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Bundesnetzagentur (BNetzA)

Tulpenfeld 4
D-53113 Bonn
Germany

For the attention of:
Mr Matthias Kurth
President

Fax: +49 228 14 69 04

Dear Mr Kurth,

Subject: Commission decision concerning case DE/2011/1274 – Wholesale markets for voice call termination on individual mobile networks in Germany-market definition and SMP

Article 7(3) of Directive 2002/21/EC¹: No comments

I. PROCEDURE

On 23 November 2011, the Commission registered a notification from the national regulatory authority of Germany, the *Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen* (BNetzA) relating to the market for voice call termination on individual mobile networks².

The national consultation³ on the market definition, the three criteria test, and SMP assessment ran from 22 June 2011 for one month. The deadline for the EU consultation

¹ 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 (Better Regulation Directive), OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12 (Framework Directive).

² Market 7 of 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 (the Recommendation on relevant markets), OJ L 344, 28.12.2007, p. 65.

³ In accordance with Article 6 of the Framework Directive.

under Article 7 of the Framework Directive is 3 January 2012.

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

II. DESCRIPTION OF THE DRAFT MEASURES

II.1. Background

The second round of market analyses of the German markets for voice call termination on individual mobile networks was previously notified to and assessed by the Commission in 2008⁴. BNetzA notified its proposal for market definition, SMP and remedies regarding the four mobile network operators (MNOs) and imposed on them access obligations and an *ex ante* price control⁵. This was followed by a notification on a detailed costing methodology and the resulting prices⁶. BNetzA further notified the imposition of remedies on two full mobile virtual network operators (MVNOs), i.e. a non-discrimination obligation, a transparency obligation and an obligation for *ex post* price control (prohibition of abusive pricing)⁷.

II.2. The notified draft measures

II.2.1. Market definition

The notified draft measure concerns the wholesale market for voice call termination on individual mobile networks, which corresponds to market 7 of the Recommendation on relevant markets.

BNetzA defines distinct markets for voice call termination on the networks of the mobile

⁴ Case DE/2008/0813, SG-Greffe (2008) D/207093.

⁵ The notification in case DE/2008/0813 only contained a proposal for remedies in abstract terms. In its comments letter (SG-Greffe (2008) D/207093) the Commission *inter alia* recalled that also under the Commission Recommendation on notifications, time limits and consultations provided for in Article 7 of the Framework Directive, price levels, amendments to the methodologies used to calculate costs or prices as well as the determination of glide-paths are considered to be material changes to the nature or scope of a remedy that have an appreciable impact on the market and should therefore be notified by the standard notification. The Commission also indicated to BNetzA that in the absence of a Community Consultation under Article 7(3) of the Framework Directive of draft measures comprising relevant details of remedies, such as specific termination rates, the Commission will consider using its powers in accordance with Article 226 TEC with regard to misapplication of Article 7(3) of the Framework Directive.

⁶ Case DE/2011/1176, SG-Greffe (2011) D/2475. This notification took place following an infringement proceeding related to the grievance of the German regulator not having notified the Commission and other national regulators of draft regulatory measures determining the level of mobile termination rates, as required by Article 7 of the Framework Directive. See IP/09/1008, 25 June 2009 and IP/10/804, 24 June 2010, <http://europa.eu/rapid/>. By notifying the pricing methodology and the prices BNetzA removed the grievance. In its comments letter (SG-Greffe (2011) D/2475) of 21 February 2011 in case DE/2011/1176 the Commission commented on (i) the scope of the present notification and of the forthcoming market analysis, (ii) the need for an appropriate cost accounting methodology with regards to spectrum costs and (iii) on asymmetry of prices.

⁷ Case DE/2009/0947; in its comment's letter (SG-Greffe (2009)65510) the Commission commented on the need to impose cost orientation, the need to impose an access obligation and the need to notify the prices if imposed.

network operators (MNOs): Telekom Deutschland GmbH (T-Mobile), Vodafone D2 GmbH (Vodafone), E-Plus Mobilfunk GmbH & Co. KG (E-Plus) and Telefónica O2 Germany GmbH & Co. OHG (O2) as well as the full MVNOs⁸, namely vistream GmbH (vistream), ring Mobilfunk (ring), Lycamobile Germany GmbH (Lycamobile) and OnePhone Deutschland GmbH (OnePhone)⁹.

BNetzA covers in its market definition mobile voice call termination via GSM, UMTS and LTE technologies insofar as they are used to handle voice traffic with the help of a PSTN handover interface¹⁰. As in its previous notifications, BNetzA proposes termination of calls in the Home Zone¹¹ to be part of the respective markets for wholesale voice call termination on individual mobile networks. BNetzA also includes the voice call termination within so called call collection services-products¹² in the respective markets.

The geographic scope of each market coincides with the geographic coverage of the network concerned and is determined as national.

II.2.2. Assessment of SMP

BNetzA intends to designate T-Mobile, Vodafone, E-Plus, O2, vistream, ring, Lycamobile and OnePhone as having SMP in the market for wholesale voice call termination on their respective individual (virtual) mobile networks.

The main criteria considered by BNetzA when reaching its conclusion are: (i) the market shares (each of the four MNOs and each of the two MVNOs has a 100%-market share on the market for voice call termination on its individual (virtual) network); (ii) absence of (or low) direct and indirect countervailing buyer power and (iii) barriers to entry.

III. NO COMMENTS

The Commission has examined the notification and has no comments.¹³

Pursuant to Article 7(7) of the Framework Directive, BNetzA may adopt the draft

⁸ According to BNetzA, full MVNOs provide call termination services in their own virtual mobile network vis-à-vis third parties, and negotiate the call termination charges on their own, independent of their mobile host network operators, with the consumers of the corresponding call termination services. So called "light" MVNOs do not offer voice call termination services and are not covered by the market definitions.

⁹ The full MVNO OnePhone is connected with E-Plus via the common mother company KPN NV but it is offering its own voice call termination services.

¹⁰ BNetzA does not include packet switched mobile voice call termination based on IP interconnection in the relevant markets on the basis that this type of conveyance is not voice specific and subject to a different handling of traffic, i.e., peering which would be competitive.

¹¹ See case DE/2008/0813.

¹² Call collection services ("*Anrufsammeldienst-Produkte*") are used by end-users to receive all communications on a mobile number. While the call collection service provider does not necessarily terminate the call on a mobile network but may use other network elements for the final conveyance to its customer, nevertheless due to the feature of mobile numbers, for the time being, the collection service provider must rely on voice call termination to a mobile network to provide the call collection service and therefore, termination towards call collection service numbers are covered by the market definition.

¹³ In accordance with Article 7(3) of the Framework Directive.

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/EC¹⁴ 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 Commission¹⁵ 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 publication¹⁶. You should give reasons for any such request.

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

¹⁴ 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.

¹⁵ Your request should be sent either by email: INFSO-COMP-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

¹⁶ The Commission may inform the public of the result of its assessment before the end of this three-day period.