EUROPEAN COMMISSION

Brussels, 23/06/2010
C(2010)4405

SG-Greffe (2010) D/8935

Office of Communications
(OFCOM)

Riverside House
2a Southwark Bridge Road
London SE1 9HA
United Kingdom

For the attention of:
Mr Ed Richards
Chief Executive Officer

Fax: +44 20 7981 3504

Dear Mr Richards,

Subject: Commission decision concerning case UK/2010/1068: Voice call termination on individual mobile networks

Comments pursuant to Article 7(3) of Directive 2002/21/EC[1]

I. PROCEDURE

On 1 April 2010, the Commission registered a notification from the UK national regulatory authority, *Office of Communications* (OFCOM) concerning the wholesale market for voice call termination on individual mobile networks[2] in the UK.

The national consultation[3] runs in parallel to the EU consultation under Article 7 of the Framework Directive. The deadline for both consultations is 23 June 2010.

---

1 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 ('the Framework Directive'), OJ L 108, 24.4.2002, p. 33.

2 Corresponding to market 7 of the 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 ('the Recommendation'), OJ L 344, 28.12.2007, p. 69.

3 In accordance with Article 6 of Directive 2002/21/EC of the Framework Directive.

On 6 May 2010, a request for information was sent to OFCOM[4] and replies were received on 17 and 21 May 2010. Further exchanges between OFCOM and the Commission services took place on 25 May 2010.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs) and the Commission may make comments on notified draft measures to the NRA concerned.

II. DESCRIPTION OF THE DRAFT MEASURES

The present notification concerns the third review of the market for voice call termination on individual mobile networks in the UK. The regulatory measure is intended to cover the period from 1 April 2011 to 31 March 2015[5].

II.1. Background

The second review of the market for voice call termination on individual mobile networks in the UK was notified to and assessed by the Commission under case UK/2006/0498[6]. At the time, OFCOM considered that (i) the provision of wholesale mobile voice call termination by each mobile network operator (MNO) constituted a separate market and (ii) that the geographic scope of each product market coincided with the geographic coverage of the network concerned. OFCOM designated Vodafone, O2, Orange, T-Mobile and H3G as having significant market power (SMP) on their respective markets and imposed on them the obligations of access, non-discrimination, transparency (including the requirement to publish a reference offer), price control and cost accounting. In its comments letter, the Commission noted that 3G licenses should be calculated at current (and not historical) value and invited OFCOM to reconsider the valuation of 3G spectrum licences.

II.2. Market definition

OFCOM proposes to define 50 separate markets for wholesale mobile voice call termination. Each of the proposed markets comprises termination services[7], irrespective

---

4 Under Article 5(2) of the Framework Directive.

5 OFCOM acknowledges that according to the new regulatory framework on electronic communications in the EU, NRAs must in future carry out a market review every three years. However, it considers that a four year regulatory period is appropriate in the present case where the proposed charge control will end in the 2014/2015 financial year. OFCOM also considers a shorter (3-year) glide path but given the large reduction in prices it was concerned that a steeper glide path might have counterproductive effects on market stability. OFCOM further states that the next market review process would commence in late 2012.

6 This market review was followed by a notification of a change to the charge control remedy imposed on the aforementioned MNOs (case UK/2007/0617) and of a measure related to the Monitoring Charge Control Compliance Statement adopted on 18 December 2007 (case UK/2008/0759).

7 OFCOM explains that voice call termination covers (at least) the ability to terminate a call to an entity controlling an electronic communications network that hosts and controls access to a mobile number range. OFCOM considers that the proposed market definition is in line with the Recommendation because the mobile numbers allocated to the operators identify those calls that are switched to, and routed by, the recipient's network. Therefore, a market definition centred on a mobile number range necessarily refers to the activity of the relevant individual mobile network. OFCOM states that their market definition (i) remains focused on 'network' but also recognises that not all MCPs operate a radio access network themselves and (ii) is based on the UK market reality and numbering plan.

of the technology used, that are provided by one mobile communication provider (MCP) to another communication provider for voice calls to mobile numbers allocated by OFCOM pursuant to the UK numbering plan and for which the MCP is able to set the mobile termination rate (MTR).

The proposed market definition implies the inclusion of termination to the following *call 'types':* off-net voice calls including off-net national roaming calls and off-net calls to a UK number roaming abroad (first leg), calls to ported-out mobile numbers[8], off-net calls to voicemail[9], voice calls to mobile terminating on IP[10] and calls forward. OFCOM also explained that the so-called 'Home-zone' products are included in the market definition if these calls have the potential to be handed over to the macro-network when the consumer resumes motion.

The geographic market for voice call termination provided by a particular MCP is the area of the UK within which the MCP (i) provides mobile voice call termination and (ii) for which it is able to set the MTR.

II.3. Finding of significant market power

OFCOM proposes to designate 50 MCPs as having SMP in their respective markets. The main criteria considered by OFCOM when reaching its conclusion are: market shares (each MCP has 100% share of terminating voice calls on its mobile number range), barriers to entry, pricing and countervailing buyer power.

OFCOM distinguishes several types of MCPs providing mobile call termination: (i) the four already established MNOs having fully-national coverage (Vodafone, O2, Orange/T-Mobile and H3G); (ii) MVNOs[11]; and (iii) new entrant MCPs that provide mobile services using the DECT guard-band spectrum (e.g. C&W and Mcom) or other technologies such as a WI-FI network to connect VoIP calls (e.g. Truphone or Jajah) and that combine infrastructure roll-out and roaming agreements or target specific areas.

II.4. Regulatory Remedies

OFCOM proposes to impose on all 50 SMP operators an access obligation and a transparency obligation, including the requirement to publish charges and to notify to

---

8 In the UK the originating operator pays the termination service at the rate set by the MCP to whom the number was originally assigned (and not at the rate of the recipient network).

9 In OFCOM's opinion, the competitive conditions do not vary between a terminated mobile call and a call forwarded to voicemail: both originating and terminating operators are unable to distinguish calls ended on voicemail from calls connected and MTRs are thus identical for both call types.

10 OFCOM considers only mobile voice calls that are terminated over IP where there is interconnection to the public switched telephone network (PSTN). All services which use email addresses or names (rather than a telephone number) to establish voice contact between two users (e.g. Skype-to-Skype calls) are not included in the market. Also, with respect to prices for voice call termination over IP, OFCOM explains that MCPs do not differentiate their charges based on the underlying technology used to terminate a call.

11 With respect to MVNOs, OFCOM explains that it does not consider any of the MCPs listed to be an MVNO in the sense of the UK definition, according to which an MVNO is a provider that does not operate a mobile communications network and in particular does not operate switching and/or call routing equipment. However, as regards MVNOs which control a switch that hosts a number range (and are therefore able to control the MTR), OFCOM further explains that termination of calls to that MVNO's number range constitutes mobile voice call termination service on that MVNO's network and would represent a separate market for mobile call termination.

interconnected parties and to OFCOM any changes to those charges taking effect.

In addition, OFCOM intends to impose on the four largest MCPs the obligations of no undue discrimination and charge control (for both fixed-to-mobile and mobile-to-mobile calls). Regarding the implementation of the charge control[12], OFCOM foresees a four-year glide-path with annual steps, to bring down the weighted average charges[13] for mobile call termination to efficient unit costs by 2014/2015 (based on a LRIC[14] approach). OFCOM also proposes to align H3G's termination charges with those of O2, Orange/T-Mobile and Vodafone by the end of the first year of the charge control[15].

Proposed glide-path for MTRs towards LRIC price level
(in real 2008/2009 prices; ppm/ €cents[16] prices)

	current MTR up to 31/03/2011	**01/04/2013 01/03/2012**	**01/04/2012 31/03/2013**	**01/04/2013 31/03/2014**	**01/04/2014 01/04/2015**	**X value** (yearly RPI-X)
Vodafone, O2, Orange/T-Mobile	4.3/ 5.2	2.5/ 3.0	1.5/ 1.8	0.9/ 1.1	0.5/ 0.6	42.7%
H3G	4.6/ 5.5	2.5/ 3.0	1.5/ 1.8	0.9/ 1.1	0.5/ 0.6	46.5%

In addition, OFCOM further restricts the frequency and magnitude of changes that may be introduced by the four large MCPs to call termination charges. In particular, any changes to the price level should (i) be introduced on the first day of each quarter and (ii) not exceed a 20% increase on any of these occasions.

---

12 The proposed charge control is in the form of 'RPI-X' price-cap regulation, in order to reflect the required reduction from the 2010/11 charges necessary to reach the efficient charge level for 2014/15. RPI represents the inflation index and X the average annual percentage by which MTRs are expected to change in real terms. RPI is assumed to be constant, i.e. 2.5%.

13 The average call termination charges are weighted by the respective volumes in the corresponding periods from the previous year. According to OFCOM, the provision of this volume- and price-related information is sufficient to check compliance with the price control remedy and obviates the need to impose an accounting separation obligation.

14 OFCOM's 2007 model has been updated to produce values using both LRIC+ and LRIC cost standards. OFCOM's updated model assesses the costs faced by a MCP (i) operating a hypothetical efficient 2G/3G/HSPA network, (ii) having achieved the minimum efficient scale of a 25% market share, (iii) using 1800 MHz spectrum to offer 2G services and 2.1 MHz spectrum for 3G services, iv) allowing for the economic depreciation of assets and (iv) WACC estimated at 7.6% (real value). The model has been developed as a bottom-up cost model, but has also been calibrated by adjusting the unit cost levels and cost causalities of different cost components, so as to ensure the model is reasonably in line with the largest MCPs' actual costs in historical years. OFCOM is using a hybrid approach, in order to capture the strengths of both top-down and bottom-up approaches.

15 OFCOM recalls that at the end of the charge control currently applied, H3G's MTR will be higher (by approximately 0.3ppm) than the symmetric maximum MTRs of O2, Vodafone and Orange/T–Mobile. OFCOM does not require an immediate reduction of H3G's charges from 1 April 2011 but imposes a different glide-path for this MNO during the first year of the price control. OFCOM explains that (i) H3G's MTRs will not be higher on average across the year than those of the other charge controlled MCPs and that (ii) an immediate reduction would not change the maximum average charge that H3G is allowed over the year.

16 EUR 1 = GBP 0.83470 (ECB conversion rates of 2 June 2010).

With respect to previously unregulated MCPs, OFCOM proposes to impose the requirement to meet reasonable requests for access to mobile call termination on 'fair and reasonable' terms. This obligation concerns both mobile call termination rates and connectivity. OFCOM believes that such an obligation will result in the commercial agreement between MCPs to exchange traffic at the same regulated rate that applies for the four large MCPs (reciprocity).

III. COMMENTS

On the basis of the present notification and the additional information provided by OFCOM, the Commission has the following comments[17]:

Need to verify SMP designation of MCPs

OFCOM believes that all the 50 MCPs which it intends to designate as SMP operators are indeed providing mobile call termination services. In this regard, the Commission notes that OFCOM's number range assignment procedure is based on the UK numbering regime and obliges the requesting operators to provide certain information, including the services they intend to provide. Nevertheless, when asked, OFCOM was not in a position to detail the precise services delivered by each of the 50 MCPs. OFCOM indicated however that, as part of the parallel national consultation process, it currently enquires whether the small MCPs do indeed provide mobile voice call termination. Against this background and in view of the fact that the outcome of the ongoing national consultation is still uncertain, the Commission urges OFCOM to make sure that all MCPs designated as having SMP in the currently notified draft measure do indeed also provide mobile voice call termination services, and to designate only those operators as having SMP which are active on the relevant market identified by OFCOM.

Need for a consistent European approach for termination rates

The Commission welcomes OFCOM's proposal to adopt a LRIC methodology resulting in significantly lower mobile termination rates in the UK and in achieving symmetry of MTRs before the end of year 2012. Nevertheless, the Commission notes that the LRIC target level will only be reached in 2014/2015, which is not in line with the Commission's Termination Rates Recommendation[18], according to which NRAs should ensure that termination rates are implemented at a cost-efficient (LRIC) level by the end of 2012. While recognising OFCOM's efforts to minimise business and regulatory uncertainty flowing from a strong decrease in MTRs, the Commission would like to remind OFCOM 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, by eliminating competitive distortions associated with above-cost termination rates. Moreover, the Commission would like to stress that it has clearly stated its policy as regards the regulation of termination rates on numerous occasions (both under the Article 7 procedure and by asking national regulators to work together towards a coherent cost-based approach to regulating

---

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

18 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.

termination rates), thus allowing NRAs to gradually reduce termination rates and avoid excessively steep glide-paths at the end of the transition (towards LRIC) period.

Furthermore, as regards the price control for H3G, the Commission notes that OFCOM opts for a glide-path in year one of the charge control thus aligning H3G charges with those of the three other large MCPs at the end of the first year of the price control, i.e. 31 March 2012. As H3G entered the market in 2003, the Commission would like to stress that it has constantly held[19] that mobile termination rates should normally be symmetrical and that asymmetry should be adequately justified by objective cost differences and limited to a transitory four year period.

Against this background, the Commission urges OFCOM: (i) to reconsider the proposed glide-path and align it with the deadline provided for in the Termination Rates Recommendation (i.e. 31 December 2012) and (ii) to reduce H3G's charges immediately through a one-off cut and then adopt the same glide-path as the 2G/3G MCPs (i.e. thus applying option 2 considered by OFCOM in its market analysis).

Need for a regular review of the market

With respect to the fact that the proposed regulatory measure covers a four year period, the Commission invites OFCOM, in the expectation of a revised price control obligation, to reconsider the timeframe of the market review, thus complying with Article 16(6) of the Framework Directive, as amended by Directive 2009/140/EC. This states that NRAs must, as a rule, carry out an analysis of the relevant market and notify the corresponding draft measure in accordance with Article 7(a) of the Framework Directive within three years from the adoption of a previous measure relating to that market.

Pursuant to Article 7(5) of the Framework Directive, OFCOM shall take the utmost account of comments of other NRAs and the Commission and may adopt the resulting draft measures and, where it does so, shall communicate them 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[20] 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[21] within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential

[19] Cases DK/2008/0765, DK/2008/0785, FR/2009/0927, IT/2008/0802, LV/2007/0574, PL/2008/0794, PL/2008/0855, ES/2009/0937, PT/2007/0707, RO/2009/0878, DK/2009/1013-1014, SK/2009/0902.

[20] Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 301, 12.11.2008, p. 23.

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

information which you wish to have deleted prior to such publication[22]. You should give reasons for any such request.

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

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