vodafone

RESOLUTION OF DISPUTES RELATING TO TERMINATION OF VOICE CALLS BY CERTAIN CATEGORIES OF MOBILE COMMUNICATIONS PROVIDER

OFCOM CONSULTATION: RESPONSE OF VODAFONE LIMITED

1. Executive summary

1.1 Vodafone Limited ("Vodafone") welcomes the opportunity to respond to Ofcom's consultation outlining its likely approach to the resolution of future disputes relating to the level of the termination rate set by small mobile communications providers ("MCPs") in the next charge control period. Vodafone recognises that the legal framework governing dispute resolution requires that Ofcom handles and determines disputes within a maximum period of 4 months. As such, Ofcom's ability to undertake the type of detailed cost modelling exercise that should be de rigueur in the context of an ex ante market review is clearly constrained. Guidance to industry stakeholders may clearly be useful where it obviates dispute referrals and the consumption of resources on the part of the regulator and industry stakeholders.

1.2 However, the justification for Ofcom's indicative approach to the determination of disputes about the termination rates of different categories of communications provider is far from clear. In some instances, the approach itself is inconsistent with the methodology that it has thus far proposed to adopt in relation to the setting of charge controls for mobile communications providers with a national network. Equally importantly, Ofcom's approach may not achieve the objective of reducing the number of disputes that it is required to determine. This is because in some cases the small MCP may not have access to the type of detailed information needed to determine the applicable mobile termination rate proposed under Ofcom's methodology. In other cases, the small MCP may be unwilling to disclose potentially sensitive information required by the party wishing to verify the termination rate that should prevail. In both of these cases, it would be difficult to avoid the referral of a dispute to Ofcom.

1.3 We would therefore invite Ofcom to reconsider its current proposed framework for the handling of disputes about the termination rates of smaller MCPs. Specifically, we would suggest that Ofcom proposes a new framework that is capable of objective justification and more likely to enable smaller MCPs and interconnecting parties to reach commercial agreement. It is also apparent from the draft guidelines that the case for Ofcom to reconsider its current approach to the setting of termination rates for other, larger MCPs with a national network remains compelling.

1.4 Furthermore, Ofcom, when seeking to provide guidance to industry about its likely approach to the determination of disputes relating to the termination rates of particular categories of communications provider, has gone beyond what is necessary to achieve its objective to the extent that it may be at risk of pre-empting the outcome of a future *ex ante* market review. This is most apparent in its statement regarding voice calls carried over an LTE network. There is no reason for Ofcom to consider the position of an LTE network in this guidance given that no UK mobile operator (small or large) has yet rolled out a network enabling the provision of LTE services. Accordingly, no small MCP is in a position to use such a network at the time of writing. Any assessment of the termination of voice calls over an LTE network awaits the deployment of such networks and a full ex ante analysis of any market for call termination on such a network based on competition law principles. Absent such analysis, there is no basis for Ofcom's statement and we would suggest that any statements regarding calls terminated on an LTE network are excluded from the scope of this guidance. Were they to remain in place, Vodafone would have serious concerns that Ofcom may have fettered its discretion in respect of any future *ex ante* market review that may be undertaken.

2. The use of geographic termination rates is unjustified and inconsistent with Ofcom's approach to setting MTRs for large/national MCPs

2.1 Ofcom identifies a number of different types of smaller communication provider and proposes that the methodology for determining the applicable termination rate will vary according to the category into which the small MCP falls. The use of a different basis for different categories of mobile communications provider is considered necessary because the time constrained nature of the dispute process militates against the type of detailed cost modelling analysis that would be possible in an ex ante market review. In respect of its third category – those "over-the-top" ("OTT") MCPs who do not use a radio access network to offer downstream retail services – Ofcom proposes adoption of the benchmark of the termination rate for a fixed operator, depending on the extent to which the MCP concerned uses a radio access network to provide termination of voice traffic.

Accordingly, an OTT MCP that terminates less than 25% of its traffic on a radio access network would be subject to the termination rate applicable to a fixed operator. An OTT MCP that terminates between 25-75% of its traffic on a radio access network is subject to a termination rate that is the average of the benchmark termination rate for a mobile operator and a fixed operator.[1] As we explain below, the justification for the use of a fixed termination rate in these two cases is far from clear.

2.2 In proposing the application of a fixed termination rate to this category of MCPs, Ofcom neglects to take into account that the MCPs are still providing a *mobile service* to subscribers. This is a service that is clearly distinguishable from services provided by a fixed line operator, a fact that has been repeatedly recognised by the European Commission's Recommendation on relevant markets[2], national regulatory authorities in ex ante market reviews and the European Commission in numerous merger decisions when defining relevant

[1] The standard or benchmark mobile termination rate applies where the OTT MCP terminates 75% or more of its traffic on a radio access network.

[2] See Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services [2007] OJ L 344/65 and accompanying Explanatory Memorandum at paragraph 4.1: *"In the initial Recommendation, a general division was made between services provided at fixed locations and those provided to non-fixed locations. Overwhelmingly, despite some moves towards hybrid or converged offerings, this distinction is considered to be still valid, because there is as yet insufficient evidence that the pricing of mobile services (to non-fixed locations) systematically constrains the pricing of services to fixed locations (or vice versa).*"

markets.[3] A specific definition of a "mobile service" is, as Ofcom recognises at Annex A4.21 of the consultation document, provided in the National Telephone Numbering Plan:

"*a service consisting in the conveyance of Signals, by means of an Electronic Communications Network, where every Signal that is conveyed thereby has been, or is to be, conveyed through the agency of Wireless Telegraphy to or from Apparatus designed or adapted to be capable of being used while in motion*."

Put simply, where a mobile service is being provided, the recipient of a call is a customer who has a variable location across that part of the UK where mobile coverage is provided by the operator, and that location can vary during the call. The costs should thus include some potentially significant allowance for the mobility premium that attaches to the mobile service, providing mobility is in fact being offered. There is no reason therefore to presume that the costs of termination on a fixed network (or more precisely BT's national fixed network) should be similar to the costs of providing mobile termination in a different manner on a different network. The adequacy of the regulated fixed termination rates to act as a proxy for something that may be entirely different is not clear.

2.3 The use of a fixed termination rate for certain categories of MCP is also inconsistent with the approach that Ofcom has thus far proposed to adopt towards the setting of price controls for national MCPs. In respect of these MCPs, Ofcom has proposed the use of a price control that is derived from a Long Run Incremental Cost methodology that makes no allowance for the recovery of fixed and common costs. Ofcom has thus far only been able to justify this approach to the setting of ex ante charge controls on the grounds that it is a core tenet of the EC Recommendation governing the setting of fixed and mobile termination rates. By contrast, regulated termination rates for fixed operators set by Ofcom continue to enable these operators to recover fixed and common costs.

2.4 As Ofcom will be aware, Vodafone has previously objected strongly to the use of a pure LRIC methodology to the setting of price controls for mobile call termination, as well as the weight attached to the EC recommendation by Ofcom. Our position in respect of this issue remains unchanged. Indeed, Ofcom's proposed approach in these draft guidelines lends further weight to Vodafone's objections and reinforces the need for Ofcom to reconsider its position in respect of pure LRIC. Ofcom is obliged, pursuant to its duties under section 3(3)(a) and (b) of the Communications Act to ensure that its approach to regulation is consistent and in line with the principle of best regulatory practice. To the extent that Ofcom now accepts that certain small MCPs should be able to recover fixed and common costs in their termination rates, we would expect that principle to be applied on a consistent basis when setting price controls for all mobile communications providers. We therefore again invite Ofcom to reconsider its current approach to the setting of termination rates for larger MCPs.

3. The proposed approach to setting the termination rates of certain MCPs may not reduce the need for referral of disputes to Ofcom

[3] See for example Case no COMP/M.5650, *T-Mobile/Orange* [2010] paragraphs 19-20 following the Commission's previous decisional practice in e.g. Case no COMP/4748 *T-Mobile/Orange Netherlands* [2007] paragraphs 8-9; Case no COMP/1795 *Vodafone Airtouch/Mannesmann* [2000] paragraphs 8-11.

3.1 Vodafone appreciates that guidance about Ofcom's likely approach to resolving disputes about the level of termination rates applicable to certain categories of mobile communications providers may reduce the need for dispute referrals. However, in this case, Ofcom's proposed approach to the termination rate applicable to OTT (and other) small MCPs may well not limit the number of disputes that Ofcom is required to handle.

3.2 This is because the applicable termination rate is dependent upon the small MCP being able to confirm to an interconnecting party the proportion of its traffic being terminated on any radio access network that it uses. This is not data that is available to any party other than the small MCP. Indeed, the MCP is unlikely to wish to disclose traffic data to an interconnecting party that is a competitor on the retail market for both commercial and competition law reasons in the event that the interconnecting party wishes to verify that the smaller MCP falls into a particular category. Additionally, traffic flows clearly change over time, which may cause the MCP to fall into different bands in different years. It is unclear how this scenario would be addressed. In general, the only way for an interconnecting party to establish that it was subject to the correct termination rate would be to regularly (potentially annually) refer a dispute to Ofcom or for Ofcom or some other third party to become involved in a verification exercise. Ofcom may not regard this activity as an efficient use of its resources and the parties may not be willing to agree upon the use of or payment to a third party auditor.

3.3 The above outcome may arise where a smaller Category 3 MCP actually has access to the information necessary to confirm which termination rate is applicable. There may also be circumstances where the smaller MCP may not have the sophisticated monitoring systems that may be necessary to identify the proportion of its traffic that is not terminated on the radio access network. It is unclear how Ofcom would seek to resolve a dispute in these circumstances. If Ofcom intends to adopt its proposed approach to disputes, it may well need to advise smaller MCPs that they may need to invest in the appropriate systems to enable the tracking and collation of the necessary data.

4. Ofcom's guidance cannot be used as a means of anticipating any future ex ante market review and approach to setting a charge control

4.1 Whilst Vodafone notes that Ofcom's guidance has been issued to take into account the different technologies and business models currently used by different MCPs, this guidance cannot be used as the vehicle to advance or presage Ofcom's approach to subjects that are properly outside the scope of the guidance document and that require a separate rigorous assessment.

4.2 In Annex 4 of its consultation document, Ofcom explains in further detail the different types of technology that are currently used by some MCPs (and specifically OTT providers) to offer communications services to customers. Ofcom then proceeds to consider voice calls on a network deployed to support Long Term Evolution services (i.e. high speed data services) and considers that this may be an OTT service that should attract only a fixed termination rate. It states at Annex A4.40:

"When LTE mobile phones are standardised and adopted by users, the underlying structure to terminate a voice call will be substantively different, as LTE will employ a packet-switched network based on IP rather than a circuit-switched network. This will mean that LTE will be closer in operation to VoIP than today's circuit switched networks."

This statement is not obviously confined to smaller MCPs and appears to be of general applicability to all MCPs that may in future operate LTE services and convey voice calls across LTE networks. Whilst clarification regarding the applicability of this statement is absent, Vodafone has a number of concerns that are set out below.

4.3 It is not obvious why such a statement is necessary in the context of guidance relating to smaller MCPs when no LTE networks are yet in UK operation. Nor is it obvious that Ofcom has undertaken to the requisite standard any examination of LTE networks on which the above statement might be predicated. Vodafone therefore is concerned that Ofcom may have already inadvertently formed a view about its approach to any future regulation (including the level of any price control) of voice termination on an LTE network. As Ofcom will be aware, the imposition of price controls requires, pursuant to the provisions of the pan-European common regulatory framework governing the telecommunications sector, a full *ex ante* market review of any putative market for call termination by a national regulatory authority based on competition law principles, including:

- identifying and defining a relevant product and geographic market pursuant to economic analysis;
- identifying an undertaking with Significant Market Power on that market;
- establishing that price controls are a justified and proportionate remedy;
- ensuring that any price controls take into account the investments of the operator, allow for a reasonable return on capital employed taking into account the risks involved;
- ensuring that any cost recovery mechanism or pricing methodology imposed serves to promote efficiency and sustainable competition and maximise consumer benefits.[4]

4.4 No such detailed investigation has been undertaken to enable Ofcom to understand the constituent elements of an LTE network or the costs incurred in the construction and deployment of an LTE network. Nor could it, since at the time of the publication of this document no such network exists in the UK. Ofcom cannot therefore be in possession of sufficient evidence to enable it to make the statement cited above.

4.5 In these circumstances, we would suggest that any statements relating to voice services on an LTE network are excluded from the final version of this guidance and left to be considered separately in any subsequent *ex ante* market review.

[4] As required by Articles 15 and 16 of Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (the "Framework Directive") and Articles 8(4), 13(1) and (2) of Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (the "Access Directive").

Should this statement be retained without adequate explanation, Vodafone would be concerned that Ofcom may have fettered its discretion in respect of any future review of termination of calls on an LTE network.

Vodafone Ltd 18 February 2011