

Public Consultation on a Draft Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU

– Wind Telecomunicazioni comments –

Wind Telecomunicazioni S.p.A. (“Wind”) welcomes the opportunity to comment on the European Commission’s draft Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU.

Established in 1997, Wind Telecomunicazioni SpA is one of the few European alternative telecom operators to offer integrated fixed, mobile and Internet services. In Italy, Wind is the third-largest mobile operator, with a market share of more than 18% and more than 16 million customers. Under the brand Infostrada the company is also the leading alternative operator in fixed-line services, with more than 1.5 million LLU customers and more than 1,2 million broadband users. Wind owns also “Libero.it” which is the top Italian web portal and is one of the largest service providers in the country.

Wind is part of GSMA, ECTA and of the Mobile Challengers Group.

First of all, Wind would like to express its support for continued regulation of mobile and fixed termination rates to appropriate cost oriented levels with the aim of establishing a consistent approach throughout Europe capable of fostering sustainable competition in European mobile markets. As a matter of fact, regulatory remedies on call termination rates are crucial for the promotion of sustainable competition in the interest of Consumers both in the fixed and mobile markets and therefore Wind supports discussions with a view to developing an harmonised and more consistent approach.

In Wind view for the mobile industry this means:

- ⇒ Immediate reduction of incumbents termination rates to truly cost oriented levels and definition of a glide path for late entrant operators to reflect cost differences compared with incumbents’.
- ⇒ Avoid any disruptive approach that can harm mobile industry market dynamics and distort competition in favour of the incumbents.

Unfortunately current proposal may not result in fostering competition and consumer welfare since the overall approach seems to lack of evidence-based reasoning, and not reflecting actual industry economics and dynamics. What makes this situation even more of a concern is that also the impacts of the proposed approach have not been thoroughly investigated neither with reference to operators nor to consumers.

Especially for MTR regulation, any relevant change from current approach should be carefully implemented to safeguard competition and consumer interests since those are the ultimate goals of regulation. In this respect, an impact assessments on smaller operators and consumer groups should be conducted before any drastic change in the regulatory environment is introduced at EU or national level.

As for the absolute level MTRs shall achieve in Europe, Wind invites the Commission to consider the complete different weight and role termination tariffs play in mobile and fixed markets. In fact, if in fixed markets voice termination revenues account for around 3% of total turnover for each operator, the situation is completely different in mobile markets where revenues from MTR account for around 20% of total turnover for each operator. In this response Wind does not speculate on this approach (i.e. pro and cons of a policy of high MTR) and its impacts on market players but wishes to stress that this has been the regulatory context late entrant mobile operators had to deal with in order to build a successful business case.

Given the relevance of mobile termination (20% of revenues) any radical change is likely to impact the entire mobile market structure and its dynamics and hence requires an appropriate assessment of the impacts may have on operators and consumers. In Wind view the impacts of the proposed draft Recommendation would vary a lot among operators and consumer groups:

- ⇒ **On operators**: a drastic reduction of revenues from MTR would impact operators in a completely different manner according to each operator economic and market position. It is easy to predict that if larger operators which enjoy strong market position and solid financial pockets will have the possibility to simply absorb the loss of a major share of their termination revenues this will not be possible for smaller operators which already face strict financial constraints. It is more than possible that smaller operators will be forced to raise prices to partly compensate for the losses leaving larger operators the possibility to further and easily increase their market shares. According to the different and specific conditions of any mobile operator is it also possible that some smaller operators will be forced out of the market. In any case it is highly probable that a consolidation/concentration phase would be triggered and led by incumbents.
- ⇒ **On consumers**: in Wind view, the economic and social impacts of a drastic reduction on MTRs on specific groups of customers such as pre-pay and low budget should be analysed to avoid that those customers would lose access to mobile telephony. As a matter of fact, a significant proportion of prepaid customers:
 - a. receive more calls than they make and a high proportion of them make very few calls which means that a drastic reduction on MTR would immediately reduce profitability of those customer.
 - b. are served by smaller operator which entered the market later and had no choice than to target the marginal part of the consumers, the higher part being already in the hand of first entrants secured through network discriminating tariff plans and strong retention and loyalty programs.

A combined reading of point a. and b. makes the likelihood that current pre-paid plans will be reviewed to introduce minimum monthly spend requirements particularly high. Given that usually prepaid customers tend also to be lower income the increase in tariffs may result in a reduction of mobile penetration (i.e. some customers may be forced out of the mobile market) and hence dramatically impact total consumer welfare and consumer welfare distribution.

In this respect, comparing market performance between EU and US, a country where MTR are set to zero, helps to comprehend the interactions between MTR regulation and market dynamics which raise potential opportunities and concerns.

At the end of 2006:

- i. **the penetration rate** of mobile services was around 80%¹ in US compared to a penetration in Europe of more than 103,8%²;
- ii. **the percentage of pre-pay customers** was just 14% in US compared to 59,8% in EU;
- iii. **the average monthly bill** for mobile voice services in US was **41,9 \$** compared to around **25 \$** in countries like Germany, UK and Italy.

As for the “efficient operator” approach, Wind challenges the Recommendation proposal since no quantitative analysis backs the “*apodictic*” reasoning that that all operators should reach/have reached a certain size (market share) within a certain period and should invest/have invested in the same technologies despite of late entry, first mover advantages and domestic market realities.

The evidence of late entry over the last 10 years shows that fluidity of mobile markets is weak and that first entrants have largely exploited first-mover advantages (optimized site installation, better frequencies, high spending customers, higher MTRs) to build solid market positions which are particularly difficult to erode also due to the adoption of strategic on-net/off-net pricing schemes which hinder smaller operator competitiveness. In such a situation smaller operators would need many years to reach their “theoretical” market share, if ever. Estimating costs according to theoretical market shares, in an industry characterised by relevant scale economies, would even worsen the competitive scenario for smaller operator since would lead to:

- ⇒ **above normal margins for larger operators** and, when cost oriented, **below cost rates for smaller operators**; and
- ⇒ a **direct subsidization of larger operators by the smaller ones**.

It has the perverse result of giving large operators a subsidy which means they are not encouraged to cost efficiency, whereas smaller operators face regulatory-imposed losses.

In Wind view the “efficient operator” definition proposed by the Recommendation is also unacceptable since equals to say that “all late entrant mobile operators in Europe are inefficient” without any evidence-based reasoning supporting this view.

This approach (i.e. efficient operator definition) is also incompatible with national and European court decision and also inconsistent with the whole liberalisation project, since, in an industry characterised by economies of scale, it implies that monopolies are the most efficient market structure. Notwithstanding this, Wind challenges the more general reasoning that setting MTR at a “symmetrical efficient” cost standard would benefit end-

¹ Federal Communication Commission, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services: Twelfth Report (released February 4, 2008).

² Commission Staff Working Document Annex to the 12th Report.

users without an assessment of the impacts may have on market dynamics and competition.

Finally, European Commission should take into account that forcing smaller operators to operate below costs on the grounds of “pure theoretic” productive inefficiency may exclude some operators from the market (or reduce their competitiveness) which would reduce consumers’ surplus and increase allocative inefficiency (academics agree that allowing moderately *inefficient* entrants to enter the market increases consumers’ surplus because it decreases prices and allocative inefficiencies of monopoly). Moreover the approach proposed in the Recommendation seems not coherent with the DG Comp Staff Discussion Paper on Article 82 that (dealing with discounts practices) openly invites to compare cost and prices of incumbents and entrants also taking into account “economies of scale and scope, learning curve effects or first mover advantages that later entrants can not be expected to match even if they were able to achieve the same production volumes as the dominant company”³.

To conclude, Wind fully endorses the objectives of lower and consistent termination rates in Europe with the aim of fostering sustainable competition and of safeguarding consumer interests. To reach those objectives, Wind invites the Commission to:

- ⇒ perform an impact assessment on smaller operators and specific consumer groups.
- ⇒ provide sufficient flexibility for all Member States to achieve the glide path to the end point in a way that best addresses their actual market distortions in order.

Wind trusts the above comments provide useful insights and remains available to provide further clarifications.

In the attached documents Wind:

- ⇒ Makes specific comments on the methodologies proposed for the calculation of wholesale termination rates in mobile and fixed networks (**ANNEX 1**)
- ⇒ Answers to specific questions posed by the Commission (**ANNEX 2**)

Please note that Annex 1 and Annex 2 should be considered and treated as confidential.

Any question regarding these comments may be addressed to:

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³ DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses paragraph 67. *“Fourthly, it may sometimes be necessary in the consumers’ interest to also protect competitors that are not (yet) as efficient as the dominant company. Here too the assessment does not (only) compare cost and price of the dominant company but will apply the as efficient competitor test in its specific market context, for instance taking account of economies of scale and scope, learning curve effects or first mover advantages that later entrants can not be expected to match even if they were able to achieve the same production volumes as the dominant company.”*