

**BEREC Opinion on
Phase II investigation
pursuant to Article 7a of Directive 2002/21/EC as amended by
Directive 2009/140/EC:**

Case AT/2016/1846-1847

**market for wholesale call termination on individual public telephone
network provided at the fixed location and the market for wholesale
voice call termination on individual mobile networks
(markets 1 and 2) in Austria**

4 May 2016

Table of Contents

1. EXECUTIVE SUMMARY 3

2. INTRODUCTION 4

3. BACKGROUND 4

4. ASSESSMENT OF THE SERIOUS DOUBTS 7

5. CONCLUSIONS..... 12

1. EXECUTIVE SUMMARY

On 23 February 2016, the Commission registered a notification by the Austrian Regulatory Authority, Telekom-Control-Kommission (TKK), concerning the remedies in the market for wholesale call termination on individual public telephone networks provided at the fixed location (Fixed Termination) and the market for wholesale voice call termination on individual mobile networks (Mobile Termination) in Austria. TKK's draft measures propose to change their previous remedies implementing Bottom-Up Long Run Incremental Cost (BU-LRIC) based termination rates such that a different termination rate could be charged where the originating operator was based in an EEA country which did not use a BU-LRIC methodology to set its termination rates. In these cases, TKK's draft measures proposed allowing a termination rate to be charged equal to the regulated (non-BU-LRIC) termination rate in the relevant country of the originating operator.

On 22 March 2016 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 doubts concern the compatibility with EU law of TKK's draft measures concerning price control remedies for the Fixed Termination and Mobile Termination markets in its current form, in particular with the non-discrimination principle envisaged by Article 56 of the Treaty on the Functioning of the European Union (TFEU) and Article 8 of the Framework Directive¹.

In light of BEREC's opinion as to the application of the non-discrimination principle, BEREC considers that the Commission's serious doubts are justified in that TKK proposed Fixed Termination and Mobile Termination (together 'Termination') rates that deviated from those based on a pure BU-LRIC cost methodology to calls originating in certain EEA countries, because TKK has not provided sufficient justification for a departure from the application of the BU-LRIC price that TKK intends to apply to the majority of EEA countries.

In addition, the Commission was concerned that TKK's proposal could create new barriers to the internal market and reverse the progress already achieved by a large number of Member States which have complied with the Termination Rates Recommendation². BEREC also agrees with these concerns.

The consistent application of BU-LRIC based termination rates across Member States is expected to enhance competition in the internal market and bring benefits to EU end users. Lack of harmonization may not only jeopardise these benefits, but may lead other National Regulatory Authorities (NRAs) to alter the conditions of their respective decisions, as Austria has done, resulting in further fragmentation of the internal market.

BEREC recognizes that NRAs can deviate from the Termination Rates Recommendation, but an alternative methodology should be duly justified in light of the policy objectives and regulatory principles of the regulatory framework. In this particular case, BEREC has

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 (Framework Directive), OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37

² Commission Recommendation 2009/396/EC on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (Termination Rates Recommendation), OJ L 124, 20.5.2009, p. 67.

concluded that TKK did not present sufficient justification for that deviation from the Termination Rates Recommendation.

2. INTRODUCTION

On 23 February 2016, the Commission registered a notification by TKK concerning its proposed draft measures in the Fixed Termination and Mobile Termination markets in Austria.

On 1st March 2016, a request for information (RFI) was sent to TKK, and a response was received on 4th March 2016.

The Commission initiated a phase II investigation, pursuant to Article 7a of the Framework Directive, with a serious doubts letter issuing on 22 March 2016³. 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 whether or not the Commission's serious doubts on the case were justified.

On 1st April 2016 the EWG sent a list of questions to TKK. Answers were received from TKK on 4th April 2016. A second list of questions was sent by the EWG on 4 April 2016 and the answers were received from TKK on same day.

The EWG met on 5th April 2016 in London. During this meeting the EWG held a conference call with TKK to gather further information and clarifications in response to the EWG questions sent previously. The objective of the EWG was to reach clear conclusions on whether or not the Commission's serious doubts are justified.

On 11th April EWG held a conference call with the Commission. On this occasion the Commission explained in detail to the EWG the reasons behind its serious doubts. This gave the group a more complete understanding of the case.

A draft opinion was finalized on 2 May and a final opinion was presented and adopted by a majority of the BEREC Board of Regulators on 4 May. This opinion is now issued by BEREC in accordance with Article 7a(3) of the Framework Directive.

3. BACKGROUND

Previous notifications

The fourth review of the wholesale markets for call termination on individual fixed and mobile networks in Austria was assessed by the Commission under cases AT/2013/1435-36. TKK defined fixed call termination as a service of transporting the incoming traffic to the subscribers' termination point from the last interconnectable exchange. All voice calls, regardless of their origination, were included in the market definition. Mobile call termination comprised of the necessary services for termination of voice calls to the selected mobile phone, regardless of where the call originates, including the interconnection service provided for the customers of a

³ C(2016) 1895

reseller. The relevant geographic markets were defined by the area (network coverage) in which the fixed and mobile termination services are provided.

TKK designated the fixed incumbent (A1 TA)⁴, and five mobile operators⁵ with significant market power (SMP) in their respective markets. TKK maintained a set of remedies (access, non-discrimination, accounting separation) and modified the price control methodology to a pure bottom-up long run incremental cost (BU-LRIC) model, which was implemented on 1 November 2013. The wholesale commercial costs constituted 75% of the total costs related to the provision of call termination provided in the fixed networks, and were established by a reference to the costs indicated by A1 TA as an integrated fixed and mobile operator. The Commission requested TKK to reassess in its final measure whether the wholesale commercial costs included in its model calculations correspond to the costs incurred by an efficient hypothetical fixed network operator.

The latest review round (AT/2014/1617-18)⁶ concerned the analysis of additional operators active on the relevant termination markets. The Commission again called upon TKK to reconsider the treatment of wholesale commercial costs. Finally, in cases AT/2015/1801-1802⁷, TKK proposed to modify the scope of the obligation of price control, and limit it to calls originating within the European Economic Area (EEA). The Commission had no comments.

Current notification and the Commission's serious doubts

Summary of notification

TKK's draft measures concern modifications to the scope of the price control obligations in the Fixed Termination and Mobile Termination markets in Austria. TKK notes that some EEA countries do not apply a pure BU-LRIC cost methodology in line with the Termination Rates Recommendation⁸ and '*Austrian operators and ultimately customers pay excessive termination fees for foreign calls (...) while the foreign operator applies a significantly lower fee*'. TKK claims that in practice this leads to unjustified asymmetries which distort competition, limit investment opportunities for Austrian operators and results in capital outflows of considerable amounts to the detriment of Austrian consumers.

Based on economic and legal considerations, TKK proposes to allow Austrian operators to charge termination rates that differ to those based on a pure BU-LRIC methodology for calls originating in certain EEA countries. Following the principle of reciprocity, Austrian operators would be allowed to charge the maximum termination rate implemented in the respective EEA countries for calls originating in this country.

⁴ The notification concerning alternative fixed operators was assessed under case AT/2013/1457, C (2013) 3815.

⁵ A1 Telekom Austria AG, T-Mobile Austria GmbH, Orange Austria Telecommunication GmbH, Hutchison 3G Austria GmbH, Mundio mobile (Austria) Limited.

⁶ C(2014) 4640

⁷ C(2015) 9215 final

⁸ Commission Recommendation 2009/396/EC on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (Termination Rates Recommendation), OJ L 124, 20.5.2009, p. 67.

In concrete terms, Austrian fixed operators will be able to apply the following Fixed Termination price caps depending on the country of origin of the call, instead of the pure BU-LRIC FTR set at 0.085 eurocents/minute:

Country⁹	Maximum FTR (eurocents/minute)
Germany	0.2400
Belgium	0.5020
Finland	2.800
Liechtenstein	3.8425
Lithuania	0.6111
Netherlands	0.3020
Poland	0.5014

Similarly, Austrian mobile operators will be able to apply the following Mobile Termination price caps depending on the country of origin of the call, instead of the pure BU-LRIC MTR set at 0.8049 eurocents/minute:

Country¹⁰	Maximum MTR (eurocents/minute)
Germany	1.66
Finland	1.25
Liechtenstein	7.3487
Netherlands	1.861

TKK proposes to distinguish between the following three scenarios:

- a) if the call originates in Austria or another EEA country, with the exception of the countries listed in the tables above, an Austrian operator will be able to charge a maximum FTR of 0.085 eurocents/minute and a maximum MTR of 0.8049 eurocents/minute,

⁹ TKK lists the values of countries which have adopted termination rates based on the cost calculation other than PURE LRIC model. The costs standards and fees by individual countries are based on the BEREC Report 'Termination rates at European level, July 2015, BoR (15) 211. TKK proposes to use a time-independent value (weighted average, weighted average value) regarding the collocation levels, the value of the lowest known level is used (meaning the lowest fee).

¹⁰ TKK lists the values of countries which have adopted pure BU-LRIC based rates, or a benchmarked rate based on these. TKK found that those MTRs range from 0.4045 eurocents/min in Malta to 1.226 eurocents/minute in Slovakia. The costs standards and fees by individual countries are based on the BEREC Report ('Termination rates at European level, July 2015, BoR (15) 211, from surveys by Cullen International ("Mobile termination rates and cost model", 22 December 2015) and from documents from proceedings in terms of Art. 7 Framework Guideline.

- b) if the call originates outside of the EEA, an Austrian operator can freely negotiate both the fixed and the mobile termination rate, and
- c) if the call originates in Germany, Belgium, Finland, Liechtenstein, Lithuania Netherlands or Poland, the Austrian fixed operator will be able to charge a higher Fixed Termination Rate (FTR) up to a maximum price cap as indicated in the table above. Similarly, an Austrian mobile operator will be able to depart from the pure BU-LRIC Mobile Termination Rate (MTR) and charge a higher fee for calls originating in Germany, Finland, Netherlands and Liechtenstein (again with the maximum cap as indicated in the table above).

The proposed new caps for termination rates would come into effect on the first day of the month following the adoption of the notified decision by TKK. They will remain in place until further notice. TKK also considered applying the principle of free negotiations to the countries listed in the tables above, as is the case with calls originating outside of the EEA, but concluded that the number of countries deviating from the Termination Rates Recommendation is limited, so that the principle of reciprocity can be implemented.

Summary of serious doubts

The Commission considers that the notified draft measure, which differentiates between call termination rates based on the origin of the call within the EEA, may constitute a restriction to the freedom to provide services which cannot be justified and may infringe the non-discrimination principle as provided in Article 8(5) of the Framework Directive. The Commission is of the view that the proposed TKK decisions are likely to deepen divergences in the regulatory approaches to setting termination rates, create new barriers in the internal market, and reverse the progress already achieved by a large number of Member States, including Austria, which have complied with the Termination Rates Recommendation. Moreover, the Commission notes that TKK has not put forward sufficient evidence that the planned increase in termination rates will not be passed on to end-users of the selected EEA countries, or that operators based in those EEA countries will not have less resources available for investment.

4. ASSESSMENT OF THE SERIOUS DOUBTS

On 22 March 2016, the Commission sent a serious doubts letter opening a phase II investigation pursuant to Article 7a of the Framework Directive. The Commission's serious doubts concern the compatibility of TKK's draft measures concerning price control remedies for the Fixed Termination and Mobile Termination markets, in particular, with the non-discrimination principle envisaged by Article 56 of the TFEU and Article 8 of the Framework Directive. The reasons for this conclusion are discussed in detail below.

Concerns of the Commission

The Commission, in its serious doubts letter expresses serious doubts regarding price control remedies for the markets for fixed and mobile call termination in Austria for the following principal reasons:

- a) Compliance with the non-discrimination principle as envisaged under the freedom to provide services principle under Article 56 of the TFEU and Article 8(5)(b) of the Framework Directive.

The Commission indicates that case law clarifies that national rules which are not applicable to services without distinction whatever the place of residence of the recipient, and which are therefore discriminatory, are compatible with Community law only if they can be brought within the scope of an express derogation, such as Article 56 of the TFEU. However economic aims cannot constitute grounds of public policy within the meaning of that provision¹¹.

The Commission also refers to Article 8(5) of the Framework Directive which imposes an obligation on NRAs to apply non-discriminatory regulatory principles to ensure that there is no discrimination in the treatment of operators in similar circumstances.

The Commission has serious doubts that the notified measures, which propose a different treatment of calls depending on the country of call origination within the EEA, comply with the principle of non-discrimination since an essentially identical competition problem would be treated in a different way without objective justification. The Commission considers that even though the termination service provided by Austrian operators will be technically identical, they will be allowed to charge a different rate for the same service on the basis of originating operators' location.

Therefore, in the opinion of the Commission, the draft measures may constitute a restriction to the freedom to provide services, by establishing a direct discrimination on the basis of the nationality of the operator originating the call. In this respect the Commission refers also to the previous Phase II investigation concerning indirect discrimination against operators established in other Member States, in particular Case DK/2012/1283, C(2012) 1031.

The Commission does not accept TKK's view that the proposed measures will not amount to discrimination, as according to the Commission calls originating from a country which has not implemented pure BU-LRIC are the same as calls originating from a country where this pricing methodology is in place. The Commission therefore concludes the requirement to have equal or similar circumstances is not met in this case. In the light of the foregoing, the Commission considers that the notified regulatory measure may constitute a restriction to the freedom to provide services which cannot be justified and may infringe the non-discrimination principle as provided in Article 8(5) of the Framework Directive.

b) Compliance with the policy objectives set out in Article 8 of the Framework Directive

The Commission has serious doubts that the proposed measures achieve the objectives set out in Article 8(3) of the Framework Directive and contributes to the development of the internal market. The Commission considers that asymmetries in termination rates within the EEA have a significant detrimental effect on the development of the internal market, and a harmonised and consistent approach in setting termination rates is particularly important to ensure that regulators do not favour their national operators at the expense of operators in other Member States by not introducing fully cost-oriented termination rates.

In the opinion of the Commission, while it shares TKK's view that the existing asymmetries must be addressed, the notified draft measures cannot be regarded as an appropriate response to the lack of regulatory consistency in this field.

¹¹ Case C-224/97 Erich Ciola v Land Vorarlberg

Furthermore, the Commission considers that TKK did not provide sufficient evidence that the planned increase in termination rates will not be passed on to end-users of the selected EEA countries, or that operators in those countries will still have the same resources available for investment.

Views of TKK

In its notified decision, TKK explains that some EEA countries do not apply a cost methodology in line with the Termination Rates Recommendation, and that therefore their operators charge significantly higher termination rates than Austrian operators. TKK believes that this type of asymmetry of fees within the EEA, based on various fee standards, leads to distortions among providers, limits their investment possibilities and leads to significant capital outflows, which in the end, are paid by Austrian end-users. In the opinion of TKK there are no circumstances known which could justify these asymmetries.

TKK claims that the non-discrimination principle under EU law is not an absolute principle. As explained in the TKK's draft decisions, the non-discrimination principle under Article 10 of the Access Directive¹² requires for example that the operator to apply equivalent conditions to other operators only under equivalent circumstances. TKK considers that there are circumstances not currently equivalent because individual Member States of the EEA have not based their termination fees on BU-LRIC.

In TKK's view, the current change in price control remedies is also to be considered proportionate in terms of Austrian national law, *'because the intensity of intervention of the specific imposed obligation will be tempered. The obligated company can - now - charge a higher fee for traffic originating in a particular EEA country'*.

TKK also points to the previous Commission recommendations submitted during the Phase II investigations¹³ in order to conclude that fair competition conditions within the EEA can be achieved only when all termination fees within the EEA will be subject to the same regulatory standard.

TKK also points to the lack of effective action by the Commission against the asymmetries in costing methodologies between the Member States, as an additional reason why TKK deems it necessary to take concrete measures at national level.

BEREC's Assessment of non-discrimination principle as envisaged under the freedom to provide services and Article 8(5)(b) of the Framework Directive

According to the serious doubts letter of the Commission, the draft measures notified by TKK may constitute a restriction to the freedom to provide services and may infringe the non-discrimination principle as set in Article 8(5) of the Framework Directive.

In this regard, in order to establish whether TKK's draft measures comply with the non-discrimination principle as envisaged under the freedom to provide services under Article 56 of the TFEU and the Framework Directive, it is particularly important to evaluate whether in

¹² Directive 2002/19/EC of the European Parliament and of 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, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37,

¹³ Case DE/2015/1713, case DE/2014/1666-1667

this specific case there are sufficient reasons that would justify – as TKK claims – a differentiation in the way calls originating in certain EEA countries (those using cost models other than pure BU-LRIC) are treated.

TKK estimates what it believes to be the efficient costs (on a BU-LRIC basis) incurred by both an Austrian fixed operator and an Austrian mobile operator terminating a voice call on their respective networks. However, TKK's current proposal is effectively setting out circumstances under which Austrian operators are permitted to set their wholesale termination rates above the efficient price level that has already been determined by TKK. In doing so, TKK's proposal permits Austrian operators to set regulated termination rates on the basis of a non-efficient cost methodology and at a price level that, crucially, reflects the costs of a non-Austrian operator active in another EEA country. TKK's proposal does not simply reciprocate the costing methodology used by another EEA country but instead reciprocates the actual rates specific to those EEA countries, which do not reflect the costs of an efficient Austrian operator.

With TKK proposing to regulate termination rates in Austria on the basis of such reciprocated rates, its proposal would result in the same competition problem (i.e., the bottleneck surrounding termination in Austria and the subsequent determination of Austrian based efficient costs) being treated in different ways. On this basis, TKK's proposal could give rise to the type of distortions in competition – across EEA countries – that consistent regulation of country specific termination rates seeks to address within the internal market.

The principle of non-discrimination is a fundamental principle of EU law, which has been reflected in the case-law of the European Court of Justice (Court). The case law clarifies that national rules which are not applicable to services without distinction whatever the place of residence of the recipient, and which are therefore discriminatory, are compatible with Community law only if they can be brought within the scope of an express derogation, such as Article 51 and following the TFEU. However, economic aims cannot constitute grounds of public policy within the meaning of these provisions¹⁴.

Moreover, Article 8(5) of the Framework Directive imposes an obligation on NRAs to apply non-discriminatory regulatory principles to ensure equality of treatment of operators in similar circumstances.

TKK argues that using the proposed measures is the appropriate method to address current distortions on the affected telecommunications markets and the existing asymmetries of mobile and fixed termination rates within different EEA countries due to the application of different cost methodologies. The Court, however, has consistently confirmed¹⁵ that the failure by a Member State to comply with its obligations may not be invoked by another Member State to justify its own failure to comply with its duties. As regards the economic impact of the alleged asymmetries on Austrian operators, the Court has clarified that "*preventing any adverse effects on an economic sector, and consequently on the economy of the State, must be regarded as an economic aim which cannot constitute a reason relating to the general interest that justifies*

¹⁴ While the Court has stated (e.g., in case Case C-220/83, *Commission v. France*) that imperative reasons – such as consumer protection - relating to the public interest may justify restrictions on the freedom to provide services, it must be noted that TKK has failed to advance this kind of argument to justify the limits placed on the price control obligation provided in the draft measures.

¹⁵ See e.g. Case 52/75, para. 11.

a restriction of a fundamental freedom guaranteed by the Treaty [such as the freedom to provide services]”¹⁶.

In light of the above, BEREC is of the view that TKK has not put forward sufficient justification as to why with regard to some EEA countries, circumstances are sufficiently different so as to justify a departure from the application of the regulated price that TKK intends to apply at domestic level as well as to the majority of EEA countries (introducing a reciprocity rule instead). The mere existence of different cost models in a number EEA countries, in what constitutes a deviation from the Termination Rates Recommendation, is in itself not sufficient to justify a departure from the principle that, absent an objective justification, all EEA calls should be treated equally regardless of their origin. As noted in the serious doubts letter, the draft measure would in this regard lead to discrimination not only between EEA countries but also among their operators, depending on whether they are established in a EEA country that has regulated termination on the basis of alternative cost models or not.

BEREC’s Assessment of Compliance with the policy objectives set out in Article 8 of the Framework Directive

According to the serious doubts letter of the Commission, the draft measures notified by TKK may constitute a barrier to the internal market and have negative effects on European end users, and as such not comply with the policy objectives in Article 8 of the Framework Directive.

TKK has validly pointed to the current situation, where some Member States do not follow the Termination Rates Recommendation, and this may result in undue financial losses for Austrian operators. TKK note that BEREC and the Commission have repeatedly stressed this point during the numerous Phase II investigations concerning some Member States’ decisions not to adopt a pure BU-LRIC model. In this regard, the draft measure also aims at alleviating a preexisting unjustified burden imposed on Austrian operators.

However, BEREC considers that, in the context of this specific case, the Framework Directive provisions related to the internal market and promotion of competition are both important. BEREC underlines, like the Commission, that the draft measure “*reverse[s] the progress already achieved by a large number of Member States, including Austria, which have complied with the Termination Rates Recommendation*”. BEREC agrees with the Commission’s view that allowing for this new option of setting prices creates divergence in regulatory approaches. This divergence could in turn result in less harmonization. While acknowledging that Austria faces a challenging situation, BEREC believes that the draft measure would in turn lead to a situation that is not optimal.

Moreover, TKK argues that its proposed measures address the negative effects of existing termination rates asymmetries on Austrian end-users such as limited investment opportunities and capital outflows. The Commission is of the view that TKK should have taken into account the effects on all EU end-users. In response to the questions from the Commission, TKK claims that end-users in the selected EEA countries would not be worse off since they can purchase the termination service of an Austrian network under the same conditions of their own network and so will not be charged beyond the fee charged in their own country. BEREC however observes that it may be the case that consumers in the listed countries could be better off if Austrian operators keep charging the lower BULRIC rate. The fact that consumers in an EEA

¹⁶ Case C-398/95, *SETTG v. Ypourgos Ergasias*, para. 23.

country with non-LRIC termination rates would pay the same termination rate for a call to Austria as for a domestic call does not seem a convincing argument, as the costs of termination for the two calls could differ.

In the light of the above, BEREC shares the Commission's view that TKK, in this particular case, when deviating from the Termination Rates Recommendation should have taken into account the possible (negative) impact of the proposed measures on all EU end-users and not only on end-users in Austria. In most cases, it may suffice to look only at national impacts. But this may not suffice in a case such as this, where the interests of Austrian consumers may be in direct opposition to the consumers in the Member States which do not apply BULRIC.

On the basis of the assessment set out in this section, BEREC considers that TKK did not provide sufficient evidence that the proposed draft measures will not have a significant detrimental effect on the development of the internal market. Moreover, BEREC is of the view that TKK did not provide sufficient evidence that the planned increase in termination rates will not be passed on to end-users of the selected EEA countries.

5. CONCLUSIONS

BEREC considers that the Commission's serious doubts regarding TKK's notified draft measures on the modification of the price control obligation on the Fixed Termination and Mobile Termination markets, as expressed in the Commission's letter to TKK of 22 March 2016, are justified in that TKK proposed the application of fixed and mobile termination rates other than those based on pure BU-LRIC cost methodology to calls originating in certain EEA countries, and TKK has not provided a sufficient justification for a departure from the application of the regulated price that TKK intends to apply to the majority of EEA countries.

On the other hand, BEREC has taken the view that the current situation, where some Member States do not follow the Termination Rates Recommendation, may result in undue financial losses for Austrian operators. In this context, TKK's decision to deviate from the Termination Rates Recommendation could allow Austrian operators to reduce capital outflows. However, BEREC believes that the draft measure would in turn lead to a situation that is not optimal.

On a general basis, the strict application of the non-discrimination principle, when faced with heterogeneities in regulatory frameworks and cost methodologies in other Member States, could create distortions to a certain extent. Those distortions may mitigate the benefits triggered by the regulation of voice termination at the national Austrian level. Such a competitive distortion has already been acknowledged by BEREC in its opinion in the Danish Phase II case DK/2012/1283,¹⁷ where a NRA was also faced with different regulatory regimes among Member States and a non-discrimination obligation at the same time.

¹⁷ "This one-way regulation applied only to "Danish operators" would result in asymmetric rates, allowing the "free to price" operator to set his termination rate at a higher level than the regulated Danish one resulting in severe competitive distortions, hence proving to be disproportionate and discriminatory and goes against the objectives of symmetry of termination rates regulation. Not only national undertakings might incur financial losses as a result of this, but also national consumers, vis-a-vis the consumers from other Member States, could be harmed in regards to the retail price [...]"

Thus, BEREC supports TKK's view that the existing asymmetries in rates for voice call termination should be addressed at the European level. BEREC, as stated in its "Internal Report on the implementation of the Termination Rates Recommendation"¹⁸ believes that "*the two-tier situation where most countries follow the recommendation principles but some others do not stands out as a concern*" and is the source of the problems in this specific case. Indeed, it is noteworthy that the draft measure will become naturally void if the listed Member States decide to follow the Recommendation.

The consistent application of LRIC-based termination rates across Member States is expected to enhance competition on the internal market and bring benefits to EU end users. Lack of harmonization may not only jeopardise these benefits, but may lead other NRAs to alter the conditions of their respective decisions, as Austria has done, resulting in further fragmentation of the internal market.

BEREC recognizes that NRAs can deviate from the Termination Rates Recommendation, but an alternative methodology should be duly justified in light of the policy objectives and regulatory principles of the Regulatory Framework. In this particular case, BEREC has concluded that TKK did not present sufficient justification for that deviation from the Termination Rates Recommendation.

¹⁸ BoR (15) 209