AGCOM and a response was received on 8 July 2016. On 11 July 2016, a supplementary RFI was sent to AGCOM, and a response was received on 13 July 2016.

## **2. DESCRIPTION OF THE DRAFT MEASURE**

### **2.1. Background**

The third review of the wholesale markets for voice call termination on individual mobile networks in Italy was notified to and assessed by the Commission under case IT/2011/1219<sup>6</sup>. On the basis of its market analysis, AGCOM designated H3G, Telecom Italia, Vodafone and Wind as having SMP on their own mobile networks/markets and imposed a set of remedies, including price control. The levels of MTRs were established on the basis of a BU-LRIC model. The MVNOs were not notified as SMP operators on the termination market given that at that time they were about to start providing services on that market. However, AGCOM committed to monitor the competitive dynamics of termination services with particular regard to MVNOs. In its comments, the Commission criticised the delayed implementation of the 2009 Termination Rates Recommendation<sup>7</sup> and the comparatively high levels of MTRs in Italy. The Commission further commented on the lack of a proper justification for the proposed asymmetry in termination rates.

The last market analysis of the wholesale markets for voice call termination on individual mobile networks in Italy was notified to and assessed by the Commission under case IT/2015/1778<sup>8</sup>. On the basis of its market analysis, AGCOM notified the four MNOs, i.e. H3G, Telecom Italia, Vodafone and Wind, as having SMP on their own mobile networks. In addition, AGCOM designated four full MVNOs, i.e. BT Italia, Lycamobile, Noverca and PosteMobile, with SMP on their respective networks. AGCOM set MTRs for the market review period by updating the pure BU-LRIC model already applied in the past market review with (a) new traffic data on volumes and peak-to-mean ratio and (b) the new WACC. As a result of the

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<sup>4</sup> According to Article 20 of the Framework Directive.

<sup>5</sup> In accordance with Article 5(2) of the Framework Directive.

<sup>6</sup> C(2011) 4895.

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

<sup>8</sup> C(2015) 5524.

above, AGCOM proposed to impose on all the SMP operators a symmetric rate of 0.98 €cent/minute.

## 2.2. The notified draft measures

The notified draft measures concern three dispute settlements between PosteMobile and H3G, Fastweb and Telecom Italia, respectively. The disputes focus on the termination rates charged by PosteMobile<sup>9</sup> in the period between 14 July 2014, when PosteMobile started providing termination services, and 30 September 2015, when PosteMobile was notified as SMP operator and therefore subject to the symmetric termination rate set by AGCOM following its market analysis.

AGCOM notes that in the relevant period PosteMobile was not notified as SMP operator and therefore subject solely to the obligation to negotiate interconnection for the purpose of providing publicly available electronic communication services in order to ensure the provision and interoperability of services<sup>10</sup>. AGCOM therefore states that the application of a cost oriented termination rate set on the basis of the incremental costs of a hypothetical efficient operator would result in a rate below the costs and would thus not be reasonable and appropriate given that PosteMobile is a new entrant in the call termination market as full MVNO.

Therefore, AGCOM took in consideration the following costs calculated according to a fully distributed cost (FDC) method: (i) operative costs, which amount to [...], (ii) common costs, which amount to [...], and (iii) migration and commercial costs, which amount to [...]; and proposed to set a [...] termination rate<sup>11</sup>. In particular, the operative costs include the access costs (air time) required by the host MNO equal to [...]<sup>12</sup>, and the network costs (Opex and Capex) equal to [...]. In addition, AGCOM explains that migration and commercial costs include the costs for platform migration from light to full MVNO, which amount to [...], and the marketing and customers operations which amount to [...]. In its reply to the RFI, AGCOM stated that migration and commercial costs reflect the actual asymmetry of competitive condition between PosteMobile and the MNOs. The latter were already operating as MNOs, whereas PosteMobile needed to migrate its customer base from light to full MVNO and start to commercialise the service. According to AGCOM, PosteMobile could not benefit, at the beginning of its operations as full MVNO, from the same economies of scale and/or scope as the MNOs, and thus could not achieve the same unit costs.

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<sup>9</sup> PosteMobile is a MVNO hosted on Wind's network. PosteMobile has been active in the retail market since 2007.

<sup>10</sup> Article 4 of the Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, OJ L 108, 24.04.2002, p. 7, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37.

<sup>11</sup> The rate of [...] corresponds to a compromise proposal of PosteMobile and is considered by AGCOM as reasonable and justified in view of the costs incurred.

<sup>12</sup> This charge is also paid for each minute of terminated traffic.

### 3. ASSESSMENT

Following the examination of the notification, the Commission considers that the notified draft measures fall under the Commission's powers of ensuring the consistent application of remedies as set out in Article 7a of the Framework Directive<sup>13</sup>, as the notified measures aim at imposing obligations on undertakings under Article 5 of the Access Directive<sup>14</sup> in conjunction with Article 20 of the Framework Directive.

Draft measures imposing regulatory obligations on undertakings in Italy, even issued in a dispute resolution procedure, 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<sup>15</sup>. AGCOM's notification comprises measures that have a significant impact on operators or users in other Member States, inter alia measures which affect the ability to access crucial network bottlenecks to serve end-users. Consequently, such draft measures may affect the patterns of trade between Member States in a manner which might create a barrier to the single market<sup>16</sup>.

The Commission has serious doubts in this regard for the following principal reasons:

#### **The need to ensure that customers derive maximum benefits in terms of efficient cost-based termination rates**

The Commission notes that the MTRs for the full MVNO PosteMobile for the period from 14 July 2014 until the 30 September 2015, when PosteMobile was not designated with SMP, is proposed to be set at the level of [...]. This rate significantly exceeds the symmetric rate of 0.98 €cent/minute set for the SMP operators during the same time period, which was applied to PosteMobile as from the 30 September 2015.

The Commission considers at this stage that such asymmetry is not adequately justified and is not in compliance with the relevant provisions of the regulatory framework, for the reasons explained below.

#### *Compliance with Article 5(1), 5(2) of the Access Directive in conjunction with Article 8 of the Framework Directive and Article 20 of the Framework Directive*

The Commission stresses that in line with the provisions of Article 5(1) of the Access Directive, NRAs should, when ensuring access and interconnection, as in the present case, exercise their responsibility in a way that promotes efficiency, sustainable competition and maximises consumer benefits.

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<sup>13</sup> Article 20 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

<sup>14</sup> 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).

<sup>15</sup> See in this regard Case C-3/14 *Prezes Urzędu Komunikacji Elektronicznej and Telefonia Dialog*.

<sup>16</sup> See Recital 38 of the Framework Directive.

The Commission refers to Article 5(2) of the Access Directive which requires the NRAs (i) to impose obligations which are objective, transparent, proportionate and non-discriminatory in the light of the objectives laid down in Article 8 of the Framework Directive. Those measures can include, where appropriate for attaining the objective pursued, the imposition of a price control obligation<sup>17</sup>.

The Commission notes that, in order to identify an appropriate and proportionate measure, AGCOM should already at this stage have analysed the market position of PosteMobile, which, even though it does not hold a license for the use of radio spectrum resources, controls the network elements essential to manage their own customers' call termination services. Since the latter corresponds to the relevant market for wholesale voice call termination on individual mobile networks, and is as such susceptible to ex ante regulation, AGCOM could already at the dispute resolution stage have anticipated PostMobile's future SMP status and imposed the appropriate price control obligations corresponding to those of the other SMP operators.

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<sup>18</sup> on the harmonised application of the Regulatory Framework in order to further the achievement of the objectives set out in Article 8 of the Framework Directive. This right arises, in particular, where the Commission finds that divergences in the implementation by the national regulatory authorities of their regulatory tasks under the Regulatory Framework may create a barrier to the internal market. It is in this context that the Commission, in order to ensure a correct and coherent interpretation and application of the relevant provisions of the Regulatory Framework within the EU, adopted the Termination Rates Recommendation<sup>19</sup>, setting out a consistent approach that the NRAs should follow regarding price control obligations for fixed and mobile termination rates.

The Commission takes the view that a cost orientation obligation based on a pure BU-LRIC methodology best promotes competition by, among other things, ensuring 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 pure BU-LRIC model, contribute to a level playing field among operators, by eliminating competitive distortions in the termination markets.

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<sup>17</sup> See in this regard Case C-85/14 *KPN Autoriteit Consument en Markt (ACM)*.

<sup>18</sup> In accordance with Article 19 of the Framework Directive.

<sup>19</sup> Commission Recommendation of 7 May 2009 on the regulatory treatment of fixed and mobile termination rates in the EU, OJ L 124, 20.05.2009, p. 67 (Termination Rates Recommendation).

The Commission considers that full MVNOs and their respective host MNOs provide the same termination service because both operators make use of the same mobile network on the basis of the wholesale service for national roaming. Consequently, full MVNOs can benefit from the same economies of scale and/or scope as the host MNO and hence achieve the same unit costs irrespective of their actual market shares<sup>20</sup>. Therefore, the Commission cannot at this stage identify any higher per unit incremental termination costs incurred when PosteMobile customers are receiving calls than those incurred by the SMP operators, whose cost efficient rate has been set at the pure BU-LRIC rate of 0.98 €cent/minute.

In the present case, any cost difference between a host MNO and operators purchasing national roaming could depend on the negotiated airtime rate. However, unless the wholesale market for access and call origination to mobile networks is not effectively competitive, termination rates under a national roaming agreement should not normally exceed those of the host MNO. This is confirmed in the present case where PosteMobile is paying for each minute of terminated traffic a wholesale access charge of [...] for the use of Wind's network.

With regard to the additional 'network costs' taken into consideration by AGCOM for the calculation of PosteMobile's termination rate, AGCOM does not substantiate how these are related to the provision of termination services by PosteMobile (bearing in mind that PosteMobile does not own a radio access network but uses that of Wind under the national roaming agreement), to which extent these are efficiently incurred, and whether or not these are traffic sensitive and therefore relevant for the calculation of termination rates.

With regard to 'migration and commercial costs' (including the costs for platform migration from light to full MVNO, and marketing and customers operations) these appear, at this stage, unrelated to the provision of wholesale termination services and should therefore not be part of a regulated termination rate based on the costs of a hypothetically efficient operator.

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

Moreover, the Commission notes that AGCOM fails to establish the direct relationship between (i) the financial imbalance stemming from traffic exchange and (ii) the termination costs incurred by the operator subject to such imbalance.

The Commission therefore has serious doubts whether surcharges for PosteMobile's termination services would not be contrary to Articles 5(1), 5(2), of the Access Directive in conjunction with Article 8 of the Framework Directive. Indeed, such unjustified asymmetries would result in higher MTRs for full MVNOs, which in

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<sup>20</sup> See case FR/2012/1304.

turn could lead to higher retail prices and the associated loss in consumer benefits contrary to Article 8 of the Framework Directive.

#### *Compliance with the non-discrimination principle as set out in the Article 8(5) (b) of the Framework Directive*

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

The Commission, at this stage, takes the view that the termination rate proposed by AGCOM would lead to a price discrimination of host MNOs *vis-à-vis* the respective full MVNOs because both operators provide the same termination service over the same mobile network and AGCOM did not provide an adequate justification as regards the objective cost differences that would warrant asymmetric MTRs.

#### *Creation of barriers to the internal market*

The measure proposed by AGCOM would very likely lead to the creation of a barrier to the internal market, as on the basis of the calling party pays principle the terminating new MVNO in Italy would be able to charge higher than efficient wholesale terminating rates for calls originated in those Member States, to the detriment of operators and their subscribers in other Member States.

In addition, the Commission points out that in most Member States a symmetric price control remedy was imposed on the full MVNOs following their entry in the market. Different regulatory approaches adopted by the NRAs within the EU would undermine the integrity of the internal market.

Moreover, the Commission observes that MTRs set at an efficient level contribute to a level playing field not only at national but also at EU level, by eliminating competitive distortions between fixed and mobile networks.

#### *Conclusion*

In this particular case, the Commission observes that AGCOM's notification does not provide an adequate justification of why the proposed approach for the price setting of the termination service provided by PosteMobile in the period from 14 July 2014 to 30 September 2015, 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 5(1), 5(2).

Hence, the Commission has serious doubts that AGCOM's proposal on termination rates can be considered justified in light of the objectives laid down in Article 8 of the Framework Directive, and in particular the objectives of promoting competition and user benefits and ensuring that there is no distortion or restriction of competition in the electronic communications sector, pursuant to Article 8(2) of the Framework Directive. The Commission further believes, at this stage, that the draft measure is not compliant with the non-discrimination principle as set out in the Article 8(5) (b) of the Framework Directive, and that the measure would create barriers to the internal market.

Therefore, the Commission has serious doubts as to AGCOM's proposal compatibility with EU law, as set out in Article 7a (1) of the Framework Directive.

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.

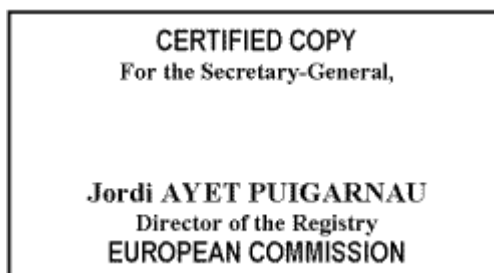
The Commission points out that, in accordance with Article 7a of the Framework Directive, the draft measures concerning remedies in the markets for call termination on individual mobile networks in Italy shall not be adopted for a further three months.

Pursuant to Recital 17 of Recommendation 2008/850/EC<sup>21</sup>, 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<sup>22</sup> 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,  
Günther Oettinger

Member of the Commission



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<sup>21</sup> 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.

<sup>22</sup> Your request should be sent either by email: [CNECT-ARTICLE7@ec.europa.eu](mailto:CNECT-ARTICLE7@ec.europa.eu) or by fax: +32.2.298.87.82.