Dear Mr. Masselos,

Subject: Commission Decision concerning Case EL/2018/2134: market for access and call origination on public telephone networks in Greece – dispute resolution

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

1. PROCEDURE

On 16 November 2018, the Commission registered a notification from the Greek regulatory authority, Hellenic Telecommunications & Post Commission (EETT), concerning the market for access and call origination on public telephone networks in Greece.

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2 Corresponding to market 15 of Commission Recommendation 2003/311/EC of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with the Framework Directive, OJ L 114, 8.05.2003, p. 45. This market has been removed from the list of the relevant markets that may warrant ex ante regulation which is contained in the currently applicable 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 the context of these dispute resolutions, there were various hearings with the concerned parties.

On 26 November 2018, a request for information (RFI) was sent to EETT and a response was received on 29 November 2018. On 4 December 2018, an additional RFI was sent to EETT and a response was received on 5 December 2018.

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.

2. DESCRIPTION OF THE DRAFT MEASURE

2.1. Background

The last review of the market for access and call origination on public telephone networks was notified to and assessed by the Commission under case EL/2006/0492. Based on its market analysis, EETT found that: (i) no operator had a market share above 50%, (ii) no mobile network operator (MNO) enjoyed a significant competitive advantage in terms of market share, (iii) market shares fluctuated, (iv) there was no evidence of collective dominance. In the absence of an operator with significant market power (SMP), no remedies were imposed on this market. The Commission had no comments.

Subsequently, EETT notified a measure (EL/2014/1631) concerning the definition of terms and conditions for granting access and interconnection. The Commission commented on the need for transparency and coherence in the notification of remedies under the EU consultation procedure (as EETT had previously set


3 The request for dispute resolution between Forthnet and Cosmote was submitted to EETT on 25 July 2016 (as the parties had failed to reach an agreement). The request for dispute resolution between Forthnet and Vodafone was submitted to EETT on 27 July 2016 (as the parties had failed to reach agreement). In both cases, EETT organised four hearings with the interested parties.

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


6 In the period of this analysis (2003-2005), four MNOs were active on the Greek market: Cosmote, Vodafone, TIM Hellas and Q Telecom. In 2006 TIM Hellas and Q Telecom merged.

7 This measure was to be applied to all operators in a symmetrical way and contained, inter alia, general principles for access and interconnection, provisions on interconnection information, indications on the procedures to conclude/amend an interconnection agreement and on the content of an interconnection agreement. EETT indicated that these provisions also intended to ensure interoperability of services, thereby promoting economic efficiency, sustainable competition, investments that generate returns, innovations and maximum benefits for end-users. EETT explained it had received several complaints from operators, with respect to interconnection agreements, especially between service providers and mobile network operators, where market players had failed to reach an agreement in commercial negotiations.
interconnection fees for some undertakings by way of decisions, which were not subject to the EU consultation procedure under Article 7 of the Framework Directive).

2.2. Draft Measures

EETT settles a dispute concerning the request for negotiation and conclusion of an agreement between the mobile virtual network operator (MVNO) Forthnet (applying for MVNO agreement) and Cosmote. In a separate procedure, EETT settles a similar dispute between Forthnet and Vodafone.

EETT notifies the present draft decisions, under Article 20 of the Framework Directive\(^8\) in conjunction with Article 5 of the Access Directive\(^9\). Furthermore, EETT mentions it takes into due account the Commission’s previous comments on the need to notify decisions concerning access and interconnection fees and, refers to Article 5 of the Access Directive for the purposes of legal certainty\(^10\).

The proposed measures are notified in the context of further specifying obligations imposed on Cosmote and Vodafone by virtue of spectrum award decisions, whereby MNOs must negotiate in good faith and grant access to their networks on reasonable terms to companies wishing to operate as MVNOs. Against this backdrop, EETT assessed the appropriateness of the terms and conditions proposed by Vodafone and Cosmote.

EETT draft decision calls on Cosmote to provide Forthnet access to its network under defined terms and conditions. In particular, EETT’s decision details: (i) the fees for the provision of wholesale access to the mobile network for MVNO services\(^11\); (ii) data service wholesale fees should not be differentiated according to the overall traffic volume\(^12\); (iii) voice services wholesale fees should not be

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8 According to Article 20 of the Framework Directive.


10 According to EETT, this notification takes into account the Commission comment in case EL/2014/1631 where the Commission noted the NRA’s obligation to notify pursuant to Article 7(3) of the Framework Directive the decisions concerning access and interconnection fees.

11 EETT proposes to set maximum national roaming wholesale prices equal to the maximum international roaming wholesale cap (EU Regulation 2017/920 as regards rules for wholesale roaming markets). According to EETT, the fees for wholesale data services for each calendar year should not exceed the prices per megabyte for the relevant year as set in EU Regulation 2017/920. As for voice services, EETT sets a cap for the wholesale call origination (Euros per minute). It details, the origination rate per minute cannot exceed EUR ). The call termination rate per minute cannot exceed the termination rate defined by EETT for the relevant year.

12 In the response to the RFI, EETT clarified the levels set out by EETT should be seen as maximum wholesale access prices below which there is space for lower commercially agreed prices. EETT clarifies the parties could agree on different prices according to traffic volume provided these are lower than the cap.
differentiated according to the overall traffic volume\textsuperscript{13}; (iv) there should not be an annual access fee to 4G services imposed on the MVNO; (v) the cap for the one-off MVNO activation/implementation of access fee.\textsuperscript{14}

EETT draft decision calls on Vodafone to provide Forthnet access to its network under defined terms and conditions. In particular, EETT stipulates: (i) the fees for the provision of wholesale access to the mobile network for MVNO services\textsuperscript{15}; (ii) data service fees should not depend on the use per subscriber; (iii) the wholesale fees for voice and SMS/MMS services should not be differentiated according to whether these services terminate on-net or off-net\textsuperscript{16}; (iv) a speed limit to the data rate of 40 megabytes per second should not be imposed to Forthnet subscribers; (v) a monthly SIM management fee should not apply.

In both cases, EETT’s price analysis is based on a comparison of the wholesale prices proposed by the respective MNOs against several benchmarks including: (i) regulated wholesale roaming price caps, as per EC Regulation 2017/920; (ii) wholesale roaming market prices in Greece, as per BEREC “International Roaming Benchmark Data Report April 2017 - September 2017”; (iii) wholesale roaming unit costs in Greece as estimated by TERA report for the European Commission "Assessment of the cost of providing wholesale roaming services in the EU”.

EETT deems international roaming caps are fair estimates of the underlying costs of providing national wholesale mobile access in Greece and considers the national roaming wholesale prices initially offered by both Vodafone and Cosmote as unreasonably high.

EETT therefore considers it appropriate to set maximum national roaming wholesale prices equal to the maximum international roaming wholesale caps. Hence, for data the maximum national roaming wholesale prices are equal to the international roaming caps for data services and, for voice, the maximum national roaming wholesale prices are equal to the international roaming caps minus the weighted average termination rate in Greece.

\textsuperscript{13} Idem.

\textsuperscript{14} According to EETT, taking into account the precedent of a comparable MVNO access seeker, Euros is considered to be reasonable as a MVNO implementation access fee.

\textsuperscript{15} EETT proposes to set maximum national roaming wholesale prices equal to the maximum international roaming wholesale cap (EU Regulation 2017/920 as regards rules for wholesale roaming markets). According to EETT, the fees for wholesale data services for each calendar year should not exceed the prices per megabyte for the relevant year as set in EU Regulation 2017/920. As for voice services, EETT sets a cap for the wholesale call origination (Euros per minute). It details, the origination rate per minute cannot exceed EUR The call termination rate per minute cannot exceed the termination rate defined by EETT for the relevant year.

\textsuperscript{16} EETT reckons that there is no objective reason to justify the differentiation of charges based on whether the call terminates within the network (on-net) or outside of the network (off-net). EETT explains that the overall cost of the call origination service for Vodafone would be similar irrespective of the termination network.
3. COMMENTS

The Commission has examined the notification and the additional information provided by EETT and has the following comment:\textsuperscript{17}:

Need to further justify economic reasoning

EETT concluded the market for access and call origination was competitive in 2006.

The Commission takes note of EETT’s proposal to settle the disputes with regard to the terms and conditions for access and interconnection, including prices, and that, moreover, its draft decisions fall under Article 5 Access Directive to the extent that they further specify existing access obligations under the respective spectrum authorisations of the two most significant mobile network operators in Greece. While conditions attached to rights of use for radio frequencies pursuant part B of the Annex to the Authorisation Directive do not fall in the scope of Article 7 of the Framework Directive, the Commission understands that, due to the specificities of the present notifications and the nature of the obligations to be imposed, EETT considers necessary to rely on Article 5 of the Access Directive in order to settle the disputes.

EETT’s analysis is based on a comparison of the wholesale prices proposed by the MNOs against relevant benchmarks including EU Regulation 2017/920, BEREC Benchmark Reports on actual wholesale roaming prices applied by Greek MNOs, and TERA studies on the cost of providing wholesale roaming services. EETT’s analysis indicates that international roaming caps are prepared on a conservative basis as safeguard caps, and are likely to leave a significant margin relative to the underlying costs of providing national wholesale mobile access in Greece. EETT concludes that the fees originally proposed by Cosmote and Vodafone were unreasonably high and provides that that the maximum national roaming wholesale prices should be equal to the maximum international roaming wholesale caps.

In the specific national circumstances, the Commission does not object to referring to these benchmarks.

The Commission notes that reasonable rates under an existing access obligation, whether under Article 5 of the Access Directive and/or Article 20 of the Framework Directive, should not be equated with a cost-oriented rate, but should enable sustainable commercial activities in order to avoid frustrating the underlying obligation.

In this context, the Commission considers that direct measures or estimates of cost, if available, can be a relevant input for EETT, provided they are merely used as a starting point for determining a reasonable rate. Similarly, where a legislative safeguard cap exists for a comparable activity based on relevant studies and impact assessment, which include assessments of the costs and investment requirements of the operators specifically concerned by a draft decision, and provided such cap leaves appreciable economic space relative to any available direct or indirect indicators of underlying costs, it may (with necessary adjustments such as for termination rates in this case) be considered a relevant benchmark. The Commission

\textsuperscript{17} In accordance with Article 7(3) of the Framework Directive.
notes that, in the present case, comparable commercial practice (i.e. actual wholesale roaming prices) regarding networks with the same geographic footprint also provides useful indications to corroborate that use of such a legislative safeguard rate does in fact amply allow network costs to be covered and network investments to be rewarded.

Therefore, the Commission invites EETT to further justify its approach in the final measure, in light of the exchanges during the present notification procedure, and, in particular, to clarify that it allows for commercially agreed wholesale prices as long as they are below the set price caps. Moreover, the Commission invites EETT to consider addressing the commercial risks by allowing reasonable guarantees to ensure mutual performance of the obligations.

Pursuant to Article 7(7) of the Framework Directive EETT 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 the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission 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. You should give reasons for any such request.

Yours sincerely,

For the Commission,
Roberto Viola
Director-General

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

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