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Danish Business Authority (DBA)

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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/2012/1283: Wholesale SMS termination on individual mobile networks - New entrant

Opening of Phase II investigation pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC

I. PROCEDURE

On 11 January 2012, the Commission registered a short notification from the Danish national regulatory authority, Danish Business Authority (DBA), concerning a new operator on the market for wholesale SMS termination on individual mobile networks¹.

The national consultation² ran from 3 November 2011 until 2 January 2012. The deadline for the EU consultation under Article 7 of the Framework Directive is 13 February 2012.

¹ This market is not listed in the 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.

² In accordance with Article 6 of the 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, 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 (Framework Directive).

A request for information (RFI)³ was sent to the DBA on 31 January 2012 and the reply was received on 3 February 2012.

Pursuant to Article 7a (1) of the Framework Directive, the Commission may notify the national regulatory authority (NRA) and Body of European Regulators for Electronic Communications (BEREC) of its reasons that the draft measure would create a barrier to the internal market or its serious doubts as to its compatibility with EU law.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Previous notifications

In its first notification⁴ for SMS termination, the DBA (at that time 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. The 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.

However, the DBA did not adopt the measures described above. Instead, the DBA re-notified the full market review in 2011⁵ proposing similar measures, but introducing a limitation on the scope of price regulation. As set out in the draft measure, only operators competing with Danish operators at retail level may obtain the regulated rates, as, according to the DBA, 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. The DBA explained the better competitive conditions by the fact that operators do not need to take into account the implications of a wholesale agreement (wholesale price) on retail markets if the agreement is with operators that do not compete at retail level. With regard to operators who compete at retail level, the market analysis concluded that large operators have clear incentives to keep wholesale prices high with the aim to sustain their high market shares. Moreover, between 80 and 95 % of the agreements between Danish and foreign undertakings are based on Bill & Keep, which would imply that the undertakings do not settle the SMS traffic exchanged between the undertakings. Typically, these agreements are made when the traffic volumes between operators are small and symmetric⁶. As the traffic volumes exchanged amongst Danish operators are substantial, there is no interest for entering into Bill & Keep agreements with each other.

In its comments, the Commission expressed its concerns about the scope of price regulation foreseen by the draft measures which may not be in line with the non-discrimination principle, and is likely to hamper the development of the internal market for SMS services. The Commission therefore called on the DBA to refrain from introducing the proposed limitation. Nevertheless, the DBA adopted the measures as

³ In accordance with Article 5(2) of the Framework Directive.

⁴ DK/2010/1100, SG-Greffe (2010) D/12414.

⁵ DK/2011/1181, SG-Greffe (2011) D/3952.

⁶ In its reply to the RFI, the DBA provided data on the volume of SMS originated abroad and terminated on Danish mobile networks. During the first half of 2010 the operators TDC, Telenor, Telia, Hi3G and Lycamobile terminated about [...] SMS originating abroad, which amounted to [...] % of all terminated off-net SMS.

initially proposed on 12 May 2011. To this the Commission responded by sending an administrative letter to the Danish authorities on 3 January 2012⁷.

In its last notification⁸, the DBA proposed to adjust the price ceilings imposed as part of an annual review process. The DBA proposed to apply a price ceiling of DKK 0.16 (~2.2 Eurocents) per SMS from 1 January 2011 to 29 February 2012 and to reduce⁹ it to DKK 0.12 (~1.6 Eurocents) per SMS for the period starting 1 March 2011 to 31 December 2012. Once again, the DBA confirmed that only operators who compete at retail level with Danish operators would be granted these regulated tariffs.

II.2. Notified decision

The mobile virtual network operator (MVNO) Lycamobile Denmark Ltd. (Lycamobile) entered the Danish market in the first half of 2010. The draft measure notified by way of a short form proposes to impose the existing set of remedies on a new entrant in the retail mobile market, which has been found to hold SMP on the wholesale market for SMS termination on its network.

II.2.1. Market definition

The DBA reiterates its market definition, stating that the wholesale market for termination of SMS consists of a number of separate individual markets. The market includes the SMS termination service regardless of where the SMS originates and the type of the SMS service.

II.2.2. Finding of significant market power

Lycamobile is the only provider of SMS termination on Lycamobile's mobile network, and therefore has a market share of 100%. Moreover, the market is characterized by non-transitory barriers to entry and absence of countervailing buyer power.

In its reply to the RFI, the DBA indicated that Lycamobile at the moment charges the same tariff as other Danish operators for the termination of SMS originating from Denmark, *i.e.* DKK 0.16 (~2.2 Eurocents). With regard to termination rates charged to foreign operators, the DBA is currently collecting additional data.

However, the DBA has provided data on termination rates charged by the regulated operators to foreign operators. The table below also contains data on the number of Bill & Keep (B&K) and interworking/interconnection agreements (IW/IC) between Danish and foreign, and Danish and other EEC/EU operators¹⁰.

⁷ Transmitted via the EU Pilot system; case 2838/11/INSO.

⁸ DK/2011/1251, SG-Greffe (2011) D/16990.

⁹ As envisaged by the glide path towards LRIC-based SMS prices.

¹⁰ The DBA notes that the data is subject to verification by operators.

	All agreements		IW/IC agreements in EEC/EU		
	No. of B&K	No. of IW/IC	No. of IW/IC	Min tariff (Eurocent)	Max tariff (Eurocent)
<i>TDC</i>	[...]	[...]	[...]	[...]	[...]
<i>Hi3G</i>	[...]	[...]	[...]	[...]	[...]
<i>Telenor</i>	[...]	[...]	[...]	[...]	[...]
<i>Telia</i>	[...]	[...]	[...]	[...]	[...]

Note: Data is subject to verification by operators.

II.2.3. Regulatory remedies

As on all other operators in the market, the draft measure proposes to impose the obligations of access, price control, non-discrimination and transparency, with a view to remedy the following competition problems: high market concentration, existence of high barriers to entry and bottlenecks, lack of price competition and no significant countervailing buyer power.

Regarding price control, a price ceiling that is already in place for other operators will start applying to Lycamobile on the day of the adoption of the decision. Until 29 February 2012, the average SMS termination price should not exceed DKK 0.16 (~2.2 Eurocents). For the period from 1 March 2012 to 31 December 2012, a price reduction is envisaged, and the maximum price will be set at DKK 0.12 (~1.6 Eurocents)¹¹. These price ceilings include all costs for terminating traffic (such as setup of the interconnection point and interconnection capacity) and were calculated on the basis of the existing long-run average incremental cost (LRAIC) model.

As in its previous measures, and confirmed in its reply to the RFI, the DBA has retained the limited scope of the price regulation remedy, which means that the price caps imposed on Lycamobile shall only apply to those operators which compete with Danish mobile operators at retail level, while other operators, i.e. those not competing at retail level with Danish mobile operators, would not be able to claim the regulated rates.

III. ASSESSMENT

The Commission has examined the notifications and the additional information provided by the DBA. DBA's draft measure concerning the market for termination of SMS falls within Article 7(a) (1) of the Framework Directive and would affect trade between Member States, because the conditions for the access to the abovementioned markets determine the costs and the ability of other operators and service providers (including those established in other Member States), to provide electronic communication services.

The Commission considers that the notified draft measure falls under its powers of ensuring consistent application of remedies as set out in Article 7(a) of the Framework Directive, as the notified measure aims at imposing an obligation on an operator in conjunction with Articles 9 to 13 of the Access Directive¹².

¹¹ Danish kroner have been converted into Euros by applying the ECB Euro foreign exchange reference rates on 19 January 2012 (1 EUR=7.4357 DKK).

¹² Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, OJ L 108,

Draft measures imposing regulatory obligations on undertakings with SMP in Denmark may have an influence, direct or indirect, actual or potential, on the ability of undertakings established in other Member States to offer electronic communication services. They comprise measures that have a significant impact on operators or users in other Member States. Consequently, such draft measures may affect the pattern of trade between Member States¹³.

The DBA intends to impose a price regulation remedy on Lycamobile which would apply only to those operators that compete with Danish mobile operators at the retail level while other operators, i.e. those not competing at retail level with Danish mobile operators, would not be able to claim the regulated rates. Those other operators are, *de facto*, typically operators offering retail mobile services in Member States other than Denmark. While the Commission does currently not recommend NRAs to define the market for SMS termination as susceptible to *ex ante* regulation¹⁴, it emphasises that - once an NRA, based on the carrying out of the 3 criteria test in a given case - concludes on the need to regulate the market in question, there is, in principle, no justification to limit the scope of regulation to benefit only domestic operators.

The Commission already twice expressed its strong concerns¹⁵ regarding the validity of the limited scope of the price regulation, and, since the new information presented by DBA does not provide any new evidence which would justify the limitation to the scope of regulation, the Commission expresses its serious doubts as to compatibility of this measure with EU law, namely the principle of non-discrimination, and it considers that the draft measure would create a barrier to the single market.

The Commission expresses serious doubts in this regard for the following principal reasons:

Serious doubts as to the compatibility of the draft measure with EU law

Infringement of the non-discrimination principle

The non-discrimination principle is a general principle of EU law, mandating equal treatment of similar situations. Moreover, Article 56 TFEU guarantees the freedom to provide cross-border services within the Union. In the context of the regulatory framework, Article 8(5) (b) of the Framework Directive imposes an obligation on NRAs to apply, *inter alia*, non-discriminatory regulatory principles to ensure that there is no discrimination in the treatment of operators in similar circumstances.

The Commission takes the view that the proposed measure would lead to an indirect discrimination of operators established in Member States other than Denmark, prohibited by the above mentioned provisions of the Treaty and the Framework Directive. Even though the proposed measure does not expressly discriminate against non-Danish operators, it will by effect result in a considerably different treatment of Danish and other EU operators, as mobile operators established outside Denmark and hence not providing retail services in

24.04.2002, p.7, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p.37.

¹³ See Recital 38 of the Framework Directive.

¹⁴ This market is not listed in the Recommendation on relevant markets, see footnote 1.

¹⁵ See comments in cases DK/2011/1181, SG-Greffe (2011) D/3952 and DK/2011/1251, SG-Greffe (2011) D/16990.

Denmark are unlikely to compete on the Danish retail market. As a result, the proposed limitation to price regulation would place EU operators established outside Denmark in a less favourable position by not granting them access to regulated SMS termination tariffs, but subjecting the level of these charges to commercial agreements.

Such different treatment would amount to (prohibited) indirect discrimination because the measure proposes different treatment of an essentially identical competition problem, which arises in relation to SMS termination regardless of where the SMS originates. The Commission takes the view that the competitive problem in these two situations appears to be the same, as other EU operators would not dispose of higher (countervailing) market power to negotiate the price for wholesale SMS termination services than those competing with the mobile operators in the retail market in Denmark. Therefore, the termination of SMS originating abroad would be characterised by the same bottleneck situation which the DBA identified for national SMS termination services.

The DBA takes the view that such a bottleneck situation would only warrant price control where operators compete at retail level¹⁶. The Commission has serious doubts that the evidence presented by the DBA is sufficient to refute a *prima facie* finding that a similar bottleneck situation exists for all SMS termination regardless of where the SMS originates. In its previous notifications¹⁷, the Danish authority explained that operators which do not compete at retail level do not operate under equivalent circumstances as the operators which do compete, and that therefore there is no legal obligation to apply equivalent conditions and grant access to regulated prices. The DBA argued that the difference in circumstances exists due to a more dynamic pricing policy towards operators with whom there is no retail competition, and that the Danish operators do not charge excessive termination rates to other EU operators. It also explained that, unlike in the case of SMS originating abroad, the Danish operators have no incentive to enter into Bill-and-Keep (B&K)- agreements¹⁸.

On the basis of the information at its disposal, the Commission believes that the evidence provided by the DBA does not support its conclusions. On the contrary, first of all, the market data collected by the DBA and provided in the reply to the RFI showed that there are no B&K agreements concluded by the mobile operators in Denmark with other EU mobile operators. Furthermore, absent regulation, the maximum price for terminating a foreign SMS can be up to three times higher than the termination tariff for a national SMS¹⁹. Therefore, with respect to SMS termination originated in other EU countries, DBA's argument that the conditions of competition are different due to the fact that Danish operators are more likely to enter into B&K agreements with foreign operators than Danish, is not at all supported by the data provided. In any case, the number of B&K agreements is

¹⁶ See Section II.1 above.

¹⁷ DK/2011/1181, SG-Greffe (2011) D/3952 and DK/2011/1251, SG-Greffe (2011) D/16990.

¹⁸ Under Bill-and-Keep agreements, the interconnected operators do not charge each other because of the rather balanced traffic in both directions.

¹⁹ The average maximum termination price charged by the four regulated operators to other EU operators is [...] Eurocents, while the price cap applied to operators competing with Danish operators at retail level is at the moment set at 2.2 Eurocents.

not pertinent to the question whether the absence of regulation of termination of foreign originated SMS would lead to an indirect discrimination as this figure does not help us to assess the effects of the measure proposed. In order to assess whether the measure would have a discriminatory effect, it is necessary to compare the volume of incoming SMS under B&K with the volume of incoming SMS terminated according to a rate that is almost three times higher than the regulated one. As a result, the Commission is not convinced by DBA's argument that the competitive situation for SMS originating in another Member State is different from the one for SMS originating in Denmark, especially in light of the fact that the prices charged by the regulated Danish operators to other EU operators for SMS termination are generally higher than those charged to Danish mobile operator.

Keeping in mind DBA's finding of barriers to entry, bottlenecks and lack of countervailing buyer power on the markets for SMS termination on individual mobile networks, the Commission has no reason to believe that Lycamobile would lack an incentive or would somehow be prevented from charging excessive SMS termination rates to foreign operators, as this is the practice of other regulated mobile operators in Denmark. Therefore, the Commission has serious doubts that the competition problem identified in relation to the termination of SMS originating from Denmark would not equally exist in relation to the termination of SMS originating abroad.

At this stage, based on the information provided by DBA, the Commission believes that the notified regulatory measure, by limiting the scope of the price regulation remedy and by applying it only to operators competing with Danish operators at the retail level, may infringe the non-discrimination principle.

Infringement of Article 8(4) of the Access Directive

The Commission points out that remedies imposed under Article 16 of the Framework Directive in conjunction with Article 8(4) of the Access Directive should be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive. Every SMS termination market is likely to be characterised by similar competition problems. As set out, the Commission at this stage has serious doubts that a mobile operator would not charge higher prices for its SMS termination service to foreign operators, and that therefore a competition problem that should be addressed by an appropriate remedy, such as the imposition of price control, does not exist.

Infringement of Article 8(5) (c) of the Framework Directive

Article 8(5) (c) of the Framework Directive requires NRAs to safeguard competition to the benefit of consumers. As explained above, the Commission believes that, absent price regulation, a mobile operator would not be prevented from charging excessively high prices vis-à-vis foreign operators. Such prices would be detrimental to end users located in Denmark as well as in other Member States, as the operators will most likely pass-on the increased costs to end-users, which will have to pay a higher retail price for cross-border SMS.

In the light of the above, at this stage the Commission takes the view that the draft measure is not compatible with EU law.

Draft measure would create a barrier to the single market

Article 56 TFEU opposes the implementation of national regulatory measures that may have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State. In the context of the regulatory framework, Article 8(5) (b) of the Framework Directive imposes an obligation on NRAs to apply, *inter alia*, non-discriminatory regulatory principles to ensure that there is no discrimination in the treatment of operators in similar circumstances. Further, Article 8(3) of the Framework Directive obliges the NRAs to contribute to the development of the internal market.

According to the proposed draft measure, only Danish operators will be able to benefit from the regulated tariff, whereas a higher (commercial) tariff is likely to be charged to foreign operators. The Commission considers that such a measure may have an influence on the pattern of trade between Member States in a manner which might create a barrier to the internal market. In this case, the proposed measure will have a significant impact on users in other Member States, as it will probably increase retail prices for cross-border SMS.

Moreover, the proposed measure will also have a significant impact on operators in other Member States. The Commission believes that the proposed partial regulation of SMS termination on a mobile operator's network may increase the costs and lower the ability of operators and service providers established in other Member States than Denmark to provide electronic communication services in Denmark. Therefore, the Commission believes that the measure in question poses a restriction to the free movement of services, and therefore a barrier to the single market.

In the light of the above, at this stage the Commission takes the view that the notified regulatory measure would create a barrier to the single market.

The above assessment reflects the Commission's preliminary position on this particular notification, and is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

The Commission points out that, in accordance with Article 7(a) of the Framework Directive, the draft measure regarding the extension of existing remedies on the market for SMS termination to the new entrant Lycamobile shall not be adopted for a further three months.

Pursuant to Point 17 of Recommendation 2008/850/EC²⁰, the Commission will publish this document on its website, together with a notice inviting third parties to submit observations on this serious doubts letter within ten working days. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission²¹ within three working days following receipt whether you consider that, in accordance with Community and national rules on business confidentiality, this document contains confidential information which you wish to have

²⁰ 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, OJ L 301, 12.11.2008, p. 23.

²¹ Your request should be sent either by email: INFSO-COMP-ARTICLE7@ec.europa.eu or by fax: +32.2.298.87.82.

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Yours sincerely,
For the Commission
Neelie Kroes
Vice-President of the Commission