EUROPEAN COMMISSION

Brussels, 15.06.2012
C(2012) 4195

Danish Business Authority (DBA)

Dahlerups Pakhus,
Langelinie Allé 17,
DK-2100 Copenhagen
Denmark

For the attention of:
Mr Jorgen Abild Andersen
Director General Telecom

Fax: + 45 3546 6001

Dear Mr Andersen,

Subject: **Commission decision concerning Case DK/2012/1323: Wholesale SMS termination on individual mobile networks in Denmark – Change of remedies**

Article 7(3) of Directive 2002/21/EC: No comments

I. PROCEDURE

On 15 May 2012, the Commission registered a notification from the Danish national regulatory authority, the Danish Business Authority (DBA)[1], concerning the market for wholesale SMS termination on individual mobile networks[2] in Denmark.

The national consultation[3] ran from 10 April 2012 to 2 May 2012.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), the Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on notified draft measures to the NRA concerned.

1 Under Article 7 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

2 This market is not listed in Commission Recommendation 2007/879/EC of 17 December 2007 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 (Recommendation on Relevant Markets), OJ L 344, 28.12.2007, p. 65.

3 In accordance with Article 6 of the Framework Directive.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

The market for wholesale SMS termination in Denmark was previously notified to and assessed by the Commission under case DK/2011/1181[4]. DBA (previously NITA) defined separate markets for SMS termination services on the individual mobile networks of the five mobile operators active on the market at the time. DBA carried out the three criteria test, concluded on significant market power (SMP) for all operators and proposed to impose the obligations of access, transparency, non-discrimination, price control in the form of a symmetric price ceiling, and cost accounting.

The proposed price control obligation was of limited scope, applying only to operators competing with Danish operators at retail level. DBA explained that the termination of international SMS is subject to greater market dynamics and it would therefore not be justified and proportionate to grant access at regulated tariffs to all operators. In its comment, the Commission expressed concerns that the price regulation foreseen might not be in line with the non-discrimination principle, and would likely hamper the development of the internal market for SMS services. The Commission therefore urged DBA to refrain from introducing the proposed limitation. Nevertheless, DBA adopted the measures as initially proposed on 12 May 2011. In the meantime, DBA adjusted the price ceilings imposed as part of an annual review process[5]. The price cap valid in the period from 1 March 2012 to 31 December 2012 amounts to DKK 0.12 (~1.6 Eurocents) per SMS.

On 3 January 2012, the Commission sent an administrative letter[6] to the Danish authorities regarding the imposed limited price control regulation. DBA responded on 15 March 2012, recognizing that the same issue was at the time dealt with in case DK/2012/1283.

In its draft measures notified in case DK/2012/1283[7], DBA proposed to extend the existing wholesale SMS termination regulation to a new entrant, the mobile virtual network operator (MVNO) Lycamobile. On 13 February 2012, the Commission decided to open a Phase II investigation, considering that the limited scope of the price control remedy which would apply only to operators competing on the Danish retail market raises serious doubts as to the compatibility with EU law, namely the non-discrimination principle, and could create a barrier to the single market.

On 26 March 2012 BEREC delivered its opinion, concluding that the Commission's serious doubts are justified and indicating that the draft measure should be amended.

On 20 April 2012, DBA submitted a revised version of its draft measure, acknowledging the concerns expressed by the Commission and endorsed by BEREC. As a result, whilst market definition and SMP assessment remained unchanged, in relation to remedies DBA proposed to abolish the limited scope of the price control obligation. In this respect DBA observed that all wholesale prices for SMS termination are considerably higher than the cost for SMS termination and that there is no effective competition in the termination of SMS originating from abroad. After analysing the amended proposal, the

---

[4] SG-Greffe (2011) D/3952.

[5] DK/2011/1251, SG-Greffe (2011) D/16990.

[6] Transmitted via the EU Pilot system; case 2838/11/INSO.

[7] SG-Greffe (2012) D/2858 and SG-Greffe (2012)8139.

Commission adopted on 16 May 2012 a decision lifting its previously indicated serious doubts.

II.2. Regulatory remedies

In its notified draft measure, DBA proposes to amend its decision of 12 May 2012 by abolishing the limited price control regulation which is currently imposed on TDC, Telenor, Telia and Hi3G. The measure, once adopted, would impose an obligation on the SMP operators to apply the regulated SMS termination price also to operators not active on the Danish retail market.

Taking into account the Commission's serious doubts letter and BEREC's opinion in case DK/2012/1283, DBA decided to re-examine the data which served as a basis for its previous decisions. DBA acknowledges that the termination of SMS originating in Denmark or abroad should be treated identically, and that there are major competition issues with regard to the termination of SMS originating both in Denmark and abroad.

Lastly, DBA confirmed that all other obligations imposed in the decisions of 12 May 2011 still apply. However, operators will no longer be required to report every six months the SMS termination tariffs charged to foreign operators as these will now be regulated, and therefore DBA will cease to monitor them.

III. NO COMMENTS

The Commission has examined the notifications and has no comments.[8]

Pursuant to Article 7(7) of the Framework Directive, DBA may adopt the draft measure and, where it does so, shall communicate it to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC[9] the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission[10] within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication.[11] You should give reasons for any such request.

8 In accordance with Article 7(3) of the Framework Directive.

9 Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 301, 12.11.2008, p. 23.

10 Your request should be sent either by email: INFSO-COMP-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

11 The Commission may inform the public of the result of its assessment before the end of this three-day period.

Yours sincerely,
For the Commission,
Robert Madelin
Director-General