Comments on the ERG draft Common Position on symmetry of mobile/fixed call termination rates

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General Comments

Arcor AG & Co. KG (Arcor) wishes to thank the ERG for the careful and considered analysis of symmetry of call termination rates. We agree that the questions of symmetries / asymmetries constitute an important module of today's and the future regulatory framework.

It is in the nature of European consultation process that the problems and suggested regulatory solutions are presently rather abstract. Subsequently, we therefore wish to substantiate the problems operators are facing in the German context in particular, and wish to suggest regulatory measures which from our point of view will be effective in ensuring sustained competition. We strongly believe that our analysis are also valid in the wider European context.

Arcor as a fixed operator only comments on fixed termination rates (FTR) and not on mobile termination rates (MTR). Consecutively we will only provide answers to the "general questions" and the "fixed part" but not to the "mobile part".

Before we come to the questions one very important content-related comment for examination: Throughout the document Germany is always considered as a country with asymmetric FTR. Please take into account that Arcor has symmetric FTR with Deutsche Telekom (DT). Other important network operators with symmetric FTR are Telefónica Deutschland GmbH and QSC AG. Arcor charges (all operators) the same FTR as DT and did not seeks higher termination rates for reasons that will be explained below.

Arcor has been taken into account in the statistics of the document, e.g. in an easily comprehensible way in Table 5. Reading the document(e.g. Table 8 and 9), Arcor seems to be considered as an operator with asymmetric FTR, which is completely misleading. In a revision of the document this should be corrected.

Questions

General questions

QUESTION G1: Do you think that the principles outlined in the general economic introduction cover adequately the underlying economic situation of both mobile and fixed termination markets?
o If yes, do you think they are sufficiently reflected in the two parts on "MTR symmetry" and "FTR symmetry" and that they are consistently applying the principles?
o If no, what do you think is missing and which reasoning should be added?

Arcor agrees with the opinion of the EU-Commission that symmetry in FTR is the normal situation and any divergence requires a good justification. This is especially true when asymmetries have been introduced well after the beginning of liberalization, e.g. like in Germany in 2004. From 1998 to 2004 the market has constantly moved towards competition without the assistance of asymmetric FTR.

If rate regulation is based on LRIC the crucial question is if there are disadvantages of OAO regarding economies of scale in the termination market. If there are no strong economies of scale, costs (per costumer) are not higher for OAO than for incumbents.

Termination services is not a component of access but of the wide area network (backhaul and backbone). Main cost driver is switching technology and to a smaller extend transmission technology, using the physical layer, and infrastructure, e.g. ducts. The build-up of switching technology is scalable, the expansion of capacity can be made in small increments. Therefore it is not necessary to build-up overcapacity when the network has to be extended.

Fixed costs, usually a source of economies of scale, only exist to a small extend regarding switching technology. A good example is the number of switches in Germany: [redacted] To a certain degree this might be compensated by longer average routes between concentrators at MDFs and switches; still this evidence suggests that there are no economies of scale at all. To the contrary it seems that OAO profit from late market entry and the possibility to start with an efficient network:

OAOs as new entrants have the possibility to construct an efficient network, that has the size that suits the needs of the operator. Inefficiencies because of “old technology” or size of the network that is not adequate should not arise. The numbers of subscriber line per switch (see above) confirm this theoretical consideration.

It goes without explanations that if FTR are higher than costs the economic outcome would be highly inefficient: The pressure to increase productive efficiency would be relaxed and inefficient market entries would be provoked. This also remains to be a problem if asymmetries exist only for a limited time. FTR that are higher than costs are inefficient in a static meaning of economic efficiency as well as in an dynamic meaning.

Please note that Arcor is convinced that there are strong disadvantages in economies of scale and scope for OAO, but they occur in access-related markets and not in termination markets.

QUESTION G2: Any further comments regarding consistent regulation of both MTR and FTR with regard to symmetry is welcome.

One of the many disadvantages of asymmetries in FTR is that they give the incumbents a justification to charge mark-ups on standard retail rates[1]. The possibility for an incumbent to charge higher prices if the call is terminated in an alternative network and to blame OAOs for that leads to a bad reputation of competitors in general. At first the operator that charges higher FTR is affected, but since many costumers are not aware of the existence of termination charges or even of differences in theses charges, retail mark-ups give a bad reputation to all OAOs. This is especially true for an OAO like Arcor, that does not charger higher FTR but has also to pay asymmetric FTR to OAO.

As long as retail rates of the incumbent are due to rate regulation, NRAs can prohibit incumbents to charge mark ups on retail rates, though this did not happen in Germany. Since “publicly available telephone services provided at a fixed location” (former markets 3 – 6) are not due to regulation any more, and therefore certain retail rate-structures cannot be prohibited, the only way to solve this problem is to regulate symmetric FTR.

Another issue is that in an market without a SMP-operator, it is likely that symmetric FTR would emerge. Probably no market participant would be willing to pay a higher price for a service like termination than he is charging. Such a result would develop independently from underlying costs as a consequence of competition. Since the aim of regulation should be to simulate the result of competition, symmetric FTR are a logical consequence of the premises of market regulation.

[1] The term “on-net / off-net tariffs” would be misleading, since costumers of DT calling an Arcor subscriber line are charged the same tariff as when calling a DT subscriber line. Arcor charges all operators the same FTR as DT.

QUESTION G3: Finally we would like to ask you to elaborate on the question of converging MTR and FTRs and the timeframe you envisage for this.

Fixed part

QUESTION F1: How do you think termination should be regulated in a converging fixed – mobile market?

QUESTION F2: Do you agree on the methodology and assumptions underlying the asymmetry index calculation?

As ERG notices the index strongly depends on the set of assumptions. Therefore it has to be questioned what the use of this index is at all. We believe that this or any other asymmetry index does not excuse NRAs from analysing the situation in each country carefully. Therefore it can only give a slight hint about differences between countries.

Again we suspect that Arcor is counted as an operators with asymmetric FTR in Figures 6 und 7. This would be entirely misleading (see answer to G1); the index should be re-calculated.

QUESTION F3: Do you think the list in paragraph 6.1 constitutes an exhaustive list of the possible reasons justifying the adoption of asymmetric tariffs?

Arcor doubts the assumption that there are significant disadvantages of OAO regarding economies of scale in the termination market (see answer to G1).

An incentive to invest in new networks might be helpful to ensure infrastructure-based competition. However, termination is not a market closely related to investments in infrastructure. Therefore FTR are the wrong trigger for investments in infrastructure.

The number of interconnection points are the same for the incumbent and OAO with a Germany-wide supply of products, since they are due to regulation.

QUESTION F4: Do you agree on the fact that any entry assistance policy for the future based on higher OAOs' FTRs is likely to be less effective than in the past?

Arcor doubts that there should be any "entry assistance policy" if this is not justified by disadvantages in (average) costs. If entry assistance is granted to the market for a certain time

period and then ended, it is hard to justify why this assistance should not be provided to operators entering the market in the future.
To avoid such a dilemma, entry assistance regarding termination markets should not be granted at all.

QUESTION F5: Could you please provide a definition of the “efficient operator” NRAs should refer to in fixing FTRs? What are the costs an efficient operator would incur to provide termination services?

An efficient operator is defined by producing efficiently, that means at least costs. Main cost driver is switching technology and to a smaller extend transmission technology and infrastructure (see answer to G1). Since there are no economies of scale in switching technology size of an operator does not matter.

QUESTION F6: Do you agree on the fact that OAOs should be as efficient as the incumbent?

Yes. (See answer to G1)

QUESTION F7: Do you agree on the fact that there are less reasons for fixed operators compared to mobile operators that justify the adoption of asymmetric tariffs?

QUESTION F8: Do you agree on the fact that if all call termination charges were based strictly on incurred costs there would be a distortion of competition?

In the absence of economies of scale, FTR can be based on incurred costs, if operators are producing efficiently. Symmetric termination rates should result in that case, since average costs are alike. If average costs would differ this would be a result of inefficiencies, being rewarded by higher termination rates. To avoid such distortions of competition, FTR should equal regulated rates of the incumbent.

Moreover, if individual FTR would be set for each operator, competing carriers and costumers would be confronted with heavy information and transaction costs. For billing reasons each carrier would have to record where each termination for each individual call was bought. Billing itself would be much more complicated than it is already nowadays.

If individual FTR are passed through to costumers, these costumers would be burdened with information costs for each call. Each call would cost a different price (per minute), depending on the involved network where the call is terminated.

QUESTION F9: Do you agree on the fact that symmetric tariffs would allow to avoid transaction and regulatory costs?

The transaction and information costs described in the answer to F8 would be avoided with symmetric tariffs.

Additionally, asymmetric FTR would confront the regulator with the daunting task to calculate individual termination rates for 50 operators in the case of Germany (see Figure 2), including cost calculations, hearings, and so forth. They also can be avoided with symmetric tariffs.

To summarise the answers to F8 and F9: The sum of all information- and transaction- and regulatory-costs might be higher than the added surcharges on the incumbent's FTR.

QUESTION F10: Do you agree on the fact that NRas should reach symmetry in fixed termination tariffs within a reasonable period of time?

Arcor strongly doubts the assumption that there are significant disadvantages of OAO regarding economies of scale in the termination market and therefore supports symmetry in fixed termination tariffs (see answer to G1).

If a NRA decides in contrast to this to allow asymmetries in FTR for a certain period, symmetry should be (re-)established as soon as possible.

QUESTION F11: Do you agree that it would be reasonable for NRAs to allow a transition period to move to symmetric FTRs? How long should this transition period be?

No, see answer to G1.

QUESTION F12: In your opinion what criterion should NRAs adopt to set the glide path?

QUESTION F13: As the length of the glide path is a controversial point, in your opinion, should the time period to reach symmetry be the same for all NRAs or should each NRA determine it according to national circumstances?