February 10, 2012

# WIND Hellas comments on Draft BEREC Report on Special Rate Services

## Introductory remarks

The subject matter of the consultation has not been addressed so far by any subject-specific EU-level regulatory framework, not even by the latest 2009 one, and thus it carries with it a certain number of challenges.

First the challenge to assess whether it is matter of regulatory intervention or not in the sense of Directive 2009/140/EC who has as aim to "progressively (to) reduce ex-ante sector specific rules, as competition in the markets develops and, ultimately, for electronic communications to be governed by competition law only.[1]"

The other challenge is to reconcile "The discretion of national regulatory authorities (…) with the development of consistent application of the regulatory framework in order to contribute effectively to the development and completion of the internal market. "[2]

Call origination market has been found sufficiently competitive according EU directives that is why it has been excluded from the process of an ex-ante regulation. However, if this is interpreted differently by NRAs, this leads to the automatic assumption that the conventional understanding of the above principles has to be reviewed. If this is indeed the case, then this should be done according EU directives with SMP market analysis and remedies that are facing proportionally possible market failures. In this case NRAs should try to set more circumstantial but always proportional intervention than a strict regulation in order to promote market welfare.

Under this perspective, we believe that the current regulatory initiative by BEREC goes a step further and actually gives a green light to individual NRAs to regulate ad hoc issues related to a so-far unregulated market segment in an un-consistent matter leading to potential market distortions.

As such, Special Rate Services (SRS) are non core-services and add value to the standard electronic communications services. Thus, they should reflect this added value in their relevant price both for the content provider and the telecom operator.
Additionally, it should be mentioned that there are also other aspects giving value to a service that can and should be monetized in order to avoid distortions. As an example, the differential of the networks (mobile /fixed) always should be taken into account because mobility adds value to the SRS.
The concern here is that over-regulating a non-core service, the risk is to see either price increases of basic services or reduced incentive for investments, detrimental both to core and non-core service provision.

Please find hereunder specific comments on behalf of WIND Hellas. In addition we wish to stress that we subscribe the relevant position of the GSMA.

[1] Whereas 5
[2] Whereas 18

**Value Chain**

With regards to the terms 'communication part' and 'service part' we put to consideration a counterproposal that we believe better describes the actual situation. 'Service' is a word including everything that the customer perceives. There is the content of the service as well as the communication, billing, cash collection, bad debts management, customer information, creation and maintenance of customer basis etc (the aspects mentioned under par. 64. of the Report). The SPs offer the content; the operators are offering all the rest practically transforming 'content' to 'service' and bringing it to the customer.

*Therefore we propose to use for the SP the term 'content part' instead of 'service part' and for the telecom operators the 'service delivery part' instead of 'communication part'.*

According to our understanding and current experience, the term 'wholesale fee' corresponds to the fees exchanged between operators. On the contrary, in this document the term OWR is extensively used also for Category 2 (see page 5) where there is no fee that TO/SP is paying to the Originating operator.

As described in the Report there are two possible aspects that this business relation can be viewed.

(a) The caller pays to the originating operator and subsequently the originating operator pays to the terminating operator the termination fee (category 2) OR

(b) The caller pays to the terminating operator and subsequently the terminating operator pays to the originating operator the originating fee (category 1)

The present Report implicitly considers that SRS market works as the model in category 1 with the difference that the originating operator invoices and performs money collection on behalf of the SP. Even if this was the case, invoicing and money collection on behalf of others cannot be considered as telecommunication or supplementary services supporting the call origination as these have not been considered as supplementary services for the Carrier Selection and Carrier PreSelection. We are not aware of a single case where the incumbent was obliged to offer retail customer invoicing and money collection to the OLOs when offering CS and/or CPS wholesale services.

In several places of the Report it is considered as positive that SP has full control over the retail price. Still, usually such cases where the wholesale provider directly controls and sets the retail price over the distribution channels are considered as vertical agreement, covered by Regulation 330/2010. Thus, in such cases it is vital to assess whether the measures employed are in line with the relevant competition law regulations (in particular Regulation 330/2010).

**Scope of Regulatory intervention**

We strongly believe that regulation should be implemented only and just to the extent that competition will be fostered... For this purpose and since the customer has always the ability to choose where to originate his SRS call, we believe that enhanced price transparency rules could bring the desired outcome.

*As an example and proposal that is enhancing the competition without imposing non-proportionate rules:*

*NRAs might impose rules where the content providers (i.e.SPs) are obliged to advertise the 'content part' based on the content price while the service delivery providers (i.e. telecom operators) are obliged to advertise (e.g. in the web sites, newspapers, bills etc) their prices concerning the 'service delivery part'.*

Possible market failures and subsequent interventions should focus on the customer and its respective welfare. This document is proposing ways to regulate prices without making clear reference to the benefits of the customers but rather leads to a re-arrangement of the revenue shares between the operators and the content providers. For example in this Report there is no reference for possible excessive pricing from the SPs for the content. Since SPs are operating under each country's 'electronic communications' regulation there is the proper regulatory background to verify that SPs are not making excessive pricing. In the context of customer focus for SRS, BEREC and NRAs can undertake an investigation with regards to costs and the wholesale incomes of the SPs.

The decision to regulate call origination markets should depend on the prevailing market conditions and should take into account the potential implications from overregulation that will reduce the intensity of competition.
In case a regulator believes a market failure is apparent, then a public consultation should run for each mobile operator separately, in order to prove they have SMP on their individual mobile networks.
If an operator is found having SMP on its network and also found to abuse its dominant position then a selection of proper remedies is necessary to be imposed. In case these remedies include price setting, then the methodology should not be cost oriented but cost controlled.
NRAs should take into serious consideration that the imposition of price controls –let alone cost oriented prices- on a well functioning competitive market harms society by reducing the intensity of competition and leading to reduced investment in the long run.
But even if the model incorrectly -in our opinion- is chosen to be a cost oriented one, the costs are not comparable with MTRs.

On the issue of costs, of course there are not only the network costs invoked to the provision of the services. Nevertheless, even focusing on the network costs these should not be related to the mobile termination costs as these are included in the cost models specially designed for the MTR calculation. The reason is twofold. One is that the call termination costs have been calculated as incremental network costs (i.e. network expansions for existing networks already offering originating services). For example costs related to the coverage have not been included in the MTR calculation and supposed to be recovered by the origination. Second because the network costs are including also IT costs (e.g. provisioning, security, fraud protection)

which are not included to the MTR calculation. In case these costs are not included also to the wholesale origination, then these should be recovered from the retail customers bringing the originating operator to an obvious competitive disadvantage position in his own network.

For the reason explained above also other costs like marketing, logistics, sales etc should not be omitted if -having all the other measures fail- the NRAs conclude that price regulation based on cost is necessary.

**Legal assessment**

In section 5 of its draft Report, BEREC discusses regulatory approaches to SRS at both the wholesale and retail levels, which include transparency and wholesale / retail price regulation measures.

Furthermore, in section 6 of its draft Report, BEREC identifies the following legal instruments of the EC electronic communication regulatory framework that grant NRAs the power to take the measures mentioned above:

- Dispute resolution (art. 20 of Directive 2002/21/EC as amended by the Better Regulation Directive).
- SMP Regulation (art. 14 - 17 of Directive 2002/21/EC as amended by the Better Regulation Directive).
- Symmetric Regulation

According to our opinion, apart from SMP regulation the other two legal instruments do not provide sufficient legal grounds for the regulation of network operators' wholesale or retail prices in relation to SRS.

A. Dispute Resolution

Article 20 § 3 of Directive 2002/21/EC (the "Framework Directive"), as amended by the Better Regulation Directive, allows national regulators to impose on the undertakings involved in a dispute any obligation to the extent that the latter is in compliance with "this [the Framework] Directive or the Specific Directives".

According to the relevant articles of the Framework and Access Directives, for a national regulatory authority to impose an obligation on an operator to follow specific wholesale or retail prices on SRS, the authority needs to (a) prove that the operator has significant market power ("SMP") on a specific market (b) following a market analysis carried in accordance with EU electronic communication rules, (c) which also indicates a lack of effective competition (i.e., the operator concerned may sustain prices at an excessively high level, or apply a price squeeze, to the detriment of end-users). In any event, such obligations may be imposed only after a specific procedure has been followed, i.e. a public consultation on the draft measure is conducted and the draft measure is notified to the Commission.

Therefore, article 20 § 3 of Directive 2002/21/EC cannot be articulated to confer to NRAs the power to resolve disputes between undertakings by imposing to operators specific wholesale or retail prices related to SRS.

B. Symmetric Regulation

i. Article 5 of Directive 2002/19/EC (the "Access Directive"), as amended by the Better Regulation Directive, gives NRAs under specific circumstances the power to impose obligations on operators to the extent that is necessary to ensure end-to-end connectivity, including in justified cases the obligation “to interconnect their networks where this is not already the case”. It also states that these obligations shall be objective, transparent, proportionate and non-discriminatory and shall be implemented in accordance with the procedures referred to in Articles 6, 7 and 7a of Directive 2002/21/EC (Framework Directive), i.e. after, among others, conducting a public consultation and notifying the draft measures to the Commission.

First of all, regulatory powers of NRAs under article 5 of Directive 2002/19/EC cannot be extended to include the imposition of specific wholesale or retail pricing. Thus, in case C-192/08, TeliaSonera Finland Oyj the ECJ has described such powers as follows : “a national regulatory authority may require an undertaking which does not have significant market power but which controls access to end-users to negotiate in good faith with another undertaking for either interconnection of the two networks concerned if the undertaking which requests such access must be classified as an operator of public communications networks, or interoperability of SMS and MMS message services if that undertaking is not covered by that classification“. In addition, symmetric regulation under the article mentioned above can be taken only in cases where end – to – end connectivity is not ensured. Lack of end – to – end connectivity can be observed only in cases where either interconnection agreements are not in place or relevant negotiations are stalled due to the reluctance of network operators to interconnect and cannot be deemed to include cases where interconnection is in place and working. Furthermore, the imposition to operators of specific wholesale or retail prices related to SRS is a measure that cannot be held as proportionate, since the aims of art. 8 of the Framework Directive can be pursued by a variety of other measures that impose lesser constraints to network operators.

For these reasons we strongly disagree that art. 5 of the Access Directive may confer to NRAs the powers to take the measures referred to at the Report under consultation.

ii. Another legal basis for symmetric regulation referred to in the draft Report, is part C of the Annex to the revised Authorisation Directive, which specifies the conditions that may be attached to rights of use for numbers. In particular, paragraph 1 of Part C provides for: “Designation of service for which the number shall be used, including any requirements linked to the provision of that service and, for the avoidance of doubt, tariff principles and maximum prices that can apply in the specific number range for the purposes of ensuring consumer protection in accordance with Article 8(4)(b) of Directive 2002/21/EC (Framework Directive).”

WIND Hellas disagrees that the legal basis mentioned above grants regulatory powers to set wholesale / retail prices for originating calls. Under the existing EC framework regulatory powers may only be exerted after a market analysis and a finding of SMP/market failure. In specific, according to the EC regulatory framework ex ante regulation can be imposed on undertakings only if three criteria, i.e. (a) presence of high and non-transitory barriers to entry, (b) market structure which does not tend towards effective competition within the relevant time horizon and (c) insufficiency of competition law alone to adequately address the market failure, are

met[3]. Furthermore, such an extensive regulatory approach as the imposition of specific wholesale or retail prices may only be applied under the relevant procedure of defining SMP/market failure.

Therefore, we strongly believe that the above legal basis wording does not suffice to give NRAs any power to set specific wholesale or retails prices on operators for originating calls without a market analysis and a finding of SMP/market failure.

iii. Finally, BEREC refers to art. 28 of the Universal Service Directive, which states that "…… national authorities [shall have the power to] take all necessary steps to ensure that end users are able to: (a) access and use services using non-geographic numbers within the Community…", and remarks that "ensuring access and use also means the prices for these services should be reasonable otherwise use would be hampered".

BEREC misinterprets art. 28 of the Universal Service Directive by considering that it grants NRAs the power to regulate specific wholesale / retails prices in relation to special rate services. First of all, SRS cannot be deemed to be included to the services constituting the universal service, which is actually defined as the provision of a defined minimum set of services to all end-users at an affordable price (see rec. 4 of the Directive). Rather art. 28 is part of chapter IV of the Universal Service Directive and, therefore, contains additional provisions for the protection of consumers. Furthermore, accessibility to SRS is not equivalent to price reasonableness, as BEREC proposes, not to mention equivalent to granting powers to regulate in specific the network operators' pricing of these services.

As a result, we are of the opinion that the Universal Service Directive cannot constitute in any way the legal basis for SRS price regulation.

**Conclusion**

With regards to the legal instruments we believe that the least onerous obligations necessary should be chosen. As with regards to the choice of the proper legal instrument we believe that the options and the selection is clear. Due to the reasons already mentioned in the Report (see parag.84) dispute resolution should be used only and if the case concerns a dispute between two stakeholders. Otherwise, if the case concerns a possible market failure with the involvement of many stakeholders, apparently a more wide approach like SMP regulation is necessary. Otherwise, a strong market distortion will occur with some content providers having different commercial arrangements –derived from the dispute resolution- than the rest market players.

Regarding Dispute resolution, we agree that it should be light and less complex but we strongly believe is not the proper tool for such cases because (a) initially it shall lead to market distortions since one player might have different conditions than the others, (b) due to this fact further dispute resolutions shall follow leading to loss of man hours, loss of problem resolution integrity due to the itemized approach and (c) finally the market will be erroneously 'regulated' with a series of decisions without a systematic and unified method, and with measures that can be either not adequate or

[3] Commission Recommendation 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 (2007/879/EC),

even worse destructive for the market and the stakeholders. As such, we believe it is not the right tool to regulate prices, let alone retail prices *(see recent case in Greece, on which we would be ready to elaborate)*.

Regarding symmetric regulation, we disagree that pricing decisions can be justified with observations or statements that address as problematic a situation (i.e the level of prices) and therefore involve into regulation of all operators (Symmetric regulation) excluding however SPs. Symmetric Regulation is a legal instrument suitable for other type of measures and remedies. There is no legal basis (as we have described above) that gives the power to NRAs to set wholesale and retail prices for SRS and call origination other than SMP regulation.

If -even after the above- we assume that SP has full control over the retail price while at the same time unilaterally decides for his termination fee, he practically will have the power to abuse its position by deciding and –of course- reducing the profit margin of the telecom operators in benefit of its own and not for the benefit of the consumers. Therefore, possible regulatory intervention has to be wise enough offering a balance between permitting sufficient flexibility and awarding power for abuse.