INTUG

Possible reform of the FCC's international settlements policy

DA 02-3314

In the Matter of

International Settlements Policy Reform	IB Docket No. 96-261
International Settlement Rates	IB Docket No. 02-324

Comments of the International Telecommunications Users Group (INTUG)

INTUG

INTUG, the International Telecommunications Users Group asbl (INTUG) is an association of national telecommunications users associations, based in Brussels.

INTUG was founded in 1974 in The Hague to act as a single voice for users of telecommunications. The mission of INTUG is to ensure that users have access to affordable, interoperable telecommunications services and that their voice is heard wherever telecommunications policy is decided. For over 25 years INTUG has argued for the introduction of competition in telecommunications and that all users must have access to the benefits of such competition.

Introduction

INTUG wrote to the International Bureau of the FCC in April 2002 expressing concern at the high cost of calls from the USA to cellphones in a large number of foreign countries.[1]

We have read with interest and some concern the comments filed by mobile network operators in response to the NPRM. We are now responding to those filings.

[1] http://www.intug.net/submissions/FCC_calls_to_international_cellular.html

The FCC will also be aware of filings by INTUG to the following international and intergovernmental bodies:

- International Telecommunication Union
    - ITU-T Study Group 3 (December 2002)
      The termination of international calls to mobile networks[2]
- APECTEL
    - APECTEL 26 (August 2002)
      Voluntary contribution to Plenary[3]
    - APECTEL 25 (March 2002)
      Voluntary contribution to Plenary[4]
- CITEL
    - XVII Meeting of CITEL PCC.I (November 2002)
      Users' regulatory issues[5]
    - XVI Meeting of CITEL PCC.I (May 2002)
      Call termination charges to mobile network[6]

Our voluntary report to APECTEL 27 in March 2003 will contain further references to the market abuses associated with international mobile call termination rates. It will also contain a summary of this filing.

The work at the ITU had been instigated by a contribution submitted by Russia to ITU-T Study Group in May 2001. This drew attention to termination rates for international calls terminating on mobile networks in some countries that were suggested to be unreasonably high. A Rapporteur Group was established to investigate the matter. It presented a report to Study Group 3 in December 2002 with suggested changes to Recommendations D.93 and D.140.

For the present, it would appear that this work by ITU-T Study Group 3 has failed and that no further progress can be made. The work was blocked by Syria and Togo, despite the fact that their operators and customers have to pay similar surcharges to those levied against callers from the USA. The comments made by their delegates indicate that they appear to have taken this action because they wanted further changes that would have been used to justify higher settlement rates on fixed networks by including additional costs. Other countries were not willing to accept this.

[2] http://www.intug.net/submissions/ITU-T-SG3_intl_termination_revised.html
[3] http://www.intug.net/submissions/APECTEL26_INTUG.htm
[4] http://www.intug.net/submissions/APECTEL25_INTUG.html
[5] http://www.intug.net/submissions/CITEL_XVII.html
[6] http://www.intug.net/submissions/CITEL_XVI_mobile_termination.html

INTUG and national telecommunications user groups in the European Union made oral comments on the excessive pricing of calls from fixed to mobile networks in the national hearings leading up to the Eighth Report on Regulatory Implementation[7]. There are remarks in that report about the problems of fixed-to-mobile call termination, both within member states and across borders.

Where the prices of international calls to mobile networks have fallen, it has been as the result of regulatory actions and not markets. It has been too slow and the subject of long-standing complaints by users.

Market abuse

In Section D of the NPRM, the Commission notes the growing incidence of higher rates for termination of calls on mobile networks.

INTUG believes that this is due to the exercise of a market abuse by foreign mobile network operators, leveraging their dominance in their domestic termination market into markets for call origination, including the USA.

Operators in the call origination market have no counter-vailing buyer power against the mobile network operators. Nor is it a practicable business strategy to offer only calls to fixed networks in countries where mobile penetration ranges from fifty per cent to ninety per cent of the population. Despite their very considerable purchasing power, US operators have turned to the FCC and to the US Trade Representative for assistance.

The mobile network operators are discriminating between their own customers and all other customers. They offer cheap call origination prices, sometimes below cost, but charge high termination prices. They terminate cheaply only those calls originating on their own networks and surcharge all other calls. They also exploit the cheap termination rates for calls to domestic fixed networks, generally cost-orientated as the result of regulatory action.

Operators, such as Orange and Telecom Italia, claim that their costs are higher. However, they are remarkably vague about why this is or by how much, nor do they document their higher costs. It is an issue that has been examined in some detail by the regulators in the United Kingdom, Sweden and some other countries. One of the reasons for the long delays in remedying this abuse has been the difficulty in determining the real costs of the mobile operators. However, to the extent that regulators have managed to ascertain costs, notably in the recent appeal before the UK Competition Commission, it seems clear that these are well below the termination rates being charged.

One possible response of US business users to these higher prices would be to program VPNs and PBXs to block calls to foreign MNOs. Alternatively, they could force callers

[7] http://europa.eu.int/information_society/topics/telecoms/implementation/annual_report/8threport/index_en.htm

to confirm that they were willing to accept the higher tariff. However, it is very doubtful that this would put any significant pressure of foreign mobile network operators and it would be a retrograde step, reducing business effectiveness. Nor would it be appropriate for the Commission to encourage such measures, which merely seek to minimise or to avoid the problem.

It seems clear that individual residential and cellphone consumers do not have this option; even when they are aware of the problem.

INTUG welcomed the FCC action in warning customers about the much higher cost of these calls. We would support further action on the education of callers about these and similar higher international rates.

The United Kingdom of Great Britain and Northern Ireland

During the course of the proceedings at the ITU, the mobile network operators placed stress on the then forthcoming outcome of the appeal they had lodged against the decision of the UK Office of Telecommunications (OFTEL).

That appeal was recently handed down by the UK Competition Commission, finding in favour of OFTEL and against the mobile network operators.[8] It imposed a reduction of 15 per cent in mobile termination rates from July 2003 and further reductions of around 14 per cent per annum for the following three years.

INTUG rejects entirely the subsequent claims made by the UK mobile network operators that the decision of the UK Competition Commission was strange, odd or anything other than entirely explicable and proper. We consider it to have been an extremely thorough and professional examination of the issues, arguments and data.

The Commission should be vigilant in order to ensure these savings are passed on to callers from the USA to the UK.

Competition in mobile telecommunications

In the filings recently made by the mobile network operators, both individually and collectively, it is claimed that mobile telecommunications is competitive:

> "The mobile market in Europe is extremely competitive ..." [ETNO]
>
> "In fact in competitive national mobile markets, such as the European ... [Telecom Italia]

[8] http://www.oftel.gov.uk/publications/mobile/2003/ctm_index_0103.htm

This avoids the question of the market definition in which they claim to observe competition. The mobile operators try to represent mobile telecommunications as a single entity, yet this is not the opinion of regulators or competition authorities.

Mobile telecommunications must be subdivided into call origination, handsets, access, text messaging, call termination and other markets.

A separate market for call termination on individual mobile network operators has now been found by the competition authorities in the Netherlands[9], the United Kingdom, the European Commission and also by the Independent Regulators Group[10].

Where the market is a single network operator and not a country, the operator necessarily has 100 per cent market share. Therefore, whether or not there is competition in the markets for call origination or access is irrelevant to the total absence of competition in the termination market.

The recent report by the *Bureau Européen des Union de Consommateurs* (BEUC) is severely critical of the supposed competition in the mobile markets, noting [11]:

- price comparison of the offers of different European operators is virtually impossible:
- quality standards met regarding geographic coverage and quality of reception should be publicly available
- unfair contract terms seem to be a recurring situation

Additionally, there are a series of abuses in the mobile sector under examination by regulators and competition authorities. The most notable examples being the cartel-like pricing arrangements for international mobile roaming and SMS. The Competition Directorate-General of the European Commission began an inquiry into international mobile roaming in 1999 at the instigation of INTUG.[12]

Price differentials

Operators, such as Orange and Vodafone in their filings, claim that higher prices for call termination are justifiable. However, they are very vague on the real costs. It is not clear why the costs should be higher, since these are new networks which ought to be cheaper and more efficient. Moreover, the recent capital spending by the mobile network operators has not been on voice telephony but exclusively on data services.

The "surcharges" imposed on callers from the USA comprise a domestic component and a foreign component. It seems highly likely that at least some US operators are adding to

[9] http://www.nmanet.nl/en/nieuws_en_publicaties/persberichten/02_27.asp
[10] http://irgis.icp.pt/admin/attachs/147.doc
[11] http://www.beuc.org/
[12] http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/roaming/

the surcharges of the foreign operators. They may also have failed to pass onto customers cost savings arising from reductions in international rates. Their mark-ups can be substantially more than seems necessary to cover any one-off costs for negotiating contracts or for programming software. Moreover, the operators are making only very modest efforts to alert callers to the high costs of such calls.

To further complicate matters, several operators are affiliated to foreign mobile network operators. Thus they are able to benefit from the higher termination rates charged by their foreign subsidiary or affiliate.

The spot market data used by INTUG in the various submissions to ITU, APECTEL and CITEL made in 2002 are a far from a perfect source. However, we believe that the price differentials are broadly correct and certainly sufficient to demonstrate the abuse. Moreover, we have had only two comments that the prices are inaccurate, in one case that the mobile termination rate was substantially below the legally determined rate.

There have been complicated explanations in the filings to the FCC concerning the variations between rates in countries using Calling Party Pays (CPP) and Receiving Party Pays (RPP). A crucial difference is that in RPP a purchaser of mobile services pays attention to the rate being charged for incoming calls, whereas under CPP they all too frequently ignore it. It is human nature is to consider the cost of the calls we will pay for, but not the costs of the calls paid for by others. Consequently, under CPP, the mobile network operator has a strong incentive to lower call origination rates and to raise call termination rates.

Despite many comments from MNOs comparing and contrasting RPP with CPP, the fact remains that the networks are identical. The only difference is in the manner in which they bill customers and this should not affect the price paid by a caller from the USA.

European Commission

The European Commission has indicated that the FCC should take no action against the member states of the European Union. It does so on the basis that fixed-to-mobile interconnection is covered by the commitments made by the European Commission under the General Agreement on Trade in Services. Therefore, it should be a matter for trade negotiators under the existing commitments and the Doha Development Round.

Clearly, the position of the US Government is a matter for the FCC and USTR to consider. A crucial question will be the most effective and expeditious means to obtain remedies for US consumers and businesses.

Pressure from the FCC would seem likely to ensure that measures are taken more promptly in the fifteen member states. It might also counterbalance some of the pressure of the mobile network operators are putting on NRAs to delay or not to act at all.

The application of the trade agreements to international fixed-to-mobile call termination is not yet widely agreed. INTUG has argued that the commitments apply to all mobile network operators, not merely those with a large overall market share. However, operators contest the applicability of cost orientation of interconnection to all or indeed any mobile networks.Vodafone, in its filing with the USTR states:

> … CompTel raises the concern that mobile termination rates in a number of European markets are not 'cost-oriented.' Vodafone agrees that the question of whether prices are 'cost-oriented' is arguably relevant to the 1377 proceedings because of, *inter alia*, provisions in the Reference Paper to the General Agreement on Trade in Services (GATS) that would apply assuming *arguendo* that mobile carriers are considered 'major suppliers' of interconnect services.

Understandably, since it has most to lose as the largest mobile operator it is prepared to argue that it the commitment does apply. If the commitments were only to apply to some operators or only to fixed operators, it would leave the others free to continue the market abuse.

One serious problem in the European Union has been uncertainty in the application of Significant Market Power (SMP) to mobile operators, compounded by a reluctance to act. It has been with painful slowness that NRAs have abandoned their position of forbearance of regulation of mobile network operators.

Only in the last few days has the European Commission taken action to require NRAs to assess the competitiveness of markets for mobile call termination, with the publication of the Recommendation on Relevant Markets[13]. At best the European Commission can be said to be dragging its feet.

Only in the second half of 2003, once the new legislation has come into effect at European Union level and has also been transposed into national laws is there the prospect of consistent measures across the fifteen member states. Even then, it will depend on the priority assigned to the mobile termination market reviews. The accession countries will be somewhat later.

Even accepting the argument that competence lies with trade negotiations it must not preclude the FCC from any analysis on the problem. In assessing the scale and identifying possible remedies it may wish to consult to USTR.

US Trade Representative

In late November, the United States Trade Representative (USTR) published a notice inviting filings under Section 1377 of *Omnibus Trade and Competitiveness Act* (1988).

[13] http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/index_en.htm

The deadline for this has now passed and the results are published on the USTR web site.[14]

Last year, the USTR published a 1377 Report which was critical of fixed-to-mobile rates to the European Union and Japan.[15]

This issue has been raised again in the new filings. Comptel has provided an estimate that in the year 2001 European mobile network operators obtained over 15.4 billion Euros in excess charges[16]. The list of countries where US operators observe this abuse extends beyond Japan and the fifteen member states of the European Union, to include Argentina, Australia and Peru.

Mobile operators, including Telstra, Verizon and Vodafone, have filed comments endeavouring to refute the accusations made in the 1377 Report of 2002 and the recent filings.

One line of defence by the operators is that the matter is under consideration in foreign countries. Often these are incredibly slow processes as the mobile network operators fight rearguard actions to defend the substantial capital flows which they are afraid to lose.

Financial analysts, estimate that around one quarter of operator revenues come from call termination. There is considerable pressure from the financial markets to show stable or rising Average Revenue Per User (ARPU), giving excellent reasons to protect revenues from termination.

It seems clear that the USTR will continue to pursue the issue of international fixed-to-mobile call rates within the sphere of the GATS. However, that must not preclude the FCC from acting in parallel within its sphere of influence and in respect of countries without GATS commitments.

Conclusions

The mobile network operators are engaged in a process of delaying regulatory action in order to extract the last monopoly rents on their call termination markets. They have strong and understandable financial incentives to do so.

In the past the FCC has taken strong action against developing countries on international settlement rates. It is now necessary, not least for the sake of equity, that it takes equally strong measures in the area of international mobile settlement rates in Europe, Japan and elsewhere. Indeed such action would be beneficial to developing countries which are also being subjected to the same abusive surcharges. Those countries do not have the

[14] http://www.ustr.gov/sectors/industry/Telecom1377/index.htm
[15] http://www.ustr.gov/enforcement/tradelaw.shtml
[16] http://www.ustr.gov/sectors/industry/Telecom1377/index.htm

resources to fight this abuse and many are not yet WTO signatories and so cannot use the disputes procedures.

The abuse is the illegal leveraging from foreign termination markets into the USA. This fully justifies action by the FCC to put pressure on foreign operators and regulators.

There is evidence in some European countries, that the practice of raising termination rates is being adopted by new entrants in fixed networks, such as cable television operators. It is important that this abuse of monopoly termination markets be suppressed quickly, before it further contaminates telecommunications markets.

The Commission should ensure:

1. that foreign regulators are actively pursuing this issue and are familiar with global best practice.
2. that the foreign regulation moves towards cost oriented prices.
3. that foreign domestic price regulation is applied to international rates

As always, the FCC should be seen to be leading by example. In particular, it must use what pressure it can to resist foreign monopolies, many of which are state-owned. It should apply the Benchmark Order to international mobile termination rates, with appropriate rates. It should consider measures to cap payments of rates in excess of cost-oriented levels.

Pressure from the FCC would encourage foreign NRAs and governments to act. There was, for example, mysterious delay of many months in the publication by the European Commission of the Recommendation on Market Definitions. This is essential for European NRAs to commence their work on market analysis.