

**BEREC Opinion on  
Phase II investigation  
pursuant to Article 32 of Directive (EU) 2018/1972 of 11 December  
2018 establishing the European Electronic Communications Code –  
notifications procedure:**

**Cases SE/2024/2555-2556**

**Wholesale call termination on individual public telephone networks provided at a fixed  
location  
&  
Wholesale voice call termination on individual mobile networks  
in Sweden**

23 January 2025

## Table of Contents

1. Executive summary .....	2
2. Introduction .....	3
3. Background.....	4
4. Assessment of the serious doubts .....	6
5. Conclusions .....	9

## 1. Executive summary

On 18 November 2024, the Commission registered two notifications from the Swedish Regulatory Authority, Post- och telestyrelsen (PTS), concerning the markets for wholesale call termination on individual public telephone networks provided at a fixed location (fixed call termination market) and wholesale voice call termination on individual mobile networks (mobile call termination market) in Sweden.

Since the termination markets have been removed from the 2020 Recommendation on relevant markets (RRM), PTS has conducted the three-criteria test and established that continued regulation is still necessary for these markets.

On 18 December 2024, the Commission sent a serious doubts letter to PTS opening a phase II investigation pursuant to Article 32(4) of Directive (EU) 2018/1972 establishing the European Electronic Communications Code (EECC). The Commission considers that the measure is not compatible with EU law for the following main reasons:

- **Lack of sufficient evidence:** The Commission considers that PTS has not provided sufficient evidence to demonstrate that the three criteria test is met and that continued regulation of wholesale call termination markets in Sweden is justified. The Commission notes that PTS's analysis is based on hypothetical anticompetitive behaviour by operators, rather than specific evidence of market failure.
- **Failure to consider alternative mechanisms:** The Commission is also concerned that PTS has not adequately considered alternative mechanisms provided under the EU's electronic communications framework, such as Article 61(2) of the European Electronic Communication Code, which provides for the possibility to impose ex-ante obligations on access, interconnection, and interoperability of services. The Commission believes that these mechanisms could be used to address potential competition concerns in the market, making the proposed regulation unnecessary.

Based on the analysis set out in this Opinion, BEREC considers that the Commission's serious doubts are justified, namely with regard to the application of the three criteria test and lack of sufficient evidence that the markets for wholesale call termination, as notified, meet the three criteria test, justifying the imposition of ex ante regulation, as well as to the failure to adequately consider alternative mechanisms.

## 2. Introduction

On 18 November 2024, the Commission registered two notifications from PTS, concerning the markets for wholesale call termination on individual public telephone networks provided at a fixed location and wholesale voice call termination on individual mobile networks in Sweden.

On 25 November 2024 and 29 November 2024, a request for information (RFI) was sent by the Commission to PTS, the related with responses were received respectively on 28 November 2024 and 2 December 2024.

The Commission initiated a phase II investigation, pursuant to Article 32 EECC, with a serious doubts letter on 18 December 2024. In accordance with the BEREC rules of procedure, on 24 December 2024 a Working Group (WG) was established with the mandate to prepare an independent BEREC opinion on whether the Commission's serious doubts on the case are justified.

On 06 January 2025, the WG held a virtual Kick-off meeting. On 9 January 2025, the WG held two virtual meetings. One meeting included interviews with relevant colleague representatives from PTS, and one with the relevant colleague representatives from the Commission. The objective of the WG was to reach a clear conclusion on whether the Commission's serious doubts are justified. The WG finalised its draft Opinion on **21 January 2025**, with a final Opinion presented and adopted by a majority of the BEREC Board of Regulators on **23 January 2025**. This Opinion is now issued by BEREC in accordance with Article 32(5) of Directive (EU) 2018/1972.

## 3. Background

### Previous notifications

#### *Fixed call termination*

The fixed call termination market in Sweden was previously notified to and assessed by the Commission under case SE/2019/2204. PTS designated, on the fixed termination market, the incumbent, Telia Company AB (Telia) (with relevant subsidiaries), and 21 other operators as having significant market power (SMP) on their respective public telephone networks. PTS imposed the following obligations on the SMP operators: (i) access, (ii) non-discrimination, (iii) transparency, including the obligation to publish a reference offer for Telia, and the obligation to publish certain information for all other operators, (iv) price control: Telia was subject to cost orientation based on a BU-LRIC model, all other operators must apply fair and

reasonable prices (i.e. in practice termination rates not higher than Telia's, guaranteeing symmetric termination rates).

#### *Mobile call termination*

The mobile call termination market in Sweden was previously notified to and assessed by the Commission under case SE/2019/2205. For the mobile voice termination PTS designated the incumbent, Telia Company AB (with relevant subsidiaries), and 13 other operators, as having SMP on their respective markets. PTS imposed the following obligations on the SMP operators: (i) transparency, (ii) non-discrimination, (iii) accounting separation, (iv) access, and (v) price control and cost accounting obligations.

Subsequently, under cases SE/2022/2358-2359, PTS notified to the Commission the withdrawal of the regulatory obligations imposed on First New Media Scandinavia AB, Infracom Communication AB and on Unicorn Telecom AB. All three operators stopped providing termination services as they transferred their rights to use the numbers from the Swedish numbering plan to other undertakings.

#### **Current notification and the Commission's serious doubts**

##### *Current notification*

PTS has argued that, despite the EU-wide regulation of termination rates, other significant price and non-price distortive practices still exist in the Swedish market, and that ex-ante regulation is still necessary to ensure effective competition. PTS carried out a three-criteria test and concluded that it is met, justifying the imposition of regulatory obligations.

PTS considered that the markets do not tend towards effective competition because large operators might engage in practices such as discrimination (offering different conditions to different originating operators), and refuse direct interconnection, which could lead to higher termination rates not capped by the Delegated Regulation.

PTS also emphasised that the lack of technical alternatives for call termination, as calls can only be terminated by the operator controlling the recipient's telephone number, limits the ability of smaller operators to negotiate fair interconnection agreements. This, combined with the significant barriers to entry and limited market dynamics, leads PTS to conclude that the market does not tend towards effective competition.

##### *Commission's serious doubts*

The Commission examined the notification and the additional information provided by PTS and considered that the notified draft measures affect trade between Member States and falls within the scope of Article 32(4) of the Code.

The Commission has serious doubts as to the compatibility of the notified draft measures with Union law and considers that they create barriers to the internal market for the following reasons:

- **Lack of sufficient evidence:** The Commission considers that PTS has not provided sufficient evidence to prove that the three criteria test is met and that continued regulation of wholesale call termination markets in Sweden is justified. The Commission notes that PTS's analysis is based on hypothetical anticompetitive behaviour by operators, rather than specific evidence of market failure.
- **Failure to consider alternative mechanisms:** The Commission is also concerned that PTS has not adequately considered alternative mechanisms provided in the EU's electronic communications framework, such as Article 61(2) of the EEC, which provides for the possibility to impose for ex-ante obligations on access, interconnection, and interoperability of services. The Commission believes that these mechanisms could be used to address potential competition concerns in the market, making regulation unnecessary.

#### **4. Assessment of the serious doubts**

BEREC has assessed the Commission's serious doubts as follows:

##### **4.1: Lack of sufficient evidence that the three criteria test is met**

###### PTS views

PTS emphasizes that the sector specific market regulation has led to the creation of a very competitive and innovative end-user market. PTS points out that the SMP guidelines prescribe the use of the "Modified Greenfield Approach" which provides that the existing market conditions, as well as expected or foreseeable market developments over the course of the next review period in the absence of regulation based on significant market power should be considered. The forward-looking approach is also referred to in the Commission's 2020 RRM. PTS considers that the application of the forward-looking methodology implies that previous misconduct and abuse of market power has little relevance for the analysis, and that evidence of previous abuse of market power is not required in order to identify a market susceptible for regulation.

PTS underlines the following regarding the three criteria test:

- High and non-transitory barriers to entry:  
Termination into one network - fixed or mobile - to terminate calls to a subscriber belonging to that network cannot be substituted by any other product. This is expected to remain so during the regulatory horizon.
- Market structure does not tend towards effective competition:  
While the Delegated Regulation on Euro-rates is likely to prevent excessive pricing, it does not address either price/non-price discriminatory practices or refusal of direct interconnection. Hence, the Delegated Regulation alone is insufficient to foster competitive dynamics over the next five years.
- Competition law alone is insufficient to adequately address the market failure(s):  
PTS argues that the general competition law is often less effective than the sector specific regulation in addressing structural issues in markets such as fixed and mobile termination.

#### Concerns of the Commission

The Commission argued that the risk of non-price anticompetitive practices (e.g., refusal of access or interconnection, discriminatory or non-transparent conditions) is considered relatively low, given the threat of re-regulation and the enforcement of ex post competition law. For regulation to be warranted, NRAs must provide evidence of threat to competition in the absence of regulation, e.g. complaints from operators, dispute resolutions or other enforcement actions related to interconnection, or attempts by operators to circumvent existing regulation.

The Commission concluded that PTS has not presented compelling evidence of potential non-competitive behaviour in wholesale call termination markets, also from the forward-looking perspective, suggesting that the termination markets do not tend towards effective competition. The Commission noted that PTS acknowledged the absence of complaints or enforcement procedures concerning termination markets in response to the RFI.

#### BEREC's Assessment

BEREC notes the Commission's view that examples of past behavior, such as complaints, dispute resolutions or other enforcement cases, could be taken as evidence of a market not tending towards effective competition.

While BEREC acknowledges that past behavior can be an indicator of future behavior, it might not be the only determining factor. BEREC considers that a forward-looking analysis might be carried out to examine whether the ability and incentives of operators to engage in any potential anti-competitive behavior is likely in the fixed and mobile call termination markets.

However, BEREC is not convinced that PTS has presented sufficient evidence to show that the operators have sufficient incentives to engage in anticompetitive behavior suggested by PTS absent regulation. Such incentives are often related to the possibility to increase price. Further, BEREC is of the opinion that PTS has not shown that the ability and incentives of operators to engage in anti-competitive behaviour is likely. PTS also has not demonstrated that other factors, for example the migration to IP networks, are not able to prevent the anticompetitive behavior.

Hence, BEREC considers that PTS has not demonstrated the existence of specific national circumstances leading to the three criteria test being fulfilled at the national level for the two termination markets, which have been removed from the RRM.

Therefore, BEREC agrees with the Commission's opinion that PTS has not presented sufficient evidence that the second criterion is met.

## **4.2 Failure to consider alternative mechanisms**

### PTS views

PTS argues that transposition of Article 60 of the EECC, which is referred to in PTS's draft decision, is less likely to address potential challenges in reaching - and implementing – effective interconnection agreements than would SMP based regulation. Notably, with regard to transparency of the terms and the risk of suspended effect of an administrative decision, PTS is of the view that non-SMP based sector specific regulation is less likely to be more effective than is SMP based regulation.

PTS also argues that a decision from PTS can be appealed to higher instances. It may therefore take a long time before the decision becomes final, which risks harming a smaller operator seeking access<sup>1</sup>.

### Concerns of Commission

In relation to the assessment of the third criterion, the Commission highlights that PTS failed to adequately consider alternative mechanisms already available under the Code.

Commission argues that PTS's analysis focuses exclusively on Article 60 of the EECC but disregards other relevant articles. The Commission specifically refers to Article 61(2) of the Code which provides for the possibility to impose ex ante obligations on access, interconnection and interoperability of services in order to ensure the fulfillment

---

<sup>1</sup> Chapter 3.3.1.1. of the PTS Market Analysis, unofficial translation



of the policy objectives of Article 3 of the Code that could act as safeguards against potential anticompetitive behavior.

The Commission also concluded that PTS should have further assessed the application of Article 32(10) which enables NRAs to adopt proportionate and provisional measures in exceptional circumstances.

### BEREC's Assessment

BEREC agrees with the Commission that the Code provides several alternative instruments for NRAs to remedy anticompetitive behavior on non-SMP regulated market. Indeed, Article 60(1) explicitly provides that *“operators shall offer access and interconnection to other undertakings on terms and conditions consistent with obligations imposed by the national regulatory authority pursuant to Article(s) 61 (...)”*.

Article 61(1) also stipulates in the second paragraph that NRAs shall provide guidance and make publicly available the procedures applicable to gain access and interconnection to ensure that small and medium-sized enterprises and operators with a limited geographical reach can benefit from the obligations imposed.

As regards Article 61(2), BEREC agrees that it provides for the possibility to establish ex ante obligations on access, interconnection and interoperability of services in order to ensure the policy objectives of Article 3 of the Code.

In addition, BEREC notes that Article 26 of the Code empowers NRAs to issue a binding decision to resolve the dispute between operators in the shortest possible time-frame.

BEREC also agrees with the Commission that Article 32(10) offers NRAs the possibility to act immediately and to adopt proportionate and provisional measures in exceptional circumstances.

BEREC also notes that in the market analysis document PTS confirms that if one operator tries but fails to reach an agreement on market terms with another operator, PTS may impose the obligation to interconnect requirements on the other operator<sup>2</sup>.

BEREC notes that any decision adopted by PTS regarding these markets, whether it is a symmetrical one, a market analysis or a decision monitoring the compliance of an operator with a market analysis or asymmetrical decision, can be appealed. Having regard to the above, BEREC considers that PTS did not present sufficient evidence to prove that alternative proceedings would be ineffective. Furthermore, any decision that could be taken after deregulation (for example decision on interconnection) would be subject to the application of Article 31(1) of the Code. Article 31(1) of the Code provides

---

<sup>2</sup> Chapter 3.3.1.1. of the PTS Market Analysis, unofficial translation

that, pending the outcome of the appeal, the decision of the competent authority shall stand in force unless interim measures are granted in accordance with national law.

Therefore, BEREC agrees with the Commission that PTS failed to adequately consider alternative mechanisms.

## **5. Conclusions**

Based on the facts presented, the review of the documentation and the WG consultations, BEREC considers that the European Commission's serious doubts regarding the draft decision of the Swedish regulatory authority PTS on case Article 32 Phase II: SE/2024/2555\_2556 - as expressed in the EC's letter to PTS of 18 December, are justified.

BEREC therefore recommends that PTS withdraw the draft decision.