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**SG-Greffe (2011) D/16990**

IT- og Telestyrelsen (NITA)

Holsteingade 63  
DK-2100 København  
Denmark

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

Fax: + 45 35 45 00 10

Dear Mr Andersen,

**Subject: Commission decision concerning Case DK/2011/1251: SMS termination on individual mobile networks in Denmark - Details of the price control remedy**

**Comments pursuant to Article 7(3) of Directive 2002/21/EC<sup>1</sup>**

## **I. PROCEDURE**

This notification from the national regulatory authority of Denmark, the IT- og Telestyrelsen (NITA), was received on 13 September 2011 and became effective on that day. It concerns an update of the price control remedy on the markets for SMS termination on individual mobile networks<sup>2</sup>.

The national consultation<sup>3</sup> was held from 28 June 2011 to 12 August 2011. The deadline for the EU consultation under Article 7 of the Framework Directive is 13 October 2011.

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<sup>1</sup> 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).

<sup>2</sup> 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), OJ L 344, 28.12.2007, p. 65-69.

<sup>3</sup> In accordance with Article 6 of the Framework Directive.

On 20 September 2011, the Commission services sent a request for information<sup>4</sup> (RFI) to NITA. The reply was received on 23 September 2011.

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**

In its first notification DK/2010/1100 for SMS termination NITA defined separate markets for SMS termination services on the individual mobile networks of the five mobile operators active on the market, covering SMS termination services irrespective of where the SMS originates and the type of SMS (i.e. termination of standard SMS and Push SMS)<sup>5</sup>. NITA carried out the three criteria test, concluded on SMP for all operators and proposed to impose on all operators the obligations of access, transparency, non-discrimination, price control, a symmetric price ceiling<sup>6</sup> and cost accounting.

However, NITA did not adopt the measures proposed in case DK/2011/1100. Instead, in case DK/2011/1181, NITA re-notified the full market review including remedies. Those measures were similar to those proposed in case DK/2011/1100 but proposed a limitation to the scope of price regulation which is based on the origination of the SMS. The Danish regulator proposed that only operators competing with Danish MNOs at retail level may obtain the regulated rates.

The Commission commented that the limitation of the scope of price regulation was not properly justified and likely to hamper the development of the internal market for SMS services. The Commission also indicated that, in the absence of a comprehensive price-regulation, Danish MNOs may have an interest to raise their termination rates vis-à-vis foreign operators which would ultimately be detrimental to end users located in Denmark as well as in other EU countries since they may have to pay a higher retail price for cross-border SMS. The Commission therefore called on NITA to reconsider its proposed price regulation and refrain from introducing requirements in their regulatory measures which may incentivise excessive pricing for terminating cross-border SMS traffic.

NITA adopted the proposed measures without lifting the limitation on the scope of the price regulation. However it also obliged the MNOs to collect the relevant market data enabling NITA to monitor the effects on the evolution of the international SMS termination markets.

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<sup>4</sup> In accordance with Article 5(2) of the Framework Directive.

<sup>5</sup> See Commission decision of 13 August 2010 (SG-Greffe (2010) D/12414).

<sup>6</sup> NITA proposed to impose a symmetric price ceiling on all operators of 0.16 DK/SMS (~ 0.022 Euro) and to impose a cost-oriented LRAIC price by an unspecified date in the future. NITA provided an estimation of a cost oriented price amounting to 0.02 DKK ~ 0.003 €/SMS.

The Commission's services are currently assessing the need to send an administrative letter with a view to proceed with an infringement procedure.<sup>7</sup>

## **II.2. Notified draft measure**

In its current draft measure NITA proposes to adjust the price ceilings previously imposed on TDC, Telenor, TeliaSonera, and Hi3G in their respective markets for SMS termination as part of an annual review process. The scope of the price control remedy is not subject of the present notification.

NITA proposes to maintain the currently applicable price ceiling of DKK 0.16<sup>8</sup> per SMS for all the MNOs from 1st of January 2011 to 29th of February 2012 and to reduce it to DKK 0.12<sup>9</sup> per SMS during the period from 1st of March 2011 to 31st of December 2012. In line with the Danish LRAIC Order the proposal is a step on the yearly glide-path towards cost-based SMS prices.<sup>10</sup>

In its answer to the RFI, NITA confirmed that only operators who compete at retail level would be granted access to the regulated termination tariff. Termination tariffs between Danish and foreign operators would instead be based on commercial agreements. NITA reiterated its justification of the limited scope of the proposed price regulation, i.e. that termination of international SMS would be subject to greater market dynamics and that it would not be justified and proportionate to address the identified competition problem by granting access at regulated tariffs to all operators. In the RFI NITA also indicated that the international SMS termination data collected in August and September 2011 show the same picture as in the beginning of the year.

## **III. COMMENTS**

On the basis of the present notification and the additional information provided by NITA, the Commission has the following comments<sup>11</sup>:

### **Limited scope of price regulation**

The Commission notes that NITA's proposed price regulation still only applies to those operators which compete with Danish mobile operators at retail level. In case DK/2011/1181 the Commission already questioned NITA's conclusion that operators of other EU countries are offered better rates by Danish mobile operators and that there is a more dynamic pricing policy towards operators with whom there is no retail competition. Pricing data collected at the time by NITA also showed that, absent regulation, the price for terminating a foreign SMS is in some cases up to twice as high as the one for terminating a national SMS, and that the termination bottleneck affects the termination of foreign SMS probably in an even stronger manner. Despite the Commission's comment issued in case

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<sup>7</sup> The Commission already launched an infringement procedure for a similar SMS termination regulatory proposal in France (infringement procedure 2011/2055).

<sup>8</sup> Approximately 0.022 €.

<sup>9</sup> Approximately 0.016 €.

<sup>10</sup> See footnote 6.

<sup>11</sup> In accordance with Article 7(3) of the Framework Directive.

DK/2011/1181, NITA did not, however, provide further relevant data to support its conclusions on the greater pricing dynamic. Therefore, the Commission's concern as to the potentially discriminatory effects of the price regulation as expressed in by the Commission in case DK/2011/1181 remain fully pertinent.

In addition, the Commission is concerned that the potentially discriminatory effects may be exacerbated by the presently proposed decrease of regulated tariffs. As a result, the price gap between foreign and national SMS termination services is likely to increase.

Against this background, the Commission asks NITA to collect, perhaps with the support of the BEREC, the relevant data on cross-border SMS traffic of Danish MNOs and their internationally interconnected operators (including traffic volumes). Should the Commission's concerns be confirmed then NITA should, by way of a new remedy decision, broaden the scope of price regulation to include also SMS termination services offered to operators not competing on the Danish retail market

Pursuant to Article 7(7) of the Framework Directive, NITA shall take the utmost account of comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measures and, where it does so, shall communicate them 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. This is also without prejudice to any other measures that the Commission may take as towards the compatibility of the resulting measures with other provisions of Union law.

Pursuant to Point 15 of Recommendation 2008/850/EC<sup>12</sup> 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<sup>13</sup> 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<sup>14</sup>. You should give reasons for any such request.

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

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<sup>12</sup> 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.

<sup>13</sup> Your request should be sent either by email: [INFSO-COMP-ARTICLE7@ec.europa.eu](mailto:INFSO-COMP-ARTICLE7@ec.europa.eu) or by fax: +32 2 298 87 82.

<sup>14</sup> The Commission may inform the public of the result of its assessment before the end of this three-day period.