KONKURENTSIAMET
Estonian Competition Authority

Mr. Reinald Krüger EUROPEAN COMMISSION Information Society and Media Directorate-General Electronic Communications Consultation Mechanism	Your: Brussels, 19 July 2012 INFSO B5 (2012) 883862 Our: Tallinn, 24 July 2012; No 8.3-12/11-0339-066

Subject: Case EE/2012/1352: Wholesale markets for voice call termination on individual mobile network.

Request for information pursuant to Article 5(2) of Directive 2002/21/EC

Dear Mr. Reinald Krüger,

Please find the answers of the Estonian Competition Authority (*ECA*) enclosed below.

1. In your previous notification, assessed in case EE/2009/883, you have set MTRs until 30 June 2012. As your current notification proposes MTRs which are to be applied as of 1 January 2013, could you please inform us which MTRs will be applied from 30 June 2012 until 1 January 2013 in Estonia?

ECA:

In accordance with the bases of the 2009 SMP decision the ECA has imposed for the SMP operators the MTRs for periods 1 July 2009 to 30 June 2010, 1 July 2010 to 30 June 2011 and 1 July 2011 to 30 June 2012. With the decision ECA reduced mobile termination rates (MTRs) by using a benchmark based on the average rate in the ERG countries together with a +/-10% cap.

In 2012 ECA has conducted on M7 a new analysis. In a draft decision ECA was proposed to designate the operators EMT, Elisa, Tele2 and ProGroup Holding as having SMP in the market and proposes the MTR levels since 1 July 2012 (as already imposed MTRs for periods 1 July 2011 to 30 June 2012 loses validity on 30 June 2012).

On 17 April 2012 pursuant to point 19 of Recommendation 2008/850/EC ECA withdrew the notified draft measure.

ECA has prepared a new draft decision and has conducted the consultation according with the Article 6 and 7 of the Directive 2002/21/EC. By the draft decision the new price control obligations will come into force since 1 January 2013 (draft decision has been submitted to the Commission on 13.07.2012).

Taking into account that:

a) the ECA withdrew the notified draft measure on 17 April 2012;
b) the already imposed MTRs for periods 1 July 2011 to 30 June 2012 lost validity on 30 June 2012;
c) the new price control obligation will come into force since 1 January 2013 as planned;
d) of the challenge to grant to the SMP operators a reasonable term for the performance of an obligation provided therein (at least two months),

to avoid the legal vacuum in the market ECA has followed the basis of the 2009 SMP decision and has established with its 22 May 2012 decision MTRs rates 0,0632 €/min for the SMP operators for period 1 July 2012 until the obligations of the new decision will enter into force as planned on 01.01.2013 (see also sections 257 of the draft decision).

Taking into account the time ranges mentioned in the sections a) – d) and the explication above, ECA could not in this situation carry out the consultations concerning MTRs rates 0,0632 €/min.

But ECA will conform, taking into account Commission´s 16.04.2012 opinion that in the case of the MTR future changes ECA will carry out a national consultation and notify the MTRs rates (the sections 380 - 383 of the draft decision).

2. Based on the footnote 42 of your notification, please confirm that the table you are referring to can be found in BEREC's "MTR Benchmark Internal Report, as of January 2012". If so, could you please confirm that you have selected for benchmarking those countries which according to the table entitled "Qualitative Information: Cost Orientation Model (as of January 2012)", page 21 of the Internal Report, implement the pure BU-LRIC methodology?

ECA :

The footnote 42 in our notification refers to Commission Recommendation of 7 May 2009 of the regulatory treatment of fixed and mobile termination rates in EU. Our benchmarking bases on BEREC internal report “MTR Benchmark (as of January 2012)“ and takes into account only EU countries where MTRs calculation bases on pure BU LRIC (the sections 379 of the draft decision and the attachment "MTR Benchmark Internal Report, as of January 2012" pages 18,19 and page 21) .

3. Please explain in more detail

a) why you have decided not to benchmark against the MTRs to be implemented by 2013 in Spain, Italy and Portugal, given that these rates have been calculated on the basis of a pure BU-LRIC methodology.

b) More specifically, please explain why you have not considered MTRs implemented in Italy as appropriate benchmarks, having in mind that the Commission has on numerous occasions referred to Italy as a Member State that has notified a pure BU-LRIC cost model (most recently in its decision concerning cases GI/2012/1335 and CZ/2012/1327 and the MTRs imposed in Italy are available from the BEREC Internal report as of January 2012. Please detail your response sufficiently in order to allow us to appropriately consider any deviation by ECA from a cost-efficient benchmark.

c) Moreover, please inform us whether you are aware of the fact that the finally adopted measure by OFCOM in the UK imposed a maximum MTR of 0.85c€/min, and not 0.95c€/min, as originally proposed.

4. Please confirm that

a) according to your notification, the MTR set at 1.29c€/min represents the cost-efficient target rate, whereas the MTR set at 1.47c€/min represents a step on the glide-pate towards that target rate.

ECA:

The MTR set at 1.47c€/min represents the cost-efficient target rate also. The MTR set at 1.47c€/min is average of pure BU LRIC as of 1st half 2013 and 1.29c€/min is average of pure BU LRIC as of 2nd half 2013 and 1st half 2014 (the sections 379 of the draft decision and the attachment “"MTR Benchmark Internal Report, as of January 2012" pages 18, 19 and page 21).

b) If so, please explain why you have considered the Hungarian MTR as an appropriate benchmark when calculating the cost-efficient rate that is to be applied in Estonia as of 1 July 2013, given that this rate, as the Commission noted in its decision concerning case HU/2011/1225, does not yet represent the cost-efficient target rate in Hungary (the imposition of a cost-efficient target rate was only announced for January 2014, depending on the outcome of a new market analysis).

ECA:

In 2012 the ECA has carried out the next M7 analysis and was proposing to designate to operators EMT, Elisa, Tele2 and ProGroup Holding the MTR level for period 1 January 2013 to 30 June 2013 MTR of 3.89c€/min. For periods since 1 July 2013 up to 30 June 2015 ECA was proposing that MTRs will be set by interim decisions which will be published on ECA´s website. When calculating the termination rate for the first half of 2013, ECA did not rely exclusively on pure BU-LRIC MTR based on BEREC internal report “MTR Benchmark snapshot”.

On 16 April 2012 the Commission expressed serious doubts concerning ECA's draft measures. This arises, first of all, because the termination rate for the first half of 2013 is set above the cost-efficient level, and secondly, because the Commission has serious concerns that the termination rates will not attain the pure BU-LRIC target even after mid-2013. In its 16.04.2012 decision[1] (page 9) the Commission pointed out that calculations of price limits that are to be applied in the future should be based on forward-looking termination rates which will be applied in the relevant Member States in the same period. This approach probably requires a more thorough analysis of the finally adopted measures in the Member States concerned, and the Commission is aware of this. However, ECA can easily overcome this issue within BEREC. As of July 2011, BEREC introduced a new section in its MTR Benchmark Internal Report, which is devoted to the analysis of the future evolution of MTRs.

On April 17 2012 pursuant to point 19 of Recommendation 2008/850/EC ECA withdrew the draft measure. In his new draft measure submitted to the Commission on 13.07.2012 ECA has changed the MTR price obligation and has based its benchmarking on BEREC internal report "MTR Benchmark (as of January 2012)" taking into account only EU countries where MTRs calculation is based on pure BU LRIC.

As a result of this the proposed MTR level for period 1 January 2013 to 30 June 2013 is 1.47c€/min (compared with initially planned MTR 3.89c€/min the MTR decreased remarkably - approximately 2.65 times or 265%) and for period 1 July 2013 to 30 June 2014 the proposed MTR level is 1.29c€/min. For subsequent MTR changes ECA will carry out a national consultation and will submit a general notification as set out in the Commission Recommendation 2008/850/EC.

We believe that by using the latest BEREC MTR benchmark snapshot (approved and validated by BEREC Board of Regulators) we will ensure the legitimacy of the ECA SMP decisions in the future and will avoid disputes with communication undertakings.

Also, if ECA takes into account the arguments which are not contained in BEREC MTR benchmark snapshot, the communications undertakings will contest such decisions utmost probably to the court. It may raise the problem of legitimacy and as a result of this the established obligations may be stopped by court (as we experienced by first MTR analyses and uncertainty (regarding to the court´s final decision) remains for years. In 2006 the court suspended, by the application of initial legal protection, the validity of the MTR obligation for period of April 2006 to November 2007.

Indeed, we cannot exclude that the SMP operators will take to court ECA decision (based of the BEREC MTR benchmark snapshot), however in this case the national case law has been already established and data are considering as legitimate basis - according to the previous decisions the undertakings upon applying the MTR have to take into account the arithmetic average rate of countries, published by the European Regulators Group in the annual comparison table of basic data.

ECA emphasizes that ECA appreciate the Commission's and its representatives advises and considers it very valuable but taking into account above-mentioned circumstances and the fact that the data provided in section 3 above-mentioned (question 3 a – c and question 4 b) BEREC MTR benchmark snapshot does not contain, ECA could not take them into account for MTR rate calculating.

According to BEREC's MTR benchmark snapshot (please see the attachment) the methodology implemented by Spain is FDC TD, by Italy TD – LRAIC and the methodology implemented by Portugal is Benchmarking. In contrast, methodology implemented by Hungary is pure LRIC.

[1] Commission 16.04.2012 decision concerning Case EE/2012/1305: Voice calls termination on individual mobile network, SG-Greffe (2012) D/6754. https://circabc.europa.eu/d/d/workspace/SpacesStore/dc9e95c3-e4e3-4d6c-8326-da9af2f410c7/EE-2012-1305%20Acte_EN(4)%2Bdate%2BC%2Bnr.pdf

BEREC’s MTR benchmark snapshot does not contain information about UK imposing maximum MTR of 0.85 c€/min. More important, we should not forget the fact that compared to the current MTR (6.32c€/min) the new MTR since 1 January 2013 will decrease approximately 4.85 times or 485%, ECA believes that even more rapid MTR decrease under these circumstances would be too burdensome for communications undertakings and may contradict the Article 13 (1) of the Access Directive and Article 52 (2) of the Estonian Electronic Communication Act – NRA, establishing obligations relating to cost recovery and price controls, should take into account the investment made by the operator and allow him a reasonable rate of return on adequate capital employed, taking into account any risks specific to a particular new investment network project (see also Annex 1 Price Analysis of the draft decisions concerning cost-based pricing of the telecommunications operators). Also ECA cannot ignore the fact that SMP operators are already during the national consultation process pointing out that the proposed decrease of MTR would not cover the investments. It is relevant, that Estonia is a relatively small country with a lower density of population, more remote areas and, therefore, lower economies of scale.

Taking into account abovementioned facts, ECA believes that the Commission's opinions stipulated in 16.04.2012 decision have been taken into account as far as possible and that ECA has acted in accordance with the Article 8 (4) of the AD: obligations imposed in accordance with this Article shall be based on the nature of the problem identified, proportionate and justified.

Annex 1 MTR Benchmark (as of January 2012) Internal report

If you have any more questions for abovementioned, please contact with us again.

Yours sincerely

Margus Kasepalu

Head of Railways and Communications Regulatory Division -
Deputy Director General.