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COMMISSION RECOMMENDATION

of 23.3.2015

in accordance with Article 7a 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") in Cases DE/2014/1666-1667: Wholesale voice call termination on individual mobile networks in Germany – Price caps

only the German version is authentic

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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")¹ and in particular Article 7a (5) thereof,

Having called on interested parties to submit their observations pursuant to the provision cited above² and having regard to their observations,

Having regard to the opinion of the Body of European Regulators for Electronic Communication (BEREC)³,

Whereas:

1. PROCEDURE

- (1) From 3 September 2014, the German Regulatory Authority, Bundesnetzagentur (BNetzA), carried out a national consultation⁴ for a period of four weeks concerning wholesale voice call termination on individual mobile networks⁵ in Germany.
- (2) On 24 October 2014, the Commission registered a notification from BNetzA⁶, concerning wholesale voice call termination on individual mobile networks in Germany.

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 (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 Notice published at: <https://circabc.europa.eu/w/browse/0fc4cbf9-3412-45fe-84bb-e6d7ba2f010e>.

³ Opinion of BEREC of 14 January 2015, BoR (15) 04.

⁴ In accordance with Article 6 of the Framework Directive.

⁵ Corresponding to market 2 in Commission Recommendation 2014/710/EU of 9 October 2014 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 295, 11.10.2014, p. 79.

⁶ 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

- (3) On 21 November 2014, the Commission, pursuant to Article 7a(1) of the Framework Directive, initiated a phase II investigation and subsequently notified BNetzA and BEREC, respectively, of the reasons as to why it believed that the draft measure would create a barrier to the internal market and why it had serious doubts as to the compatibility of the draft measure with EU law (the "serious doubts letter").
- (4) On 14 January 2015, BEREC delivered its opinion to the Commission⁷ and fully supported the Commission's serious doubts.

2. DESCRIPTION OF THE DRAFT MEASURE

2.1. Previous notifications

- (5) The third round of market analyses of the German markets for wholesale voice call termination on individual mobile networks in Germany was previously notified to and assessed by the Commission under Case DE/2011/1274⁸. The Commission had no comments as to the market definition and the SMP assessment with respect to the markets for wholesale voice call termination on individual mobile networks.
- (6) BNetzA defined distinct markets for voice call termination on the networks of the mobile 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 MVNOs, namely Vistream GmbH (Vistream), Ring Mobilfunk (Ring), Lycamobile Germany GmbH (Lycamobile) and OnePhone Deutschland GmbH (OnePhone).
- (7) The geographic scope of the relevant markets coincides with the geographic coverage of the network concerned and is determined as national.
- (8) BNetzA designated 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.
- (9) Furthermore BNetzA notified in January 2013⁹ draft measures imposing remedies on the designated SMP operators. With regards to the obligation of cost-orientation, and based on a LRAIC+ methodology, BNetzA proposed to set (retrospectively) the following symmetric MTRs for all SMP operators: (i) for the period of 1 December 2012 to 30 November 2013: 1.85 €/ct/min; and (ii) for the period of 1 December 2013 to 30 November 2014: 1.79 €/ct/min.
- (10) On 28 February 2013 the Commission expressed its serious doubts as to the compatibility of the proposals with EU law and stated that it considered that the draft measures, if adopted, may create a barrier to the internal market. Subsequently, on 27 June 2013 the Commission issued a recommendation under Article 7a of the Framework Directive requesting BNetzA to amend or withdraw the draft measures. On 19 July 2013 BNetzA adopted its final measure without amending the proposals as recommended by the Commission. On 29 October 2013 the Commission sent a pilot letter to Germany.

(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.

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

⁸ C(2011) 10077.

⁹ Case DE/2013/1424, C(2013) 1266.

- (11) On 15 October 2013¹⁰ BNetzA defined an additional market for voice call termination on the network of sipgate Wireless GmbH ('sipgate Wireless'). BNetzA designated sipgate Wireless as having SMP on the relevant market. The Commission had no comments on the draft measure.
- (12) Subsequently on 6 November 2013¹¹ BNetzA notified a draft measure imposing on sipgate Wireless the full set of remedies, including *inter alia* an obligation to offer mobile call termination at cost-orientation. The price methodology proposed by BNetzA at the time whilst being symmetrical, relies on the same LRAIC+ methodology used for the MTRs for other SMP on the relevant market previously notified to the Commission¹².
- (13) The Commission expressed its serious doubts as to the compatibility of the proposals with EU law and stated that it considered that the draft measures, if adopted, may create a barrier to the internal market and was fully supported in its approach by BEREC. As a result on 4 April 2014 the Commission issued a recommendation under Article 7a of the Framework Directive requesting BNetzA to amend or withdraw the draft measure. On 11 April 2014 BNetzA adopted its final measure without amending the proposal as recommended by the Commission.
- (14) On 20 May 2014 BNetzA notified its proposal concerning the rates for mobile termination and granting of collocation to be imposed on sipgate Wireless with retroactive effect from 3 February 2014 until 30 November 2014¹³. The proposed MTR was set at 1.79 €/min and was based on the previously notified LRAIC+ model. The Commission expressed its serious doubts as to the compatibility of the proposals with EU law and stated that it considered that the draft measures, if adopted, may create a barrier to the internal market. After obtaining a fully supportive BEREC Opinion in that case the Commission issued a recommendation under Article 7a of the Framework Directive requesting BNetzA to amend or withdraw the draft measure. On 24 October 2014 BNetzA adopted its final measure without amending the proposal as recommended by the Commission.

¹⁰ Case DE/2013/1503, C(2013) 6942.

¹¹ Case DE/2013/1527, C(2013) 8634.

¹² Whilst this approach leads, as recommended by the Commission, to the application of symmetric MTRs across Germany, by proposing a LRIC+ instead of a pure BU-LRIC costing methodology BNetzA chooses not to follow a core part of the Termination Rates Recommendation (in particular Recommends 2 and 6 and the Annex of the Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU, OJ L124, p. 67). BNetzA states in its draft measure that the relevant provisions of the German telecommunications law (TKG) have to be interpreted in the light of EU law in general and the Termination Rates Recommendation in particular, and that – in case of conflict – methods set out by the Commission prevail over the regulatory default model set out by national law. BNetzA, nevertheless, justifies its decision not to follow the recommended pure BU-LRIC approach by alleging that the non-recognition of common costs falls within its wider discretion to choose the most appropriate regulatory model and by stating that a pure BU-LRIC methodology would not be better suited to meet the policy objectives of promoting competition, the interest of citizens and consumers and contributing to the development of the internal market.

¹³ Case DE/2014/1605, C(2014) 4291.

2.2. The notified draft measure

- (15) In the currently notified draft measures with regard to the obligation of cost-orientation, BNetzA proposes to set for all SMP operators (MNOs and MVNOs¹⁴) the following MTRs: as of 1 December 2014 until 30 November 2015 a rate of 1.72 €/min and from 1 December 2015 until 30 November 2016 a rate of 1.66 €/min.
- (16) MTRs are based on the same LRAIC+ cost model, as applied in cases DE/2013/1424, DE/2014/1527 and DE/2014/1605, respectively. BNetzA indicates in the draft measure that its approach is not in accordance with Recommends 2 and 6 of the Commission's recommendation on termination rates¹⁵.
- (17) BNetzA states in its draft measure that the relevant provisions of the TKG have to be interpreted in light of EU law in general and the Termination Rates Recommendation in particular and that in case of conflict the methods set out by the Commission prevail over the regulatory default model set out by national law.
- (18) However, BNetzA remains of the view, as expressed in cases DE/2013/1424, DE/2014/1527 and DE/2014/1605 that a LRAIC+ methodology should be used as a basis for the calculation of termination rates. In order to apply the pure BU-LRIC model recommended by the Commission, BNetzA claims that it would have to be proven that the recommended model addresses the identified market failures better than the German LRAIC+ model.

3. SERIOUS DOUBTS EXPRESSED BY THE COMMISSION WHEN INITIATING THE SECOND PHASE OF THE ARTICLE 7a PROCEDURE

- (19) On 21 November 2014, the Commission expressed serious doubts as to the compatibility of the draft measures with EU law and provided reasons why it believed that the draft measures would create a barrier to the internal market.
- (20) The Commission agreed that based on the competition problem identified by BNetzA in the notification of the market review in 2011, consisting of the risk of excessive pricing and margin squeeze, a price control remedy is appropriate.
- (21) The Commission noted that BNetzA proposes to implement price caps for mobile termination rates based on a LRAIC+ methodology.

3.1. Compatibility with EU law

- (22) The Commission referred to Articles 8(4) and 13(2) of the Access Directive¹⁶ that require NRAs (i) to impose remedies which are 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 and in relation to the imposition of price controls, (ii) to ensure that the chosen cost recovery mechanism serves to promote efficiency and sustainable competition and maximises consumer benefits. Moreover, the Commission refers to Article 16(4) of the Framework Directive, which requires NRAs to impose on SMP undertakings appropriate regulatory obligations.

¹⁴ BNetzA proposes to impose this obligation on the following MNOs: Telekom Deutschland, Vodafone, Telefónica, E-Plus Mobilfunk and MVNOs: Lycamobile Germany and siggate Wireless.

¹⁵ Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU, OJ L124, p. 67 (the "Termination Rates Recommendation").

¹⁶ Directive 2002/19/EC of the European parliament and the Council of 7 March 2002 on access to, and interconnection, of electronic communications networks and associated facilities, OJ L 108, 24.4.2002, p. 7 (of the Access Directive).

- (23) In addition, the Commission stressed that pursuant to Article 8(3) of the Framework Directive, NRAs shall contribute to the development of the internal market by cooperating with each other, the Commission as well as BEREC in a transparent manner to ensure not only the development of a consistent regulatory practice, but also consistent application of the Framework Directive and the Specific Directives (together, the Regulatory Framework).
- (24) In this regard, the Commission may issue recommendations¹⁷ on the harmonised application of the Regulatory Framework in order to further the achievement of the objectives set out in Article 8 of the Framework Directive. This right arises in particular where the Commission finds that divergences in the implementation by the national regulatory authorities of their regulatory tasks under the Regulatory Framework may create a barrier to the internal market. It is in this context that the Commission, in order to ensure a correct and coherent interpretation and application of the relevant provisions of the Regulatory Framework within the EU, adopted the Termination Rates Recommendation, setting out a consistent approach that NRAs should in principle follow regarding price control obligations for fixed and mobile termination rates.
- (25) The Commission recommended NRAs to ensure that termination rates are implemented at a (i) cost efficient, (ii) symmetric level, (iii) and as of 31 December 2012. In the context of wholesale voice call termination markets, and given in particular their characteristics and the associated competitive and distributional concerns¹⁸, the cost efficient rate is normally the one resulting from a pure BU-LRIC methodology. This is because a BU-LRIC model provides both the correct cost signal to operators to increase efficiency and contributes to avoiding competitive distortions
- (26) It is therefore recommended that termination rates should be set at the cost which would be faced by an efficient operator providing the relevant service. Given that voice call termination services are traffic-related services, setting the efficient cost for their provision on the basis of a pure BU-LRIC methodology implies that mobile termination rates should allow only for the recovery of those costs which vary with the level of termination traffic and that would be avoided if a wholesale voice call termination service were no longer provided to third parties¹⁹.
- (27) The Commission noted that BNetzA proposed to use a LRAIC+ methodology which – contrary to Recommends 2 and 6 of the Termination Rates Recommendation – allocates non-traffic related costs to the provision of the mobile termination service.

¹⁷ In accordance with Article 19 of the Framework Directive.

¹⁸ The accompanying Explanatory Note of the Commission Staff Working paper (SEC(2009) 600, 7.5.2009) sets out that due to the particular nature of the termination markets characterised on the one hand by "two-way" interconnection and on the other hand by monopolies in each relevant market, which create the incentives of terminating operators to raise prices substantially above cost, cost-orientation obligations based on a BU-LRIC methodology are the most appropriate intervention to address productive- and allocative- efficiency concerns as well as maximising consumer welfare. As a result, in order to ensure compliance with the requirements of the regulatory framework, in particular Article 13(2) of the Access Directive, i.e. the requirements to promote efficiency and sustainable competition as well as to maximise consumer benefits, NRAs shall apply a BU-LRIC cost model when setting termination rates.

¹⁹ Recommend 6 of the Termination Rates Recommendation.

- (28) When adopting the Termination Rates Recommendation, the Commission clearly stated that, when deciding on the correct level of the regulated wholesale termination rate, it is essential to ensure that the methodology chosen pursuant to Article 13(2) of the Access Directive promotes efficient production and consumption decisions and minimises artificial transfers and distortions between competitors and consumers²⁰.
- (29) Due to the specific (two-sided) nature of call termination, only a narrow definition of the incremental cost will lead to the most efficient and least distortionary use of call termination services and ultimately minimise the risk of problems such as cross-subsidisation between operators as well as inefficient pricing and investment behaviour.
- (30) Whilst Article 19(2) of the Framework Directive provides NRAs the possibility not to follow a recommendation, in such circumstances they have to provide the reasons for such a position. Any regulatory approach chosen by the NRA alternative to the one recommended by the Commission according to Article 19 of the Framework Directive has to comply with the other provisions of this Directive and the Specific Directives in the present case, in particular Articles 8(4) and 13(2) of the Access Directive in conjunction with Articles 8 and 16(4) of the Framework Directive.
- (31) A cost orientation remedy based on a pure BU-LRIC methodology best promotes competition by, among other things, ensuring that all users derive maximum benefit in terms of choice, price and quality, in line with Article 8(2) of the Framework Directive.
- (32) The Commission considered that BNetzA did not provide convincing justification why the chosen LRAIC+ approach would meet the objectives set out in Article 8 of the Framework Directive. Moreover, the Commission did not share BNetzA's assertion that the recommended BU-LRIC approach would not serve the interests of telecoms operators or end-users any better than the LRAIC+ approach. In this respect, the Commission considered that BNetzA neglected the fact that a pure BU-LRIC approach is better suited to facilitate a more efficient distribution of financial transfers between competing operators, thus ultimately minimising the risk of problems such as cross-subsidisation between operators, inefficient pricing and/or investment behaviour. As a result, a pure BU-LRIC approach is better suited to meet the requirement to promote efficiency set out in Article 13(2) of the Access Directive.
- (33) Furthermore, the Commission did not share BNetzA's view that its proposed method is better suited (than BU-LRIC) to serve the policy objectives of promoting competition and protecting EU citizens' interest. On the contrary, evidence gathered so far appears to confirm the Commission's original expectation that the introduction of termination rates based on a pure BU-LRIC methodology results in significant consumer welfare gains²¹, thus (i) maximising consumer benefits in accordance with Article 13(2) of the Access Directive and (ii) ensuring that users derive maximum

²⁰ See for more detail, in particular, section 4.1 of the Commission Staff Working Document accompanying the Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU of 7 May 2009, SEC(2009) 600.

²¹ See for many, the case studies on Spain and the UK: "The welfare effects of mobile termination rate regulation in asymmetric oligopolies: The case of Spain", by Sjaak Hurkens and Angel L. Lopez, October 2011; and "Welfare Analysis of Regulating Mobile Termination Rates in the UK (with and Application to the Orange/T-Mobile Merger)" David Harbord and Steffen Hoernig, March 2010.

benefits in terms of choice, price and quality as required by Article 8 (2) (a) of the Framework Directive.

- (34) Therefore, BNetzA did not present sufficient evidence that the LRAIC+ methodology, would achieve the policy objectives set out in Article 8 of the Framework Directive, as it may lead to competitive distortions between operators with asymmetric market shares and traffic flows and, ultimately, lead to the application of consumer tariffs, which are based on wholesale inputs above avoidable costs.
- (35) In conclusion, the Commission expressed serious doubts as to the compatibility of the proposed draft measure with Articles 8(4) and 13(2) of the Access Directive in conjunction with Articles 8 and 16(4) of the Framework Directive.

3.2. Creation of barriers to the internal market

- (36) The Commission considered that the approach proposed by BNetzA results in a level of mobile termination rates, which is higher than the average MTR in those Member States that employ a pure BU-LRIC methodology. Hence, for the period until 30 November 2016 the application of a LRAIC+ methodology leads to a considerable difference in absolute terms between German MTRs and those of other Member States, which are calculated in accordance with Articles 8(4) and 13(2) of the Access Directive. This difference would be incurred at the expense of the operators, and eventually consumers, in the Member States from where the calls originate²².
- (37) Any such considerable asymmetries in mobile termination rates within the EU not only distort and restrict competition, but have a significant detrimental effect on the development of the internal market, i.e. create a considerable barrier to the single market, and, therefore, result in a violation of the principles and objectives of Article 8(2) and (3) of the Framework Directive. A harmonised approach in setting mobile termination rates is particularly important to ensure that regulators do not favour their national operators at the expense of operators in other Member States by not introducing fully cost-oriented termination rates. It is exactly for that reason that the Commission has adopted the Termination Rates Recommendation to ensure a harmonised application of the Regulatory Framework in order to contribute to the development of the internal market and further the objectives set out in Article 8 of the Framework Directive.
- (38) In light of the above considerations, the Commission considered that the draft measure would create barriers to the internal market.

3.3. Conclusions provided in the letter of serious doubts

- (39) In this particular case, the Commission observed that BNetzA's notification did not provide sufficient justification of why its proposed approach for wholesale voice call termination on individual mobile networks meets the policy objectives and regulatory principles enshrined in Article 8 of the Framework Directive, and can be considered to be in line with Article 8(4) of the Access Directive. Hence, the Commission expressed serious doubts that BNetzA's proposal on mobile termination rates can be

²² The fact that neighbouring countries, such as Poland, Austria and France, comply with the Termination Rates Recommendation and apply a pure BU-LRIC model, meaning that MTRs are at about half the level of German MTRs, leads to a significant net transfer of termination revenues to the detriment of operators in those countries. For example, for Austria alone estimates suggest that if BNetzA adopts its decision as proposed this will lead to Austrian mobile operators "overpaying" German operators by ca. €12 million over the next two years.

considered appropriate in the given termination markets within the meaning of Article 16(4) of the Framework Directive and justified in light of the objectives laid down in Article 8 of the Framework Directive—particularly the objectives of promoting competition and user benefits pursuant to Article 8(2) of the Framework Directive—and believed that the draft measure would create barriers to the internal market.

4. OBSERVATIONS SUBMITTED BY THIRD PARTIES

- (40) On 10 December 2014 the Commission received a comment from a third party supporting the LRAIC+ approach as applied by BNetzA.

5. PROCEDURE FOR CONSISTENT APPLICATION OF REMEDIES

5.1. BEREC's Opinion

- (41) On 14 January 2015²³ BEREC issued an opinion on the Commission's letter of serious doubts pursuant to Article 7a (3) of the Framework Directive.
- (42) On the basis of its analysis BEREC considered that the Commission's serious doubts were justified in that (i) BNetzA's proposed MTRs are not based on a pure BU-LRIC costing methodology which, as recommended by the Commission, generally results in a better competitive outcome, and (ii) BNetzA has not provided a valid justification for deviating from the TR Recommendation and in particular, has not provided evidence to support its view as to why this decision would be better suited to meet the policy objectives of promoting efficiency and sustainable competition and maximize consumer benefits, than pure BU-LRIC. BNetzA therefore did not prove that national circumstances justify the deviation from the recommended MTR costing methodology.
- (43) Moreover, BEREC stressed that all the concerns already raised in cases DE/2013/1424²⁴, DE/2013/1527²⁵, and DE/2014/1605²⁶ are fully supported by BEREC also in this case, and hence all relevant conclusions on case DE/2013/1424, DE/2013/1527, and DE/2014/1605 can also be drawn for the present case.
- (44) In addition, BEREC shares the Commission's concerns that BNetzA's proposal could create barriers to the internal market when other NRAs set MTRs based on the methodology recommended by the Commission (via a pure BU-LRIC model and/or by benchmarking pure-LRIC model results) and BNetzA deviates from that methodology without valid justification

5.2. Close Co-operation between BNetzA, BEREC and the Commission

- (45) BNetzA, BEREC and the Commission closely co-operated pursuant to Article 7a (2) and (4) of the Framework Directive in order to identify the most appropriate and effective measure in light of the objectives laid down in Article 8 of the Framework Directive.
- (46) The Commission considers that BNetzA did not provide any additional justification during this co-operation phase as to how the notified measures (i.e. the LRIC+

²³ Opinion of BEREC of 14 January 2015, BoR (15) 04.

²⁴ Opinion of BEREC of 12 April 2013, BoR (13) 47.

²⁵ Opinion of BEREC of 16 January 2014, BoR (14) 07.

²⁶ Opinion of BEREC of 24 July 2014, BoR (14) 105.

methodology) could be compliant with Articles 8(4) and 13(2) of the Access Directive or meet the objectives of Article 8 of the Framework Directive.

- (47) At the end of the three month period following the Commission's notification of its serious doubts to BNetzA and BEREC, BNetzA did not amend or withdraw its draft measure.

5.3. Conclusion of the procedure opened to ensure consistent application of the remedies

- (48) Since BNetzA maintained its draft measures at the end of the three months period following the Commission's notification of its serious doubts in accordance with Article 7a (1) of the Framework Directive, the Commission, taking utmost account of the opinion of BEREC, may issue a recommendation requiring BNetzA to amend or withdraw the draft measure or to take a decision to lift its reservations indicated in the letter of serious doubts.
- (49) The Commission considers that the reservations expressed in its serious doubts letter are still valid.
- (50) In particular, given the specific characteristics of mobile call termination markets in general and the associated competitive and distributional concerns in particular, the Commission stresses that the objectives of promoting efficiency and sustainable competition, maximising consumer benefits and contributing to the development of the internal market would be best achieved by a cost-orientation remedy based on a pure BU-LRIC methodology.
- (51) In addition, mobile termination rates set at an efficient level on the basis of a pure BU-LRIC methodology contribute best to ensuring a level playing field among operators by eliminating competitive distortions between fixed and mobile networks in the provision of termination services and between operators with asymmetric market shares.
- (52) Moreover, high termination rates tend to lead to high retail prices for originating calls and correspondingly lower usage rates thus decreasing consumer welfare. As a result, a cost-orientation remedy based on a pure BU-LRIC methodology best promotes competition by ensuring that all users derive maximum benefits in terms of choice, price and quality in line with Article 8 (2) of the Framework Directive. In addition it best meets the requirements of 13 (2) of the Access Directive, which states that any pricing methodology chosen must serve to promote efficiency and sustainable competition and maximise consumer benefits.
- (53) The Commission also refers to the reasons provided in BEREC's opinion of why a pure BU-LRIC approach is generally the most appropriate costing methodology for the calculation of termination rates.
- (54) Whilst the Commission recognises, in light of Article 19(2) of the Framework Directive, that NRAs have a margin of discretion to propose an alternative methodology and may choose not to follow the approach recommended in the 2009 Termination Rates Recommendation, it underlines that any alternative methodology has to be duly justified, in order to show that it fully complies with the policy objectives and regulatory principles of the Regulatory Framework. In particular, any alternative methodology has to take into account the characteristics of the specific markets to be regulated and be appropriate in light of the policy objectives and regulatory principles enshrined in Article 8 of the Framework Directive.

- (55) BNetzA has not provided further evidence that the alternative proposed methodology, i.e. LRIC+, is more, or at least as, appropriate in the circumstances of the German mobile termination markets than a measure based on pure BU-LRIC.
- (56) In this respect, the Commission notes, that BNetzA could not provide convincing evidence supporting their assertion that the "recovery gap" between the proposed LRIC+ approach and a pure BU-LRIC methodology would be closed by the regulated operators through an increase in prices for their end-users.
- (57) The Commission therefore concludes, in line with BEREC's opinion, that BNetzA did not provide sufficient evidence that its notified measures fully complies with the policy objectives and regulatory principles of the Regulatory Framework.
- (58) Furthermore, on the basis of the calling party pays principle, prevalent in Europe, terminating operators in Germany will be able to benefit from higher termination rates based on a LRIC+ methodology at the expense of operators, and ultimately consumers, in those Member States, from which the call originates and, which do apply fully cost-oriented MTRs in line with Article 8 (2) of the Framework Directive and Articles 8 (4) and 13 (2) of the Access Directive.
- (59) Any such considerable asymmetries in mobile termination rates within the EU not only distort and restrict competition but have a significant detrimental effect on the development of the internal market, thus creating a considerable barrier to the single market.
- (60) As a result, the Commission considers that, given the characteristics of the specific termination markets to be regulated, the LRIC+ methodology proposed by BNetzA is not appropriate in light of the policy objectives and regulatory principles enshrined in Article 8 of the Framework Directive and taking account of the requirements set out in Articles 8 (4) and 13 (2) of the Access Directive.
- (61) Consequently, the Commission is of the view that the principles and objectives of the Regulatory Framework are not met by the application of the LRIC+ methodology as proposed in Germany.
- (62) On the basis of the above, and recalling its reasons expressed in the serious doubts letter, the Commission issues the present recommendation requiring BNetzA to amend or withdraw the draft measures.

HEREBY ISSUES THIS RECOMMENDATION:

1. BNetzA should amend or withdraw the remedies relating to the price caps charged by the SMP operators for mobile termination (in market 2) in Germany in order to ensure that the evaluation of the efficient costs for the rates applied on the mobile termination markets is based on a pure BU-LRIC methodology, as being the most appropriate methodology for the regulation of the rates applicable in the mobile termination markets.
2. BNetzA should implement new MTRs based on the methodology provided in point 1 without delay and in any event no later than 1 July 2015, having regard to the objectives laid down in Article 8 of the Framework Directive, and with particular regard to Article 8(3)(d) of the Framework Directive, which requires BNetzA to co-operate with other NRAs, with the Commission and with BEREC so as to ensure the development of consistent regulatory practice, and as recommended by the Commission in the 2009 Termination Rates Recommendation, which recognises the

pressing need to ensure that consumers derive the maximum benefits in terms of efficient cost-based mobile termination rates.

3. The Commission will publish this recommendation on its website. BNetzA is invited to inform the Commission within three working days following receipt of this recommendation whether it considers that, in accordance with European Union and national rules on business confidentiality, it contains confidential information which BNetzA wishes to have deleted prior to publication. Any such request should be reasoned.
4. In accordance with Article 7a (7) of the Framework Directive, where BNetzA decides not to amend or withdraw the draft measures on the basis of this recommendation, it shall provide the Commission with a reasoned justification.
5. In accordance with Article 7a (6) of the Framework Directive, BNetzA shall communicate the adopted draft measure to the Commission by 24 April 2015. This period might be extended, at BNetzA's request, to allow BNetzA to undertake a public consultation in accordance with Article 6 of the Framework Directive.
6. This Recommendation is addressed to BNetzA.

Done at Brussels, 23.3.2015

*For the Commission
Günther OETTINGER
Member of the Commission*