

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

**Case IT/2016/1885**

**Market for wholesale voice call termination on individual mobile  
networks (market 2) in Italy**

**6 September 2016**

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## 1. EXECUTIVE SUMMARY

On 29 June 2016, the European Commission registered a notification from the Italian national regulatory authority, Autorità per le Garanzie nelle Comunicazioni (AGCOM), concerning termination rates in the market for wholesale call termination on individual mobile networks.

The decision allows PosteMobile to set MTRs at 1.7 cents per minute, for terminating calls from H3G, Fastweb and Telecom Italia. The rate is calculated based on actual costs from PosteMobile, rather than using a BU-LRIC costing method, thereby ending up higher than the regulated rate of 0.98 cents per minute that was set in the last market analysis of the wholesale markets for voice call termination on individual mobile networks in Italy.

On 28 July 2016 the Commission sent a serious doubts letter (SDL) 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:

- 1) *Compliance with Article 5(1), 5(2) of the Access Directive in conjunction with Article 8 of the Framework Directive and Article 20 of the Framework Directive*
- 2) *Compliance with the non-discrimination principle as set out in the Article 8(5) (b) of the Framework Directive*
- 3) *Creation of barriers to the internal market*

On the basis of the assessment set out in this Opinion, BEREC considers that the Commission's serious doubts are justified.

## 2. INTRODUCTION

On 29 June 2016, the Commission registered a notification from the Italian national regulatory authority, AGCOM, concerning termination rates in the market for wholesale call termination on individual mobile networks.

On 5 July 2016, a request for information (RFI) was sent to AGCOM, and a response was received on 8 July 2016.

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 SDL on 28 July 2016. 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 8 August 2016 the EWG sent a first list of questions to AGCOM. Answers were received from AGCOM on 9 August 2016, a second list was sent on 18 August 2016 and the answers were received on 19 August 2016.

The EWG met on 10 August 2016 in The Hague. Part of this meeting involved a discussion between the EWG and a representative of AGCOM, in order for the EWG to gather further information on the case, and for the AGCOM representative to provide clarification in response

to the questions sent the week before and to some additional questions that arose during the discussion. The objective of the EWG meeting was to form a view on the SDL, get a better understanding of AGCOM's arguments and information, and to reach clear conclusions on whether or not the Commission's serious doubts are justified or not.

On 17 August 2016 the EWG held a conference call with the Commission. On this occasion the Commission explained, in response to a number of questions and in some additional detail, to the EWG the reasons behind its serious doubts. This gave the EWG a more complete understanding of the case.

A draft opinion was finalized on 29 August 2016 and a final opinion was presented and adopted by a majority of the BEREC Board of Regulators on 6 September 2016. This opinion is now issued by BEREC in accordance with Article 7a(3) of the Framework Directive.

### 3. BACKGROUND

#### Previous notifications

The third review of the wholesale markets for voice call termination on individual mobile networks in Italy was notified to and assessed by the Commission under case IT/2011/1219<sup>1</sup>. On the basis of its market analysis, AGCOM designated H3G, Telecom Italia, Vodafone and Wind as having SMP on their own mobile networks/markets and imposed a set of remedies, including price control. The levels of MTRs were established on the basis of a BU-LRIC model. The MVNOs were not notified as SMP operators on the termination market given that at that time they were yet to start providing termination services. However, AGCOM committed to monitor the competitive dynamics of termination services with particular regard to MVNOs. In its comments, the Commission criticised the delayed implementation of the 2009 Termination Rates Recommendation<sup>2</sup> and the comparatively high levels of MTRs in Italy. The Commission further commented on the lack of a proper justification for the proposed asymmetry in termination rates.

The last market analysis of the wholesale markets for voice call termination on individual mobile networks in Italy was notified to and assessed by the Commission<sup>3</sup>. On the basis of its market analysis, AGCOM notified the four MNOs, i.e. H3G, Telecom Italia, Vodafone and Wind, as having SMP on their own mobile networks. In addition, AGCOM designated four full MVNOs, i.e. BT Italia, Lycamobile, Noverca and PosteMobile, with SMP on their respective networks. AGCOM set MTRs for the market review period by updating the pure BU-LRIC model already applied in the past market review with (a) new traffic data on volumes and peak-to-mean ratio and (b) the new WACC. As a result of the above, AGCOM proposed to impose on all the SMP operators a symmetric rate of 0.98 €cent/minute.

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<sup>1</sup> C(2011) 4895.

<sup>2</sup> Commission Recommendation of 7 May 2009 on the regulatory treatment of fixed and mobile termination rates in the EU, OJ L 124, 20.05.2009, p. 67 (Termination Rates Recommendation).

<sup>3</sup> C(2015) 5524. The SDL states that this is case IT/2015/1778, while it is actually case IT/15/1768

## Current notification and the Commission's serious doubts

### Summary of notification

The notified draft measures concern three dispute settlements between PosteMobile and H3G, Fastweb and Telecom Italia, respectively. The disputes focus on the termination rates charged by PosteMobile<sup>4</sup> in the period between 14 July 2014, when PosteMobile started providing termination services, and 30 September 2015, when PosteMobile was notified as SMP operator and therefore subject to the symmetric termination rate set by AGCOM following its market analysis.

AGCOM notes that in the relevant period PosteMobile was not notified as SMP operator and therefore subject solely to the obligation to negotiate interconnection for the purpose of providing publicly available electronic communication services in order to ensure the provision and interoperability of services<sup>5</sup>. AGCOM therefore states that the application of a cost oriented termination rate set on the basis of the incremental costs of a hypothetical efficient operator would result in a rate below the costs and would thus not be reasonable and appropriate given that PosteMobile is a new entrant in the call termination market as full MVNO.

Therefore, AGCOM took into consideration the following costs calculated according to a fully distributed cost (FDC) method: (i) operative costs, which amount to [xxx] €cent/minute, (ii) common costs, which amount to [xxx] €cent/minute, and (iii) migration and commercial costs, which amount to [xxx] €cent/minute; and proposed to set a 1.7 €cent/minute termination rate<sup>6</sup>. In particular, the operative costs include the access costs (air time) required by the host MNO equal to [xxx] €cent/minute<sup>7</sup>, and the network costs (Opex and Capex) equal to [xxx] €cent/minute. In addition, AGCOM explains that migration and commercial costs include the costs for platform migration from light to full MVNO, which amount to [xxx] €cent/minute, and the marketing and customers operations which amount to [xxx] €cent/minute. In its reply to the RFI, AGCOM stated that migration and commercial costs reflect the actual asymmetry of competitive conditions between PosteMobile and the MNOs. The latter were already operating as MNOs, whereas PosteMobile had to migrate its customer base from light to full MVNO and in order to commercialise the service. According to AGCOM, PosteMobile could not benefit, at the beginning of its operations as full MVNO, from the same economies of scale and/or scope as the MNOs, and thus could not achieve the same unit costs.

### Summary of serious doubts

The Commission considers that the asymmetric rates proposed by AGCOM do not comply with the relevant provision of the regulatory framework, for the following three reasons:

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<sup>4</sup> PosteMobile is an MVNO hosted on Wind's network. PosteMobile has been active in the retail market since 2007.

<sup>5</sup> Article 4 of the 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, 24.04.2002, p. 7, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37.

<sup>6</sup> The rate of 1.7 €cents corresponds to a compromise proposal of PosteMobile and is considered by AGCOM as reasonable and justified in view of the costs incurred.

<sup>7</sup> This charge is also paid for each minute of terminated traffic.

1) *Compliance with Article 5(1), 5(2) of the Access Directive in conjunction with Article 8 of the Framework Directive and Article 20 of the Framework Directive*

The Commission notes that AGCOM could have analysed the market position of PosteMobile sooner, and could have anticipated their future SMP status. This should have led to the imposition of price control obligations, based on the pure BU-LRIC methodology. Furthermore, the Commission considers that an MVNO's termination rate is not to exceed its host MNOs termination rate, as the MVNO can benefit from the same economies of scale and/or scope. AGCOM has not been able to justify including network costs, common costs, commercial and migration costs in calculating a cost oriented termination rate.

2) *Compliance with the non-discrimination principle as set out in the Article 8(5) (b) of the Framework Directive*

The Commission notes that the decision would violate the non-discrimination principle, as PosteMobile would be allowed to charge a higher rate than their host MNO, even though they would provide the same termination services.

3) *Creation of barriers to the internal market*

The Commission considers that the decision would likely create a barrier to the internal market, since the MVNO would be able to charge a higher MTR than operators from other Member states. In most member states, symmetric price control remedies have been imposed on MVNO's following their market entry.

#### **4. ASSESSMENT OF THE SERIOUS DOUBTS**

On 28 July 2016, the Commission sent a SDL 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 compatibility of AGCOM's draft measures concerning the setting of asymmetric MTR for an Italian full MVNO (PosteMobile) in particular with articles 5(1) and 5(2) of the Access Directive in conjunction with articles 8 and 20 of the Framework Directive.

The following paragraphs are meant to analyse the Commission's serious doubts. Paragraph 4.1 describes BEREC's assessment of the need for maximum benefits for customers. This paragraph is split into five distinct elements, all of which represent the individual aspects of the Commission's overall serious doubt regarding the need for maximum benefits for customers. The next paragraph is dedicated to (non-)compliance with the non-discrimination principle. Finally, paragraph 4.3 assesses effects of the decision on the internal market.

#### **4.1. Assessment of the need to ensure that customers derive maximum benefits in terms of efficient cost-based termination rates**

##### **a) Anticipation of PosteMobile's SMP status**

###### *Concerns of the Commission*

In its SDL, the Commission takes the view that, given PosteMobile's control of network elements essential to manage their own customers' call termination services, AGCOM should have anticipated PosteMobile's future SMP status at an earlier stage, and, as this control of network elements is susceptible to ex-ante regulation, that AGCOM should have imposed the appropriate price control obligations at that time, rather than allowing a period of more than one year (14 July 2014 – 30 September 2015) until PosteMobile was notified as an SMP operator and therefore subject to the symmetric termination rate set by AGCOM following the market analysis.

The Commission takes the view that the period in question has effectively led to an ambiguity with respect to the implementation of regulatory tasks under the Regulatory Framework, which may potentially create a barrier to the internal market.

In its RFI, the Commission further interrogated AGCOM on what the Commission saw as the unjustified delays to the market analysis and dispute resolution procedures. The Commission focused on:

- Why AGCOM did not carry out a Market Analysis once PosteMobile started to provide termination services in July 2014?
- Why the dispute resolution was not resolved within four months?
- How AGCOM took into account the objectives laid down in Article 8 of the Framework Directive when deciding on the dispute settlement?

###### *Views of AGCOM*

According to AGCOM, it had already started its evaluation of the SMP position of PosteMobile in the mobile voice call termination market analysis well ahead of the date when PosteMobile started operating as a full MVNO (evolving from an Enhanced Service Provider). Poste Mobile was subsequently notified and subject to symmetric price control from September 2015. Thus, according to AGCOM, the market analysis was timely, since it was already in process when PosteMobile started to operate as an MVNO.

AGCOM has stated (in its response to the Commission's RFI) that the lag of time between PosteMobile's start of operation as full MVNO (July 2014) and its notification (September 2015) is related to the need to complete the national public consultation, to approve the draft decision, to notify it to the Commission and waiting for its comments, and to approve the final decision.

In addition, in its response to the Commission's RFI questions, AGCOM explained that PosteMobile submitted its request for a dispute settlement to AGCOM on 3 November 2014. The main procedural steps were carried out by 2 February 2015. However, subsequently

PosteMobile and Fastweb asked AGCOM for an interruption to proceedings in order to carry out attempts to reach an agreement, and pending the mobile termination market analysis that was ongoing. Those concerned felt that it was better, before settling the dispute, to wait for the completion of the market analysis that would have notified PosteMobile with SMP.

The proceeding for dispute resolution was interrupted for about 8 months (from February 2015 to September 2015) pending the market analysis. The parties involved all considered that it was essential to know the result of the mobile market analysis before the dispute could be settled. AGCOM considered such a request as reasonable in order to avoid a decision that could have been in contrast with the market analysis.

#### *BEREC's Assessment*

During the meeting between the EWG and the AGCOM representative, the facts relating to the timeframe of the market analysis and of the dispute resolution processes were discussed in detail.

The EWG was sympathetic towards AGCOM with respect to the time lag that developed in the Italian market. However, in light of the previous review (third round) of the wholesale markets for voice call termination on individual mobile networks in Italy, AGCOM committed to monitor the competitive dynamics of termination services with particular regard to MVNOs. At the time, the Commission criticised AGCOM for the delayed implementation of the 2009 Termination Rates Recommendation and the comparatively high levels of MTRs in Italy. The Commission further commented on the lack of a proper justification for the proposed asymmetry in termination rates at that time.

Given the timing of the dispute resolution with respect to the current round of market analysis, as well as the operators' suspension of the dispute pending the results of the market analysis, it is clear that the two processes are interlinked. Hence, AGCOM's assessment of the dispute resolution acknowledges the fact that PosteMobile has been designated as SMP starting from 30 September 2015 with the obligation to provide mobile termination at symmetrical rates.

Nevertheless, BEREC believes that AGCOM could have analysed whether PosteMobile had market power at the time of the disputes. BEREC agrees with the Commission that this analysis should have led to the imposition of price control obligations corresponding to those of the operators formally designated with SMP.



## b) Economies of scale

### *Concerns of the Commission*

The Commission considers that full MVNOs and their respective host MNOs provide the same termination service because both operators make use of the same mobile network on the basis of the wholesale service for national roaming. Consequently, similar to case FR/2012/1304, the Commission takes the view that full MVNOs can benefit from the same economies of scale and/or scope as the host MNO and hence achieve the same unit costs irrespective of their actual market shares.

### *Views of AGCOM*

According to AGCOM, PosteMobile could not benefit, at the beginning of its operations as a full MVNO, from the same economies of scale and/or scope as the MNOs, and thus could not achieve the same unit costs. Namely, PosteMobile had to migrate its customers from an ESP<sup>8</sup> to a full MVNO platform.

### *BEREC's Assessment*

As a matter of principle, BEREC agrees that if it can be demonstrated that a new mobile entrant operating below the minimum efficient scale incurs higher per-unit incremental costs with the provision of mobile termination services, the new entrant mobile operator may be entitled to recover them during a transitory period if there are impediments on the retail market related to market entry and expansion. While considering the dynamic market effects (benefits to competition and consumers) of regulatory intervention, such transitory asymmetry for new entrants recognises scalability issues typical to mobile networks.

On the other hand, BEREC understands that while MVNO entry in Italy is neither subject to licence conditions nor to coverage obligations, PosteMobile has been active in the mobile retail market since 2007, namely as a light MVNO before becoming a full MVNO after 7 years of mobile operations, i.e. in July 2014. In essence, having access to wholesale inputs from established network operators in Italy, PosteMobile has been able to provide mobile services and build up scale (customer base) over a considerable period of time, while at the same time avoiding the significant upfront investment typical to mobile network roll-out (mobile networks have large fixed costs and thus create economies of scale). Therefore, despite its switch from light to full MVNO, it is difficult to qualify PosteMobile as a new entrant in the mobile business<sup>9</sup> and to accept a justification of asymmetric rates based on a lack of economies of scale.

Secondly, it is questionable whether the concept of the new entrant operating below the minimum efficient scale<sup>10</sup>, is even applicable to MVNOs. In principle, wholesale inputs such as MVNO access/national roaming allow internalisation (at least to some extent) of the economies of scale and scope of their hosts, therefore reducing the relevance of the minimum efficient scale. Of course, the degree to which an MVNO can internalise (benefit from) the economies

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<sup>8</sup> Enhanced Service Provider

<sup>9</sup> For example, PosteMobile 2015 voice traffic in 2015 amounted to [xx] billion minutes.

<sup>10</sup> As consecrated in recital 17 and article 10 of the TR Recommendation

of its host depends on the price paid for the access<sup>11</sup>. In the present case, PosteMobile could benefit from the economies of scale of its host, so that a transitory period to “scale-up” does not appear to be necessary.

In addition, in its notification<sup>12</sup> AGCOM finds that, when comparing the FDC unit cost of termination<sup>13</sup>, PosteMobile’s own accounting valuation is “in line” with Vodafone and H3G, and “slightly higher than Wind’s and significantly lower than Telecom Italia’s”<sup>14</sup>. Or, even when leaving aside what economies of scale are normally attributed to termination services in a decremental approach, such FDC accounting valuations are in themselves an indication of the overall economies of scale enjoyed by PosteMobile, relative to those of established mobile operators in Italy.

Based on the information and assessment above, BEREC considers that for the period 14 July 2014 – 30 September 2015, PosteMobile could have achieved similar economies as the ones which characterised established mobile networks in Italy. Therefore, BEREC agrees with the Commission that there is no valid justification for treating PosteMobile any differently than the MNOs designated with SMP.

### **c) Additional network costs**

#### *Concerns of the Commission*

The Commission also raises concerns about the inclusion in the regulated termination of some network cost elements<sup>15</sup>, for which the Commission believes AGCOM does not substantiate their relation to the provision of termination services, the extent to which they are efficiently incurred and whether or not they are traffic sensitive.

#### *Views of AGCOM*

According to AGCOM, when switching from light to full MVNO, PosteMobile needed to invest in core network equipment, such as a G-MSC platform for STP functionalities, session border gateways for SIP control management, an HLR/HSS/AuC, and Intelligent Network systems.

AGCOM considered that, for a limited and transitory period, until the SMP decision based on the latest round of market analysis came into effect (Decision No.497/15/CONS), a fair and reasonable termination rate for PosteMobile would be based on FDC rather than on pure BU-LRIC, which would have been disproportionate.

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<sup>11</sup> In the present case, the economic space between the negotiated airtime fee and the (pure BU-LRIC) termination fee exceeds [xx] %, which seems to suggest a reasonable capacity to internalise the economies of scale of the host network

<sup>12</sup> Chapter 4.3, point 66 and figure 5

<sup>13</sup> Comprising network costs, common costs and other costs

<sup>14</sup> accounting valuations of each operator use FDC and are based on the most recent accounting data provided to AGCOM by the operators

<sup>15</sup> Cost categories labeled MVNE, other network, network labour cost, depreciation and cost of capital, which when attributed to [xx] billion minutes corresponding to 2015 traffic, contribute to a total of [xx] eurocents/minute of the FDC cost of Postemobile.

*BEREC's Assessment*

BEREC notes the inclusion of these network costs in the termination rate for PosteMobile because of its choice to use FDC rather than pure BU-LRIC. They are based on the actual costs incurred, reflect the accounting records of PosteMobile and have been developed according to the regulatory guidelines for FDC, which have been used in the past by AGCOM to determine mobile termination rates, before the adoption of pure BU-LRIC. The per-unit costs are based on 2015 traffic.

A full MVNO would indeed need to use equipment such as G-MSC, session border gateways, HLR/HSS/AuC or intelligent network systems. On the other hand, as already mentioned, AGCOM found PosteMobile's cost accounting valuations "in line" with Vodafone and H3G, and "slightly higher than Wind's and significantly lower than Telecom Italia's".

Therefore, BEREC cannot find sufficient reasons to doubt that the said costs are efficiently incurred.

However, to the extent that the said costs are not incremental to the provision of termination services either directly or indirectly, we acknowledge that they should not normally be recovered through regulated fees. Indeed, any cost included in the termination rate needs to be incremental to the provision of the service, i.e. would not have been incurred absent the provision of termination. Furthermore, when setting cost-oriented termination rates for new entrant operators and/or MVNOs, we find no economic argument to justify the use of other cost bases (departure from pure BU-LRIC cost base) even for limited and transitory periods.

Based on this assessment, we believe the Commission's doubts are justified regarding network costs, which cannot be considered incremental to the provision of termination traffic.

## **d) Surcharge for migration and commercial costs**

*Concerns of the Commission*

The Commission also raises concerns about the inclusion in the regulated termination rate of migration and commercial costs (including costs for platform migration from light to full MVNO, and marketing and customer operations). The Commission believes these costs are unrelated to the provision of wholesale termination services.

*Views of AGCOM*

According to AGCOM, migration and commercial costs reflect the actual asymmetry of competitive conditions between PosteMobile (who needed to migrate its customer base from light to full MVNO) and the already operating MNOs. In its reply to the EWG, AGCOM says that the additional network, customer migration and commercial costs are necessary for the MVNO to compete with the incumbent operators already present in the market and that in order to provide wholesale mobile termination services PosteMobile needed, at first, to migrate its customers to its own platform.

*BEREC's Assessment*

BEREC recognizes that PosteMobile needed to migrate its customer base to its own platform, in order to become a full MVNO and better compete in the retail market.

However, costs related to platform migration (from light to full MVNO), marketing and customer operations are hardly traffic-related costs. In any case they are not incremental to the provision of termination services. BEREC therefore agrees with the Commission that these costs should not be included in the calculation of an MTR for PosteMobile.

### **e) Surcharge for traffic imbalances**

*Concerns of the Commission*

In its SDL, the Commission expresses serious doubts regarding the argument that new entrants should be compensated because their traffic is imbalanced in the early years of activity, and the resulting financial loss is greater than what would be incurred if MTRs were already set at the level of pure BU-LRIC.

Related to this, the Commission, in its RFI to AGCOM, made a specific request in relation to PosteMobile's market position in the termination market, and whether AGCOM has 'somehow taken (it) into account'.

*BEREC's Assessment*

BEREC did not find any evidence of this issue in AGCOM's notification.

BEREC therefore concludes that the Commission's serious doubts regarding the surcharge for traffic imbalances are not justified.

## **4.2. Assessment on the non-discrimination principle**

The Commission takes the view that, since the objective cost differences that would warrant asymmetric MTRs for PosteMobile are not adequately justified, the termination rate proposed by AGCOM would lead to price discrimination of the host MNOs vis-a-vis the respective full MVNOs; a situation which may infringe the non-discrimination principle as set out in Article 8(5) of the Framework Directive.

According to AGCOM's answer to the RFI, its proposed measures ensure that there is no discrimination in the treatment of undertakings in similar circumstances, since the termination rate set in all three disputes is the same.

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

In this regard, the similarity of circumstances in which operators may find themselves is not given by the nature or type of regulatory intervention. The mere fact that some rates are set in

a dispute resolution procedure (as opposed to SMP based regulation) changes neither the nature of the service, nor the economic circumstances of the operator which provides them. Moreover, the three disputes have had the same service as an objective.

Resulting from the assessment under paragraph 4.1., BEREC is of the view that AGCOM has not put forward sufficient justification as to why the circumstances of PosteMobile are sufficiently different so as to justify a different treatment as regards the termination rates it provides. In such circumstances, the draft measure would lead to discrimination, not only between PosteMobile and its host MNO, as noted by the Commission, but also with regard to other providers of mobile termination which buy this service from PosteMobile.

### **4.3. Assessment on creation of barriers to the internal market**

The Commission argues that the draft measures would allow PosteMobile to charge higher than efficient wholesale termination rates and that as such, this would very likely lead to the creation of a barrier to the internal market, to the detriment of operators and their subscribers in other Member States.

AGCOM finds itself on the other side of the argument. In its answer to the RFI, AGCOM suggests that the proposal removes remaining obstacles to the provision of services in the internal market by allowing parties to conclude the interconnection contract, and encourages the interoperability and end-to-end connectivity since the same rate could be applied to calls from other countries.

BEREC recognizes that, in principle, any interconnection agreement between undertakings who control access to end-users removes an obstacle to the provision of services in the internal market (contrary to the situation where there is no interconnection agreement). However, while such absolute obstacles are valid irrespective of the termination rate, there is also consistent precedent in Europe where the creation of barriers is analysed in more detail. Namely, any unjustified national deviation from a common methodology to set rates, put forward by the Termination Rate Recommendation, has been consistently considered susceptible to create barriers to the internal market.

In the present case, AGCOM has not adequately justified a different treatment as regards the termination rates of PosteMobile, in particular the use of FDC plus a surcharge for migration and retail commercial costs. BEREC therefore is of the opinion that the draft measures may create a barrier to the internal market, and therefore shares the Commission's serious doubts.

## **5. CONCLUSIONS**

BEREC considers that the Commission's serious doubts regarding the draft decision of AGCOM on dispute settlements concerning termination rates in the market for wholesale call

termination on individual mobile networks, as expressed in the EC's letter to AGCOM of 28 July 2016 are justified.

BEREC is of the opinion that the decision is at odds with the need to ensure that customers derive maximum benefits in terms of efficient cost-based termination rates. As outlined in section 4, BEREC did not find justification, economical or otherwise, for setting different termination rates for PosteMobile. Normally such a deviation is expected to be supplied with solid argumentation, e.g. on the basis of a lack of the required minimum efficient scale. Furthermore, BEREC agrees with the Commission that PosteMobile included several costs which do not appear to be directly related to the provision of termination services. BEREC could not find any evidence supporting the Commission's argument against a surcharge for traffic imbalances, and therefore does not agree with this issue. BEREC concludes however, that a sufficient amount of evidence remains to justify the Commission's serious doubts regarding the need to ensure that customers derive maximum benefits in terms of efficient cost-based termination rates.

Regarding the Commission's serious doubts concerning the non-discrimination principle, BEREC is of the view that AGCOM has not sufficiently justified why the circumstances of PosteMobile call for a different treatment as regards the termination rates it provides. Therefore BEREC concludes that these doubts are justified.

The final serious doubts issued by the Commission argue that PosteMobile's decision would very likely lead to the creation of a barrier to the internal market, to the detriment of operators and their subscribers in other Member States. BEREC considers that AGCOM has not adequately justified a different treatment as regards the termination rates of PosteMobile, in particular the use of FDC plus a surcharge for migration and retail commercial costs. BEREC therefore is of the opinion that the draft measures may create a barrier to the internal market, and therefore shares the Commission's serious doubts.