



EUROPEAN COMMISSION

Brussels, 16/05/2012
C(2012)3395

SG-Greffe (2012)8139

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/2012/1283: Wholesale SMS termination on individual mobile networks – new entrant

Decision to lift reservations indicated in the serious doubts letter 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.

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 DBA on 31 January 2012 and the reply was received on 3 February 2012.

On 13 February 2012 the Commission, pursuant to Article 7a(1) of the Framework Directive, notified DBA and the Body of European Regulators for Electronic Communications (BEREC) of its reasons for considering that the draft measure would create a barrier to the single market and its serious doubts as to the compatibility of the draft measure with the Community law (the "serious doubts letter").

On 14 February 2012 the Commission posted a notice on its website inviting third parties to submit observations on the serious doubts letter within ten working days.

The Commission did not receive any third party observations.

On 26 March 2012 BEREC delivered its opinion to the Commission.

On 20 April 2012 DBA submitted a revised version of its draft measure.

II. DESCRIPTION OF THE ORIGINALLY NOTIFIED DRAFT MEASURE

The draft measure notified by way of a short form notification on 11 January 2012 concerned the mobile virtual network operator (MVNO) Lycamobile Denmark Ltd. (Lycamobile), who entered the Danish market in the first half of 2010. As Lycamobile has been found to hold SMP on the wholesale market for SMS termination on its network, the draft measure proposed to impose an existing set of remedies on the new entrant.

II.1. Market definition

DBA reiterated its market definition, stating that the wholesale market for termination of SMS consists of a number of separate individual markets corresponding to the networks of the mobile (virtual) network operators. The market included the SMS termination service regardless of where the SMS originates and the type of the SMS service.

II.2. Finding of significant market power

Lycamobile is the only provider of SMS termination on its 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, DBA indicated that Lycamobile at the moment charges the same tariff as other Danish operators for the termination of SMS originating in Denmark, *i.e.* DKK 0.16 (~2.2 Eurocents). With regard to termination rates charged to foreign operators, DBA said it was collecting additional data.

However, DBA did provide data on termination rates charged by the other 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 EEA/EU operators.

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

	All agreements		IW/IC agreements in EEA/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.3. Regulatory remedies

As on all other operators in the market, the draft measure proposed 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 would 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 would be set at DKK 0.12 (~1.6 Eurocents)⁴. 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, 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. THE SERIOUS DOUBTS LETTER

In its letter to DBA of 13 February 2012, the Commission expressed its serious doubts as to the compatibility with EU law of DBA's original proposal, namely with the principle of non-discrimination and requirements referred to in Article 8(4) of the Access Directive and Article 8(5) (c) of the Framework Directive. Furthermore, the Commission considered, at that stage, that the measures proposed by DBA would have created barriers to the internal market.

III.1. Serious doubts as to the compatibility with EU law

The Commission raised serious doubts about the compliance of the draft measure with the following provisions of EU law:

The non-discrimination principle

Having in mind the general principle of non-discrimination, and more precisely, Article

⁴ 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).

56 TFEU and Article 8(5) (b) of the Framework Directive, the Commission took the view that the proposed measure would lead to an indirect discrimination of operators established in Member States other than Denmark. Since mobile operators established outside Denmark are unlikely to compete on the Danish retail market, the measure would *de facto* treat EU operators not established in Denmark differently. 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.

In the Commission's view, such a different treatment would have amounted to (prohibited) indirect discrimination because the measure proposed a different treatment of an essentially identical competition problem. The Commission further took the view that the competition problem arising in connection with the termination of an SMS originating from Denmark or abroad 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 DBA identified for national SMS termination services.

On the other hand, DBA took the view that such a bottleneck situation would only warrant price control where both operators compete at retail level⁵. DBA explained in its previous notifications⁶ that operators which do not compete at retail level do not operate under equivalent circumstances as the ones which do compete, and that therefore there is no legal obligation to apply equivalent conditions and grant access to regulated prices. 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. Moreover, DBA claimed that the Danish operators have no incentive to enter into Bill-and-Keep (B&K) agreements⁷ when an SMS is originating in Denmark.

The Commission took the view that the evidence provided by DBA does not support its conclusions. The market data collected by DBA and provided in the reply to the RFI showed that there are no B&K agreements concluded between mobile operators in Denmark and other EU operators. In any case, the Commission explained that in order to assess whether the measure would have a discriminatory effect on the market, the number of B&K agreements is not decisive. What DBA needs to compare is 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. Furthermore, the Commission observed that, absent regulation, the maximum price for terminating a foreign SMS is up to three times higher than the termination tariff for a national SMS⁸. Therefore, the Commission had no reason to believe that Lycamobile would lack an incentive or would somehow be prevented from charging excessive SMS termination

⁵ See Section II.1 above.

⁶ DK/2011/1181, SG-Greffe (2011) D/3952 and DK/2011/1251, SG-Greffe (2011) D/16990.

⁷ Under Bill-and-Keep agreements, the interconnected operators do not charge each other because of the rather balanced traffic in both directions.

⁸ The average maximum termination price charged by the four regulated operators to other EU operators is 6.43 Eurocents, while the price cap applied to operators competing with Danish operators at retail level is at the moment set at 2.2 Eurocents.

rates to foreign operators, as this is the practice of other regulated mobile operators in Denmark.

Article 8(4) of the Access Directive

The Commission pointed out that remedies 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. The Commission at that stage expressed its concerns that the identified competition problem, namely the possibility to charge higher prices for SMS termination to non-EU operators, was not addressed with an appropriate price control remedy.

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

The Commission expressed the view that absent price regulation a mobile operator would not be prevented from charging higher 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 would most likely pass-on the increased costs to end-users. Therefore, the Commission took the view that the proposed measure is not likely to attain the objective of safeguarding competition to the benefit of consumers.

III.2. Creation of barriers to the single market

In addition to its serious doubts as to the compatibility with EU law, the Commission also noted that the draft measure would have an influence on the pattern of trade between Member States in a manner which might create a barrier to the internal market. The proposed measure was likely to have a significant impact on users in other Member States, and would have led to an increase in retail prices for cross-border SMS. The Commission also stated 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 to provide electronic communication services in Denmark.

IV. OPINION OF BEREC

In its Opinion delivered on 26 March 2012, BEREC considered that the Commission's serious doubts regarding DBA's draft decision are justified.

IV.1. Serious doubts as to the compatibility with EU law

BEREC agreed with the Commission that there are no relevant competitive differences among operators competing or not competing with Lycamobile in the Danish retail market, since the competition distortion is based on a bottleneck which is in essence the same irrespective of the nature of the operator which seeks to buy termination of SMS from an operator in Denmark.

BEREC carried out an in depth legal analysis and concluded that the draft measure violates the non-discrimination principle. BEREC argues that, in principle, any restriction that is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State should be abolished. BEREC continued by stating that the freedom to provide services may be limited only by provisions which are justified by imperative reasons relating to the public interest. According to the relevant case law, the protection of a specific economic sector cannot, by itself, constitute an imperative reason of public interest.

In conclusion, BEREC took the view that both, operators competing and not competing

at the retail level, are in the same position and encounter the same problems when their SMS is to be terminated in Lycamobile's network.

Therefore, BEREC could not identify an objective difference of situations between the two categories of operators that could have justified a difference of treatment regarding the scope of the price control obligation that was to be imposed on Lycamobile.

BEREC also concluded that the Commission's serious doubts about the compliance of the draft measure with Article 8(4) of the Access Directive and Article 8 (5) (c) of the Framework Directive are justified.

IV.2. Creation of barriers to the single market

BEREC explained that the regulation applied by the NRAs should support the development of the internal market in a way which would prevent unequal treatment of operators in similar circumstances. As already explained, BEREC concluded that the preconditions for different treatment are not met in the analyzed case. In effect, even if the differentiation of prices is not based on nationality, DBA's draft measure would result in discriminating against operators and consumers in other Member States, would place a barrier to the provision of electronic communications services at the European level, and would also hinder both the emergence of new and the prospects of existing pan-European operators. Therefore BEREC concluded that the Commission's serious doubts, that the draft measure is likely to create a barrier to the single market, are justified.

IV.3. Final Considerations

As a result of its analysis, BEREC took the view that the draft measure should be amended so as not to exclude SMS originated abroad from the scope of the price control obligation.

BEREC also noted that unilateral regulation by one particular Member State may result in a considerable loss of bargaining power by national undertakings in their interconnection negotiations with unregulated foreign operators, if reciprocal termination rates among countries are not in some way guaranteed. BEREC explained that a one-way regulation applied only to operators established in Denmark would allow operators who are not subject to a price cap to set higher termination rates for SMS. This would result in asymmetric rates and severe competitive distortions, leading to a financial loss for the operators established in Denmark. Moreover, national consumers, when compared to the consumers from other Member States, could be harmed with regards to the retail price of cross-border SMS.

Finally, BEREC pointed out that if DBA modifies the decision in line with the serious doubts letter, this would put Lycamobile at a disadvantage when compared to Danish MNOs, as the latter are regulated by a price control obligation which does not apply to foreign operators.

V. DESCRIPTION OF THE AMENDED DRAFT MEASURE

On 20 April 2012 DBA provided the Commission with a revised draft measure amending its original proposal. In its amended proposal, DBA acknowledged the concerns expressed by the Commission, and decided to revise the draft measure accordingly. As a result, whilst market definition and SMP assessment remain unchanged, in relation to remedies DBA proposes to abolish the limited scope of the price control obligation, which was initially envisaged to apply only to operators which compete with Danish operators at the retail level. This proposal stems from the amended market analysis

performed by DBA, especially the new analysis of pricing trends.

DBA observed that there are different incentives in relation to the pricing between Danish mobile operators and those between Danish and foreign operators. Irrespective of whether the SMS is sent directly to Danish networks or channelled through foreign networks (as in case of Push SMS), all wholesale prices for SMS termination are considerably higher than the cost for SMS termination calculated on the basis of DBA's long-run average incremental costs (LRAIC) model, which is approximately 2øre (~0.26c€). More specifically, DBA concluded that the fact that operators do not compete for the same retail customers does not mean that a competition problem does not exist in relation to termination of SMS originated abroad.

DBA further explained that the difference in prices for SMS termination, whether the origin is in Denmark or abroad, cannot be explained by technical factors. This conclusion is also supported by the fact that the LRAIC model developed by DBA has not previously differentiated the cost of SMS termination on this basis. The price of terminating a bulk of the SMS traffic that originated in a foreign mobile network is significantly higher than what is warranted by the LRAIC model, indicating that there is no effective competition in the wholesale market for SMS termination of foreign SMS on Lycamobile's network.

VI. ASSESSMENT

Article 7a(5) of the Framework Directive entitles the Commission to, after taking utmost account of the opinion of BEREC if any, either issue a recommendation requiring the NRA concerned to amend or withdraw the draft measure, or to take a decision to lift its reservations indicated in the serious doubts letter.

Following an examination of DBA's amended draft measure and taking utmost account of BEREC's opinion, the Commission has taken the decision to lift the reservations indicated in the serious doubts letter. This decision is based on the following reasons:

- i) The Commission no longer has serious doubts as to the compatibility of the amended draft measure with EU law. The Commission's main concern was that the draft measure would lead to indirect discrimination against operators established in Member States other than Denmark. However, the newly proposed measure imposes a price control remedy on the SMS termination service regardless of where the SMS originated. This will in practice prevent Danish operators from charging higher prices to operators established outside Denmark compared to Danish ones. Therefore, the Commission does no longer believe that the draft measure would lead to indirect discrimination. Moreover, the Commission welcomes DBA's recognition that an essentially identical competition problem exists in relation to termination of SMS originated in Denmark and SMS originated abroad. The pricing analysis performed by DBA shows that the price of terminating a bulk of the SMS traffic that originated in a foreign mobile network is significantly higher than what is warranted by the LRAIC model, leading to DBA's conclusion that the imposition of a price remedy is indeed necessary to address the described competition problem.
- ii) Further to that, the Commission no longer has serious doubts that the draft measure would infringe Article 8(4) of the Access Directive, since DBA addressed the existing bottleneck with an appropriate price control remedy.
- iii) Finally, the Commission no longer has serious doubts that the draft measure would infringe Article 8(5)(c) of the Framework Directive, since DBA's proposal

to impose a price control remedy regardless of where the SMS originates will prevent Danish operators from charging higher prices to operators established abroad. Therefore, the risk that higher costs incurred by non-Danish EU operators would be passed on to consumers by charging a higher retail price has now been controlled for.

- iv) For the reasons set out above, the Commission no longer has serious doubts that the proposed measure would create a barrier to the single market, as the originally proposed price regulation that could have dissuaded operators and service providers established in other Member States from the provision of their services in Denmark has now been abolished. As for BEREC's remark that unilateral regulation by one particular Member State may result in a considerable loss of bargaining power by national undertakings, the Commission cannot address this argument in this particular decision, since Article 7a of the Framework Directive only entitles it to determine the compatibility of DBA's draft measure concerning SMS termination for Lycamobile with EU law. In any case, if there was a competition problem on the market for SMS termination in other EU Member States, then this should normally be addressed by ex ante regulation, in case the market fulfils the three distinct criteria, or ex post competition law, and the alleged limited bargaining power of Danish operators would not be material. Equally, if there was no competition problem identified by the national NRA or national competition authority (NCA), then there is no strong reason to believe that Danish operators could not secure the same rates for SMS termination as local or other EU operators.
- v) To conclude, the Commission welcomes DBA's proposal to amend the draft measures and believes that the serious doubts expressed in its letter of 13 February 2013 are no longer valid. As to BEREC's comment that the adoption of the amended measure by DBA would result in Lycamobile being worse-off vis-à-vis Danish MNOs, the Commission believes that the adoption of the proposed measure would not seriously harm Lycamobile or its consumers. In any event, the asymmetrical regulation should be in place for a limited period of time, as DBA informed the Commission and BEREC in writing that it would shortly amend existing SMS termination regulation in relation to all other Danish operators. In any case, the Commission believes that the benefits gained by abolishing the limitation of the price control remedy outweigh the potential downsides of asymmetrical rates being in place for a limited period of time.

As a result of the above, the Commission has decided, after taking utmost account of the opinion of BEREC, to lift the reservations indicated in its serious doubts letter of 13 February 2012 with immediate effect.

The Commission's position on this particular amended 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/EC⁹, 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 Commission¹⁰ within three

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, 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.

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 deleted prior to such publication¹¹. You should give reasons for any such request.

Yours faithfully,
For the Commission,
Michel Barnier
Member of the Commission

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