BoR (15) 61

BEREC Opinion on

Phase II investigation

pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC:

Case FI/2015/1718

Wholesale voice call termination on individual mobile networks (market 2) in Finland

7 May 2015

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1. EXECUTIVE SUMMARY

On 27 February 2015, the Commission registered a notification from the Finnish national regulatory authority, Viestintävirasto (FICORA), concerning the market for wholesale voice call termination on individual mobile networks in Finland.

FICORA proposes to impose a set of remedies on the three largest operators[1], including cost orientation and an obligation not to exceed a price cap of 1.25 eurocent per minute[2]. With regard to calculating the cost oriented level of MTRs and setting the price cap for the three largest MNOs, FICORA does not follow the approach recommended by the Commission in its Recommendation on Termination Rates[3]. According to FICORA, national legislation explicitly limits its ability to choose pure BU-LRIC as a cost model to calculate the efficient level of MTRs. In particular, FICORA points to the Government Bill 221/2013 (a preparatory document leading to the adoption of the binding Information Society Code) which states that a reasonable price should include overheads regarding production, and thus the pure BU-LRIC methodology could not be seen as reasonable. Therefore, for the purpose of calculating the MTRs price cap of 1.25 eurocent per minute FICORA used its top-down Fully Allocated Costs model.

On 26 March 2015, the Commission sent a serious doubts letter opening a phase II investigation pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC. The Commission´s serious doubts concern the lack of justification for FICORA´s deviation from the Recommendation on Termination Rates, possibly leading to non-compliance with EU law and creation of barriers to the internal market.

On the basis of the economic analysis set out in this Opinion and the EU Law, BEREC considers that the Commission´s serious doubts are justified.

BEREC suggests that FICORA should provide the Commission with a valid justification for its deviation from the recommended pure BU-LRIC methodology for setting termination rates. Alternatively, FICORA should reassess its approach, in particular, in light of the special character of the regulated service in question, so that the MTR level in Finland is set in accordance with the Recommendation on Termination Rates as soon as possible. If the NRA appears to be constrained in its capability to set relevant remedies, it would be useful to further analyse these constraints.

2. INTRODUCTION

On 27 February 2015, the Commission registered a notification from the Finnish national regulatory authority, FICORA, concerning the market for wholesale voice call termination on

[1] DNA, Elisa and TeliaSonera.
[2] The smallest operator (Alands Telekommunikation) must, instead, comply with a ”fair and reasonable” pricing, which according to FICORA will lead to the same MTR as applied by the three largest operators.
[3] Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (2009/396/EC).

individual mobile networks[4] in Finland. On 10 March 2015, the Commission sent a request for information (RFI) to FICORA, and a response was received on 13 March 2015.

The Commission initiated a phase II investigation, pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC, with a serious doubts letter on 26 March 2015. In accordance with the BEREC rules of procedure the Expert Working Group (EWG) was established immediately after that date with the mandate to prepare an independent BEREC opinion on the justification of the Commission's serious doubts on the case.

On 2 April 2015, the EWG sent a list of questions to FICORA. Answers were received from FICORA on 7 April 2015.

The EWG met on 9 April 2015 in Prague. During this meeting the EWG also met with FICORA to gather further information and clarification on the on-going case and the responses to the questions previously sent. In addition, some further questions were also raised by the EWG. The objective of the EWG was to reach clear conclusions on whether or not the Commission's serious doubts are justified. FICORA sent its answers to these additional questions on 14 April 2015.

A draft opinion was finalised on 29 April 2015 and a final opinion was presented and adopted by a majority of the BEREC Board of Regulators on 7 May 2015. This opinion is now issued by BEREC in accordance with Article 7a(3) of the Framework Directive.

3. BACKGROUND

Previous notifications

The market for wholesale voice call termination on individual mobile networks in Finland was previously notified to and assessed by the Commission under case FI/2006/0403. Subsequently FICORA notified its decision concerning voice call termination in a network of an additional Mobile Virtual Network Operator (FI/2008/0778). The Commission commented inter alia on the ineffectiveness of the imposed cost orientation obligation, according to which the mobile termination rates (MTRs) were negotiated between the undertakings, and only subject to ex-post control.

Current notification

The now repealed Finnish Communications Market Act of 2003, granted FICORA the competence to impose cost oriented pricing obligations and to impose *ex ante* price caps for local loops unbundling and leased lines, all other services could have been subject to an *ex post* control only.

As of 1 January 2015, the Finnish Communications Market Act has been replaced by The Information Society Code. According to the Information Society Code, FICORA now is able to impose price caps and choose a cost model. However, in FICORA´s view, a (pure) BU-LRIC

[4] Corresponding to market 2 in Commission Recommendation of 9 October 2014 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 (2014/710/EU).

methodology would not be in line with the national legislation, as the Government Bill 221/2013, which constitutes the preamble of the Information Society Code, states that it would not be considered *a priori* reasonable to base prices on a costing approach not including overheads. According to FICORA, the preamble is in practice binding as national courts do not depart their interpretation of the norm from them.

Market definition

FICORA defines the relevant product market as the market for voice call termination on an individual mobile network. The market definition includes all calls terminated on the mobile network, irrespective of the network technology used.

Finding of significant market power

FICORA proposes to designate DNA, Elisa, TeliaSonera and Alands Telekommunikation as having SMP in the market for voice call termination in their respective mobile networks.

Regulatory remedies

FICORA proposes the following obligations on the three largest operators:

(i) obligation to interconnect;

(ii) obligation to publish terms of delivery and pricing;

(iii) obligation to set non-discriminatory prices and to provide termination and related interconnection services under non-discriminatory conditions;

(iv) cost accounting; and

(v) cost orientation, including an obligation not to exceed a price cap of 1.25 eurocent per minute.

With regard to the smallest operator (Alands Telekommunikation) FICORA proposes to impose obligations (i) to (iii) above, and an obligation to comply with "fair and reasonable" pricing. FICORA considers that imposing a price cap would not be proportional or reasonable in view of the size of Alands Telekommunikation.

With regard to calculating the cost oriented level of MTRs and setting the price cap for the three largest MNOs, FICORA does not follow the approach recommended by the Commission in its Recommendation on Termination Rates. In the notified draft measure FICORA states that national legislation explicitly limits FICORA ability to choose pure BU-LRIC as cost model to calculate the efficient level of MTRs. In particular, FICORA points to the Government Bill 221/2013 (a preparatory document leading to the adoption of the binding Information Society Code) which states that:

"*the costs of an efficient operator should include, to a reasonable degree, also the overheads regarding production of the products or services. Hence, the pure LRIC methodology, which has been used in some EU countries, could not be seen as reasonable*".

In the reply to the Commission´s RFI, FICORA also clarifies that it has not considered deviating from this statement. Even though it is contained in a non-binding document, FICORA cannot

disregard the legislator's intention not to apply a pure BU-LRIC methodology. FICORA further states that while in the legal doctrine on the sources of law the preparatory documents are not equal to law, as to their binding nature, they are de facto binding since they are decisive for the Finnish courts when interpreting and applying laws.

Therefore, for the purpose of calculating the MTRs price cap of 1.25 eurocent per minute, FICORA used its top-down (i.e. based on costs actually incurred by the Finnish operators and not on the basis of costs of a hypothetical efficient operator) Fully Allocated Costs model (FIFAC – FICORA Fully Allocated Costs model). The price cap is calculated as a weighted[5] average of the individual model results for the three largest operators DNS, Elisa and TeliaSonera.

FICORA has also compared the results of its FIFAC model with the MTRs set by other regulators in Europe. In particular, as FICORA itself recognises that a pure BU-LRIC cost methodology sets prices at the level of markets subject to competition, it considers that its price cap is consistent with the results of other NRAs who applied a pure BU-LRIC model, as reported in BEREC reports on fixed and mobile termination rates in January 2014 (1.31 eurocent per minute on average) and June 2014 (1.22 eurocent per minute on average).

Commission's serious doubts

On 26 March 2015, the Commission sent a serious doubts letter[6] opening a phase II investigation pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC. The Commission has serious doubts as to the compatibility of FICORA´s draft measures with EU law and considers that they would create a barrier to the internal market.

The Commission, in its letter, expresses serious doubts regarding the price control remedy on the market for wholesale voice call termination on individual mobile networks in Finland for the following reasons:

The need to ensure that customers derive maximum benefits in terms of efficient cost based termination rates

The Commission takes note of the national legal constraints reported by FICORA that would impede the implementation of price caps based on a pure BU-LRIC methodology. Notwithstanding, the Commission also notes that FICORA considers the pure BU-LRIC methodology as a model to set price caps for MTRs at the level of competitive markets and that the proposed MTRs are significantly higher (by 25 %) than the average of pure BU-LRIC MTRs as calculated by other European regulators.

Compliance with Articles 8(4) and 13(2) of the Access Directive in conjunction with Article 8 of the Framework Directive and Article 16(4) of the Framework Directive

The Commission refers to Articles 8(4) and 13(2) of the Access Directive[7], which require NRAs (i) to impose remedies, which are based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive,

[5] The weight coefficients are based on the terminating traffic volumes.
[6] C(2015) 2258 final
[7] Directive 2002/19/EC of the European parliament and the Council of 7 March 2002 on access to, and interconnection, of electronic communications networks and associated facilities, OJ L 108, 24.4.2002, p. 7 (the Access Directive).

making a specific reference to Article 8(3) of the Framework Directive regarding to the NRA's duty to contribute to the internal market through a consistent regulatory practice and also of the consistent application of the Regulatory Framework and (ii) in relation to the imposition of price controls to ensure that the chosen cost recovery mechanism serves to promote efficiency and sustainable competition and maximises consumer benefits. Moreover, the letter refers as well to Article 16(4) of the Framework Directive, which requires NRAs to impose on SMP undertakings appropriate regulatory obligations.

The Commission recalls that, due to the specific nature of the voice call termination market, the objectives set in Article 8 are normally best achieved by a cost orientation remedy based on a pure BU-LRIC methodology, as recommended in the Recommendation on Termination Rates. Moreover, the Commission observes that mobile termination rates, which are based on a pure BU-LRIC model, contribute to a level playing field among operators, by eliminating competitive distortions in the termination markets.

With regards to the choice of the cost methodology, the Commission recognises that, although according to article 19(2) of the Framework Directive NRAs shall take utmost account of the Recommendation, NRAs can also deviate from the Recommendation if reasons in light of the policy objectives and regulatory principles of the Regulatory Framework are provided.

However, the Commission considers that FICORA departed from the pure BU-LRIC costing methodology without providing sufficient reasons to show that the Top-Down FAC methodology would allow achieving the policy objectives set in Article 8 of the Framework Directive.

In particular, it is underlined in the serious doubts letter that the FAC methodology: (i) includes common costs not related to traffic whereas only a narrow definition of the incremental cost would lead to the most efficient and least distortionary use of call termination services and ultimately minimise the risk of problems such as cross-subsidisation between operators and inefficient pricing and investment behaviour and (ii) is based on costs incurred by the mobile operators in Finland, without regard to whether such costs would be actually incurred by an efficient operator. Such an approach does not appear to encourage the regulated operators to minimise their production costs and to increase their productive efficiency over time and, therefore, allows the recovery of inefficiently incurred costs leading to higher price caps on MTRs and, ultimately, to higher retail prices.

Nevertheless, the Commission acknowledges that, due to the above mentioned national legislative constrains, FICORA seems not to be in a position to apply Article 19 of the Framework Directive and, thus, the methodology eventually applied, a Top-Down based on Fully Allocated Costs (FAC), cannot be considered a choice of the regulator made under Article 19 of the Framework Directive.

Creation of barriers to the internal market

The Commission notes that terminating operators in Finland will be able to benefit from a higher rate at the expense of operators, and ultimately consumers, in those Member States from which the call originates and that do apply pure BU-LRIC based MTRs. Any such considerable asymmetries in MTRs within the EU not only distort and restrict competition but have a significant detrimental effect on the development of the internal market and thus result in a violation of Article 8 of the Framework Directive.

Moreover, the Commission observes that MTRs set at an efficient level contribute to a level playing field not only at national but also at EU level, by eliminating competitive distortions between fixed and mobile networks.

Conclusion

The Commission observes that FICORA's notification does not provide sufficient justification of why its proposed approach for the markets for voice call termination on individual mobile networks in Finland meets the policy objectives and regulatory principles enshrined in the Framework Directive. Hence, the Commission has serious doubts that FICORA's proposal on the MTRs can be considered appropriate in the given termination market within the meaning of Article 16(4) of the Framework Directive and justified in light of the objectives laid down in Article 8 of the Framework Directive, and in particular the objectives of promoting competition and user benefits pursuant to Article 8(2) of the Framework Directive, and believes that the draft measure would create barriers to the internal market.

4. ASSESSMENT OF THE SERIOUS DOUBTS

Pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC, BEREC shall issue a reasoned opinion on the Commission's serious doubts. In the present case, BEREC shares the Commission's serious doubts for the following reasons:

Compliance with Articles 8(4) and 13(2) of the Access Directive in conjunction with Article 8 of the Framework Directive and Article 16(4) of the Framework Directive

Concerns of the Commission

The Commission refers to the regulatory principles contained in the EU Regulatory Framework and is of the view that the draft measures notified by FICORA do not appear to comply with these principles and objectives. In particular, the methodology used by FICORA for MTR calculation would not be in line with the approach embraced by the Commission in the Recommendation on Termination Rates, considered by the Commission as the most appropriate to achieve the principles and objectives of the EU Regulatory Framework.

The Commission notes that the only reason provided by FICORA for departing from the recommended methodology are the provisions of Finnish national law which, according to FICORA, limit the regulator´s discretion to choose a cost setting methodology based on pure incremental costs. In conclusion, the Commission considers that FICORA did not present sufficient evidence that the proposed Fully Allocated Costs methodology would allow achieving the regulatory objectives set out in Article 8 of the Framework Directive, as it may lead to competitive distortions between operators with asymmetric market shares and traffic flows and, ultimately, lead to the application of consumer tariffs, which are based on wholesale inputs above avoidable costs.

BEREC's Assessment

The serious doubts of the Commission aim at non-compliance of the draft measure with relevant provisions of the EU Regulatory Framework stemming from a lack of sufficient and compelling justification for deviation from the recommended pure BU-LRIC methodology for

MTR calculation. FICORA, on BEREC´s request, confirmed that its motivation for the chosen FAC methodology was based on the provisions of Finnish national law, namely on the Government's Bill giving guidance as to what regulated prices could not be seen as reasonable (i.e. prices without overheads). Therefore, in FICORA´s view, a pure BU-LRIC methodology would not be in line with the national legislation since this costing approach does not include overheads, and thus prices calculated by this methodology may not be considered as reasonable as required by the Information Society Code.

BEREC notes that recommendations are not legally binding and that an NRA can deviate from them[8]. However, NRAs shall take utmost account of the recommendations issued under Article 19 of the Framework Directive and where a NRA chooses not to follow them, it shall inform the Commission, giving the reasons for its position. At the same time, the alternative approach must comply with the relevant provisions of the EU Regulatory Framework.

According to Article 13(2) of the Access Directive, a NRA shall ensure that any cost recovery mechanism or pricing methodology that is mandated serves to promote efficiency and sustainable competition and maximise consumer benefits. According to Article 8(4) of the Access Directive, obligations imposed shall be based on the nature of the problem identified, and be proportionate and justified in light of the objectives laid down in Article 8 of the Framework Directive. The Recommendation on Termination Rates, in Articles 2 and 6, recommends that the evaluation of efficient costs is based on current cost and the use of a BU-LRIC methodology. Therefore, any NRA that intends to deviate from the recommended approach has to provide sufficient reasons as to why another cost methodology would be better suited to meet the regulatory objectives. BEREC is of the view that FICORA has not provided such justification.

As to the benefits of pure BU-LRIC methodology for setting termination prices, BEREC has so far established quite a long history of consistent assessment[9] in this matter and remains of the same opinion also in this case. It is, nonetheless, worth mentioning that, in case of termination services, a pure BU-LRIC approach is generally the most appropriate for the following principal reasons:

- According to recital 20 of the Access Directive, the method of cost recovery should be appropriate to the circumstances taking account of the need to promote efficiency and sustainable competition and maximize consumer benefits. Termination markets are an instance of a two-way access where both interconnecting operators are presumed to benefit from the arrangement but, as these operators are also in competition with each other for subscribers, termination rates can have important strategic and competitive implications. A pure BU-LRIC approach takes into account this specific characteristic of the termination markets, as it takes into account that the common costs (overheads) can be recovered from services other than termination. The notified measures do not justify why FAC methodology should be more appropriate to the circumstances of the termination market in Finland.
- There is an objective reason to recover common costs (overheads) on retail markets rather than on the wholesale termination markets. By taking into account pure

[8] The very same non-binding character of recommendations stems also directly from Article 288 of the Treaty on the Functioning of the European Union.
[9] See e.g. BoR (12) 23, BoR (12) 61, BoR (13) 47, BoR (14) 07, BoR (14) 105, BoR (15) 04.

incremental costs when determining termination rates operators are being encouraged to recover their common costs on retail markets (on which there is a price constraint) and not on a monopolistic market (on which there is a risk of excessive prices). Moreover, operators have a disincentive to lower their off-net call prices because by doing so they generate more outbound traffic which attracts out-payment to rivals. If termination rates decrease, the cost of terminating calls decreases for each operator and retail price competition increases as operators have stronger incentives to reduce their call charges. Lower termination rates would increase competition in call charges, so pure BU-LRIC delivering lower termination rates should be preferred in general to, in this case, FAC methodology. Pure BU-LRIC is therefore generally more appropriate to promote competition and to ensure that users derive maximum benefit in term of price. The notified measures do not justify why FAC based calculation would be a more appropriate cost standard in light of these objectives in the Finnish market.

- The pure BU-LRIC method is also more appropriate to reduce competitive distortions between fixed and mobile operators. MTRs generally include part of the mobile access costs that are therefore recovered from fixed callers. Fixed operators are also generally constrained to some extent in their ability to offer flat rates for mobile call services as part of their flat-rate packages, due to MTRs being (usually) significantly higher than FTRs[10]. Compared to FAC, pure BU-LRIC generally reduces the asymmetry in absolute levels between FTRs and MTRs. Therefore, the pure BU-LRIC methodology in general better meets the objectives of Article 8(2) of the Framework Directive, according to which NRAs should promote competition by ensuring that there is no distortion or restriction of competition in the electronic communication sector.

As a result, a pure BU-LRIC methodology in general better satisfies the objectives of the EU Regulatory Framework. FICORA proposes, however, to apply a FAC methodology in the Finnish market without providing sufficient economic justification. BEREC therefore considers that the Commission´s serious doubts, expressed in its letter to FICORA of 26 March 2015, are justified.

In addition and following FICORA´s restriction to decide on employment of certain costing methodologies stemming from the national legislation, BEREC would like to highlight the importance of independency assigned to NRAs in order to ensure the effective application of the EU Regulatory Framework embedded in Article 3(3a) of the Framework Directive and refers to its previous statement[11] in this matter.

Creation of barriers to the internal market

Concerns of the Commission

The Commission considers that terminating operators in Finland will be able to benefit from a higher rate based on a top-down fully allocated cost model at the expense of operators, and ultimately consumers, in those Member State from which the call originates and which do apply pure BU-LRIC MTRs. Any such considerable asymmetries in MTRs within the EU not only

[10] This relationship exceptionally does not apply for Finland with the current level of MTRs equal to 1.87 eurocents compared to FTRs ranging from 2.2 to 2.8 eurocents.

[11] http://berec.europa.eu/files/document_register_store/2012/11/BoR_(12)_119_BEREC_statement_on_independence_of_NRAs.pdf or http://berec.europa.eu/doc/2012/12.03.12_press-release.pdf

distort and restrict competition but have a significant detrimental effect on the development of the internal market and thus result in a violation of Article 8(2) and (3) of the Framework Directive. The Commission therefore considers that the draft measure would create barriers to the internal market.

BEREC's Assessment

As stated in previous BEREC opinions on phase II cases relating to MTRs, BEREC shares the Commission's general concern regarding the creation of barriers to the internal market through the setting of widely different termination rates across the EU members. BEREC notes that this was one of the main reasons for issuing the Recommendation on Termination Rates.

However, BEREC also notes, as it has been consistently stated in past phase II opinions, that it is not the variation of (mobile and fixed) termination rates within the EU, *per se*, that creates barriers to the internal market, but the unjustified national deviation from a common methodology put forward by the Recommendation on Termination Rates.

The analysis conducted in the previous sections has shown that, in BEREC's view, FICORA's decision to deviate from the Recommendation on Termination Rates is not justified in light of the policy objectives and regulatory principles of the Regulatory Framework. Therefore, FICORA's decision to deviate from a common, Europe-wide methodology would result in a barrier to the internal market, putting the operators and ultimately the consumers in other Member States that apply a pure BU-LRIC methodology at an undue disadvantage.

FICORA considers that its price cap (1.25 eurocent per minute) is consistent with the results of other NRAs who applied a pure BU-LRIC model with an average tariff of 1.31 eurocents in January 2014 and 1.22 eurocents in June 2014. Nevertheless, as raised by the Commission, the weighted average tariff for Member States that have implemented the Commission Recommendation based on BEREC MTRs snapshots[12] was approximately 1 eurocent in both January 2014 and June 2014 and is expected to further decrease (1.22 eurocents for June 2014 represented rather the weighted average for the whole group of benchmarked countries than the average value for countries with implemented pure BU-LRIC methodology – see the graph below).

So, according to the Commission's view, operators from other EU Member States where termination rates are based on a pure BU-LRIC methodology, will be forced to pay higher termination prices to Finnish operators in case a Fully Allocated Costs approach is employed, which would exceed by 25% the average pure BU-LRIC tariffs from other countries that have set tariffs based on pure BU-LRIC. This excessive price is, at least partly, caused by an inappropriate methodology. These higher and asymmetric wholesale costs will generally translate into higher retail prices in competitive retail markets in other Member States. BEREC is of the opinion that unjustified asymmetries in termination rates across the EU will lead to cross-subsidy of national operators by foreign operators and ultimately consumers. Since in the present case it has already been found that a deviation from the pure BU-LRIC approach is not adequately justified, and considering that FAC leads to significantly higher rates, the

[12] See BEREC BoR (14) 55 and BoR (14) 173 for BEREC MTRs snapshot Report as of January 2014 and as of July 2014 respectively

eventual use of a FAC approach to set mobile termination rates in Finland will lead to cross subsidies of Finnish operators at the expense of foreign operators and consumers.

BEREC notes that harmonization of approach in setting mobile termination rate, and harmonized application of the Regulatory Framework in order to contribute to the development of the internal market, is an ongoing process. It could be useful to verify that NRAs are in a position to implement the Regulatory Framework, and that they do not face constraints which prevent them from doing so.

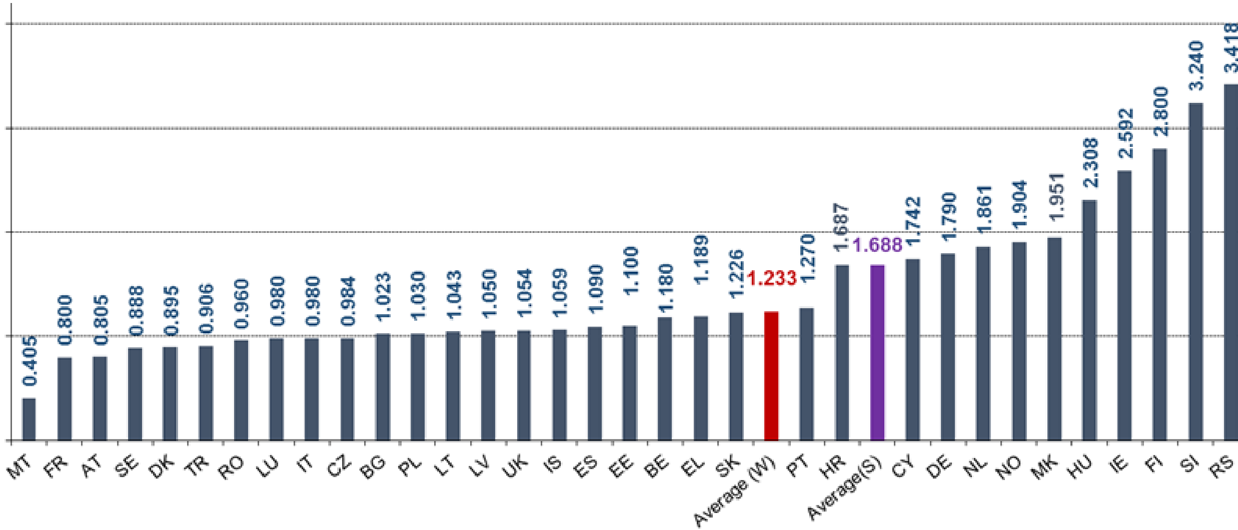

Figure 1: Average MTR per country as of July 2014 Source: BEREC

5. CONCLUSIONS AND RECOMMENDATIONS

Pursuant to Article 19 (2) of the Framework Directive, NRAs should take utmost account of the Commission´s recommendations, but can choose not to follow a recommendation. Thus the assessment and compatibility with European law cannot be based only on non-compliance with the Recommendation on Termination Rates. However, where a NRA chooses not to follow this Recommendation, it has to inform the Commission and give sufficient justification for its position. Nonetheless, NRA’s decisions must be issued in view of the principles and objectives established in Article 8 of the Framework Directive.

On the basis of the assessment set out in section 4 above, BEREC considers that the Commission´s serious doubts regarding the draft measure of FICORA on the market for wholesale voice call termination on individual mobile networks in Finland, as expressed in the Commission´s letter to FICORA of 26 March 2015, are justified. FICORA´s proposed MTRs are not based on a pure BU-LRIC methodology, as recommended by the Commission, and FICORA has not provided a valid economic justification as to how the chosen methodology allows the achievement of the regulatory objectives. Furthermore, economic analysis shows that a pure BU-LRIC methodology results in a better competitive outcome. BEREC is of the opinion that bringing the costing methodology in line with the Recommendation on Termination Rates simultaneously for all market participants (at the earliest opportunity) would have presented the least risk for unjustified market distortions.

In addition, BEREC shares the Commission´s concerns that FICORA´s proposal could create barriers to the internal market if other NRAs set MTRs based on the methodology recommended by the Commission (via a pure BU-LRIC methodology) and FICORA deviates from that methodology without valid justification.

BEREC proposes that FICORA shall provide the Commission with sufficient evidence on how the chosen costing methodology allows the achievement of the regulatory objectives. If such sufficient reasoning cannot be provided, then BEREC recommends FICORA to reassess its approach to setting MTRs in light of the special character of the service in question.

Finally, with regard to FICORA´s restriction to decide on the use of certain costing methodologies stemming from the national legislation BEREC would like to highlight the importance of independency assigned to NRAs in order to ensure the effective application of the EU Regulatory Framework embedded in Article 3(3a) of the Framework Directive. If the NRA appears to be constrained in its capability to set relevant remedies, then it would be useful to further analyze these constraints.