Brussels, 27.6.2013
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COMMISSION RECOMMENDATION

of 27.6.2013

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 Case DE/2013/1424: voice call termination on individual mobile networks in Germany

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 above[2] 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 18 April 2012, the German Regulatory Authority, *Bundesnetzagentur* (BNetzA), carried out a national consultation[4] for one month concerning draft remedies for the markets for wholesale call termination on individual mobile networks[5] in Germany. In addition, BNetzA carried out a national consultation concerning the cost methodology for the calculation of cost oriented termination rates and the actual level of these rates, which ran from 21 November 2012 for one month[6].

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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 10 April 2013, BoR (13) 47.

4 In accordance with Article 6 of the Framework Directive.

5 Corresponding to market 7 in Commission Recommendation 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 OJ L 344, 28.12.2007, p. 65-69.

6 Both these national consultations concerned the main SMP operators, i.e. Telekom Deutschland GmbH (as successor of T-Mobile Deutschland GmbH), Vodafone D2 GmbH, E-Plus Mobilfunk GmbH & Co. KG and Telefónica Germany GmbH & Co. OHG. For draft measures and the costing methodology concerning Lycamobile Germany GmbH, a new MVNO, BNetzA carried out national consultations

(2) On 31 January 2013, the Commission registered a notification from BNetzA concerning the setting of new mobile termination rates in the above-mentioned markets.

(3) On 12 February 2013, a request for information (RFI)[7] was sent to BNetzA, followed by an additional request dated 13 February 2013 and responses were received on 15 February 2013.

(4) On 28 February 2013, the Commission, pursuant to Article 7a(1) of the Framework Directive, informed 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 compatibility of the draft measures with EU law (the "Serious doubts letter").

(5) On 20 March 2013, 28 March 2013 and on 02 April respectively, the Commission received five third party observations[8].

(6) On 10 April 2013, BEREC delivered its opinion to the Commission[9].

(7) On 2 May 2013, a meeting between BNetzA, BEREC and the Commission took place in order to identify the most appropriate and effective measure addressing the Commission's serious doubts in line with Article 7a (4) of the Framework Directive.

2. DESCRIPTION OF THE DRAFT MEASURE

2.1. Previous notifications

(8) The third round market analyses of the German markets for voice call termination on individual mobile networks was previously notified to and assessed by the Commission in 2011 under case DE/2011/1274[10]. At the time BNetzA only notified its proposal for market definition and the assessment of significant market power (SMP).

(9) With regards to the market definition, 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[11], namely Vistream GmbH (Vistream)[12], Ring Mobilfunk

from 2 May 2012 for one month and from 19 December 2012 for one month, respectively.

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

8 In accordance with Article 7a(2) of the Framework Directive.

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

10 C(2011) 10077.

11 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.

12 In response to the Commission's request for information, BNetzA confirmed that due to on-going insolvency proceedings, Vistream GmbH, which since February 2012 operated as Telogic Germany GmbH, currently does not offer mobile call termination services.

(Ring)[13], Lycamobile Germany GmbH (Lycamobile) and OnePhone Deutschland GmbH (OnePhone)[14].

(10) BNetzA included in the relevant markets 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 interface[15].

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

(12) 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.

(13) As to remedies, subsequent to its second round market analyses, notified to the Commission under case DE/2008/0813[16], BNetzA imposed, by way of its final decision of 25 February 2011[17], the following mobile call termination rates[18]:

MTR price caps 1.12.2010 – 30.11.2012 (in €ct/min)			
Telekom Deutschland GmbH	Vodafone D2 GmbH	E-Plus Mobilfunk GmbH & Co. KG	Telefónica O2 Germany GmbH & Co. OHG
3.38	3.36	3.36	3.39

(14) On 19 November 2012 BNetzA communicated to the Commission provisional measures pursuant to Article 7 (9) of the Framework Directive regarding the setting of preliminary mobile termination rates (MTRs) applying to all four main mobile network operators designated to have SMP. The preliminary rate as of 1 December 2012 is 1.85 €ct/min.

2.2. The notified draft measure

(15) The notified draft measures concerns solely the imposition of remedies on the designated SMP operators. In this respect BNetzA proposes to impose the following set of remedies on T-Mobile, Vodafone, E-Plus[19], O2 and Lycamobile:

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13 Under case DE/2012/1347 BNetzA notified to the Commission the withdrawal of all obligations regarding Ring Mobilfunk as this operator ceased to provide mobile call termination services.

14 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.

15 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.

16 SG-Greffe (2008) D/207093.

17 Notified to and assessed by the Commission under case number DE/2011/1176.

18 The MTRs for DT, Vodafone and O2 were set on the basis of common costing tools combined with individual per operator-input cost accounting data. Although the costs of E-Plus were calculated using the same method, ultimately, the MTRs for E-Plus were set on the basis of national benchmarking against the MTRs of the operator reflecting the next highest costs, i.e. Vodafone..

19 In response to the Commission's request for information, BNetzA confirmed that the measures imposed

(16) Access obligations, including co-location;

(17) A non-discrimination obligation;

(18) Transparency obligations, including the publication of standard reference offers[20]; and

(19) An obligation to offer mobile call termination at cost-orientation.

(20) With regards to the obligation of cost-orientation, BNetzA, proposes to set (retrospectively) the following symmetric MTRs for all SMP operators[21]:

MTR price caps (in €ct/min)		
	01/12/2012-30/11/2013	01/12/2013-30/11/2014
All operators	1.85	1.79

(21) As part of the current notification BNetzA sets out draft measures which describe the precise cost model to be used to calculate wholesale voice call termination charges for mobile networks. BNetzA proposes to calculate the costs of an efficient operator by employing a LRIC+ costing methodology. In doing so, BNetzA includes in its relevant cost stack both 'non-traffic-related' common costs as well as traffic-related costs, which could be attributable to services other than wholesale voice mobile call termination.

(22) 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[22]. 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.

(23) 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

on E-Plus will also apply to OnePhone GmbH as an enterprise legally connected through the same mother company (KPN NV).

[20] It has to be noted, though, that the transparency obligation imposed on Lycamobile does not also include an obligation to publish a standard reference offer. Instead, BNetzA proposes to oblige Lycamobile to publish relevant information in relation to technical specifications, access conditions and relevant tariffs.

[21] In addition to MTRs, BNetzA also proposes to set the charges for related services, such as, for example, a one-off fee for the provision of intra-building segments at 2Mbit/s (483.20 €), an annual rental charge for intra-building segments at 2 Mbit/s (764.22 €) and an annual rental charge for common channel signalling (331.65 €). Other related services may be charged according to actual expenses.

[22] See 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 (the "Termination Rates Recommendation").

pure BU-LRIC methodology would not be better suited to meet the policy objectives of promoting competition and the interest of citizens and consumers. Furthermore, in its notification BNetzA states that with regards to the policy objective of contributing to the development of the internal market, the proposed approach is preferable, as a pure BU-LRIC approach would not serve better the internal market objective, as it would not, in BNetzA's view, be better suited to achieve the other two policy objectives, thus denying the self-standing importance of the objective to contribute to the internal market[23].

(24) BNetzA does not propose to introduce the target rate using a glide-path but intends to impose the MTR calculated pursuant to the proposed cost model with immediate effect. Due to expected efficiency gains BNetzA proposes to introduce a slight decrease after the first year.

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

(25) The Commission expressed serious doubts as to the compatibility of the draft measure with EU law and provided reasons why it believed that the draft measure would create a barrier to the internal market.

(26) 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.

(27) The Commission noted that BNetzA proposes to implement price caps for mobile termination rates based on a BU-LRIC plus methodology from 1 December 2012 until 30 November 2014.

3.1. Compatibility with EU law

(28) The Commission referred to Articles 8(4) and 13(2) of the Access Directive[24] which require national regulatory authorities ("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 (ii) in relation to the imposition of price controls to ensure that the chosen cost recovery mechanism serves to promote efficiency and sustainable competition and maximises consumer benefits. Moreover, the Commission referred to Article 16(4) of the Framework Directive which requires NRAs to impose on SMP undertakings appropriate regulatory obligations.

(29) 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, with the Commission and BEREC in a transparent manner to ensure not only the development of a consistent regulatory practice but also

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[23] In response to the Commission's request for information, BNetzA adds that the policy objective of contributing to the internal market under Article 8 (3) of the Framework Directive is not on an equal footing but committed and subordinate to the other two policy objectives of promoting competition, Article 8 (2) of the Framework Directive and promoting the interests of citizens of the EU, Article 8 (4) of the Framework Directive. In addition, in its response to the Commission's request for information, BNetzA advises the Commission to accept the "competition of [regulatory] systems" ("Wettbewerb der Systeme") inherent in its approach, as it leads to market results beneficial for Germany.

[24] 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 (the Access Directive), as amended by Directive 2009/140/EC.

consistent application of the Framework Directive and the Specific Directives (together, the "Regulatory Framework").

(30) In the context of the wholesale markets for voice call termination on individual mobile networks, the Commission underlined that, given its characteristics and the associated competitive and distributional concerns, the above mentioned objectives of promoting efficiency and sustainable competition, maximising consumer benefit and contributing to the development of the internal market, would best be achieved by a cost orientation remedy based on a pure BU-LRIC methodology. Moreover, the Commission observes that mobile termination rates set at an efficient level contribute to a level playing field among operators by eliminating competitive distortions between fixed and mobile networks in the provision of termination services.

(31) In this regard, the Commission pointed out that it may issue recommendations[25] 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 a recommendation on fixed and mobile termination rates in the EU (the "Termination Rates Recommendation")[26], setting out a consistent approach that the NRAs should in principle follow regarding price control obligations for fixed and mobile termination rates.

(32) For this purpose, the Commission recommended that NRAs should ensure that termination rates are implemented at a cost efficient, symmetric level as of 31 December 2012[27]. Moreover, it recommended that the level should be determined including only those costs which would be avoided if a wholesale voice call termination services were no longer provided to third parties[28], i.e. applying a pure BU-LRIC costing methodology.

(33) Whilst the Commission recognised that Article 19 (2) of the Framework Directive provides the NRAs the possibility not to follow a recommendation, it pointed out that in such circumstances an NRA has to provide the reasons for its position. At the same time, any regulatory alternative approach chosen by the NRA 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 Article 8 and Article 16(4) of the Framework Directive.

(34) The Commission observed that 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. Moreover, the Commission pointed out that

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[25] In accordance with Article 19 of the Framework Directive.

[26] Commission Recommendation of 7 May 2009 on the regulatory treatment of fixed and mobile termination rates in the EU, OJ L 124, 20.05.2009, p. 67.

[27] Recommend 11 of the Recommendation.

[28] Recommend 6 of the Recommendation.

mobile termination rates based on a pure BU-LRIC model contribute to a level playing field among operators, by eliminating competitive distortions in the termination markets.

(35) Whilst the Commission welcomed the proposed introduction of symmetric MTRs in Germany, it noted that, with regards to the choice of the relevant costing methodology, the draft measures notified by BNetzA did not appear to comply with the above principles and objectives set out in the regulatory framework.

(36) In particular, the Commission observed that BNetzA proposed to employ a LRIC+ methodology, which – contrary to Recommends 2 and 6 of the Termination Rates Recommendation – includes in the calculation of the relevant mobile call termination rate both 'non-traffic-related' common costs as well as traffic-related costs, which could be attributable to services other than wholesale voice mobile call termination. However, when adopting the Termination Rates Recommendation, the Commission clearly stated that, when deciding on the correct level of the regulated wholesale mobile 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 consumers[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 and inefficient pricing and investment behaviour.

(37) The Commission considered that BNetzA did not provide sufficient and compelling economic reasons to justify why it choose not to follow the Recommendation. In particular, BNetzA's assertion that, due to its inability to determine with certainty existing price elasticities of wholesale buyers, calling end-users and called end-users, it cannot curtail the ability of SMP operators to recover common costs via call termination rates, neglects that a pure BU-LRIC approach is better suited to facilitate a more efficient distribution of financial transfers between competing operators and thereby to a level playing field between all fixed and mobile operators.

(38) In addition, for the reasons set out above, the Commission did not share BNetzA's assertion that its proposed method was better suited to serve the policy objectives of promoting competition and the interest of citizens of the EU as it would not lead to a situation of over-recovery of costs. Furthermore, the Commission did not agree with BNetzA's 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. On the contrary, evidence gathered so far appears to confirm the Commission's original expectation that the introduction of wholesale MTRs based on a pure BU-LRIC method results in significant consumer welfare gains[30].

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[29] 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.

[30] 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.

(39) It was the Commission's view that, in the present case, BNetzA did not present sufficient evidence that the proposed LRIC+ methodology would equally allow for achieving these regulatory objectives. In fact, the Commission had serious doubts as to whether the proposed LRIC+ methodology would allow for the achievement of the policy objectives set out in Article 8 of the Framework Directive, as it may lead to competitive distortions between fixed and mobile markets and/or 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.

(40) The Commission therefore had 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

(41) The Commission further noted that due to the fact that BNetzA intended to set mobile termination rates above the level of avoidable costs, terminating operators in Germany will be able, on the basis of the calling party pays principle, to benefit from this rate 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[31]. The approach proposed by BNetzA results in a level of mobile termination rates, which – at 1.85 €ct/min for the period until 30 November 2013 (and 1.79 €ct/min for the following year until 30 November 2014) – is more than 80% higher than the average MTR in those Member States, which employ a pure BU-LRIC methodology in compliance with the Termination Rates Recommendation[32]. Hence, for the period until 30 November 2014 the application of a LRIC+ methodology would lead to a considerable difference in absolute terms between German MTRs and those in other Member States, which are calculated in accordance with the Termination Rates Recommendation and 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 originate.

(42) 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 particular 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 mobile 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

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[31] For example the 5 most populous Member States (leaving aside Germany itself) are all applying a pure BU-LRIC rate: FR (FR/2011/1200) with a target rate of 0.80 €ct/min; IT (IT/2011/1219), 0.98 €ct/min; ES (ES/2012/1291), 1.09 €ct/min; UK (UK/2010/1068), 0.86* €ct/min; PL (PL/2012/1368), 1.04* €ct/min (*depending on exchange rate).

[32] The average mobile termination rate in the Member States, which have employed their own BULRIC methodology (i.e. BE, FR, IT, PT, ES, DK, UK, PL) is – depending on current exchange rates – marginally above 1 €ct/min. In addition, many other Member States have now opted to benchmark their MTRs against these "BULRIC-countries".

development of the internal market and further the objectives set out in Article 8 of the Framework Directive.

(43) Moreover, the Commission observed that mobile termination rates set at an efficient level contribute to a level playing field not only at national but also at EU level, by eliminating competitive distortions between fixed and mobile networks.

(44) Leaving aside the validity of BNetzA's claim (which the Commission questioned) that the proposed approach is the most appropriate to achieve the policy objectives of Article 8(2) and (4) of the Framework Directive, the Commission did not share BNetzA's assertion that the third policy objective of Article 8(3) of the Framework Directive is subordinate to the other two. In the light of this, a "competition of systems", as suggested by BNetzA, would be detrimental to furthering the internal market, as it would create exactly the type of inward-looking national assessment that Article 8(3) of the Framework Directive attempts to prevent.

(45) In light of the above considerations, the Commission considered, in its serious doubts letter, that the draft measure would create barriers to the internal market.

3.3. Conclusions provided in the letter of serious doubts

(46) In this particular case, the Commission observed that BNetzA's notification did not provide sufficient justification of why its proposed approach for the markets for voice call termination on individual mobile networks in Germany met the policy objectives and regulatory principles enshrined in Article 8 of the Framework Directive, and could be considered to be in line with Article 8(4) of the Access Directive. Hence, the Commission had serious doubts that BNetzA's proposal on mobile termination rates could be 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, and in particular 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. PROCEDURE FOR CONSISTENT APPLICATION OF REMEDIES

4.1. BEREC's opinion

(47) On 10 April 2013 BEREC issued an opinion on the Commission's letter of serious doubts pursuant to Article 7a (3) of the Framework Directive

(48) On the basis of its economic analysis, BEREC considered that the Commission's serious doubts were justified in that BNetzA's proposed MTRs until November 2014, which are not based on a pure BU-LRIC costing methodology.

(49) In particular, BEREC considered that BNetzA has not offered appropriate economic reasoning to demonstrate that a measure based on LRAIC+ is a more appropriate remedy to address the competitive concerns identified in the German market than a measure based on pure BU-LRIC. This is particularly the case taking account of the specificities of termination markets, and the policy objectives of promoting efficiency and sustainable competition and maximising consumer benefits as set out in Article 8 of the Framework Directive.

(50) BEREC expressed the opinion that, in the case of termination services, a pure BU-LRIC approach is generally the most appropriate for a number of reasons.

(51) In BEREC's view, in light of Article 13(2) of the Access Directive and points 2 and 6 of the 2009 Termination Rates Recommendation, any NRA which wants to deviate from the recommended pure BU-LRIC methodology has to provide sufficient and compelling economic reasons as to why another cost methodology would be better suited to meet the policy objectives enshrined in Article 8 of the Framework Directive.

(52) In the present case, BEREC could not endorse BNetzA’s alternative LRIC+ approach on the basis of BNetzA's justification that pure BU-LRIC would not be better suited than LRIC+. BEREC considers that a proper justification of the choice of LRIC+ by BNetzA should have consisted in assessing whether LRIC+ would be better suited than pure BU-LRIC to meet the policy objectives of the regulatory framework.

(53) In addition, BEREC assessed the need to ensure that customers derive maximum benefits in terms of efficient cost based termination rates. With regard to methodological issues on the LRIC+ approach chosen by BNetzA BEREC considers that even in highly competitive markets, it is not necessarily the case that a multiproduct firm will allocate joint and common costs with an (equal proportionate or volume proportionate) mark-up to all products offered. In many cases prices do only cover the incremental/marginal costs, to attract customers or following an optimisation calculus to achieve the best outcome in a two– or multi-sided market.

(54) Although it is understood that on the whole (taken into account all products) the total (efficient) costs need to be recovered, this does not mean that each product will contribute - or even contribute equally - to achieve this. To take an emulated competitive outcome (the “as-if competition price”) that also accounts for joint and common costs as starting point, would in BEREC's view only be appropriate if the outcome was an efficient allocation (in terms of no welfare losses, i.e. prices are reflecting marginal utilities). This is not the case with an equal proportionate mark-up as the termination service is a two-way access service and encounters an externality, which is not taken into account by BNetzA.

(55) In BEREC's view applying the proposed LRIC+, also means that the calling party is contributing to the recovery of the networks’ joint and common cost of the terminating company. In this respect and concerning BNetzA’s argument that an LRIC+ approach is better suited to avoid a "recovery gap" BEREC noted, that a recovery gap resulting from a switch from LRIC+ to pure BU-LRIC can only emerge in case of a net-inflow of traffic. In this case, the most appropriate way to recover such a gap, from an efficiency point of view, would be to let the operator decide on the basis of price elasticities taking into account that the common cost recovery should preferably come from markets/services with effective competition or from other regulated wholesale services in a way that a negative competitive impact is minimised. From an efficiency point of view such a recovery would clearly be preferable over a LRIC+ based recoupment from mobile call termination, which does not address the market failure and hence does not aim to minimise the resulting efficiency losses and competitive effects.

(56) Furthermore, BEREC states that reducing the efficiency analysis to a rather specific interpretation of cost causation (i.e. the question who is triggering the service), is not sufficient in that it does not take into account the specific nature of the termination service. It is more efficient to follow an approach which explicitly takes into account the existence of a market failure (externality). Based on this reasoning, BEREC notes that it cannot follow BNetzA’s reasoning that LRIC + would be a more appropriate costing methodology than pure BU-LRIC to calculate efficient termination prices.

(57) In its competition assessment of BNetzA's proposal, BEREC did not consider the fact that mobile network operators did not oppose a LRIC+ methodology, as convincing reason to contradict the presumption that an MTR set at the incremental level reduces the barriers to entry and to expansion.

(58) Likewise, in relation to effects on the fixed networks BEREC considers that the arguments presented by BNetzA, namely the existence of a 2:1 ratio of mobile-mobile traffic imbalance to the detriment of smaller operators, does not allow one to reject the relevance of on-net/off-net price differentiations in the German market, especially given the increasing share of on-net traffic. In BEREC's view, a reduction in mobile termination rates is entirely translated into lower marginal costs of providing an off-net call. From a theoretical standpoint, there are no reasons why not to expect lower prices for off-net calls in the presence of lower mobile termination rates, in a competitive market.

(59) BEREC also considers that the application of a pure BU-LRIC approach contributes to reflect the true value of the resources used at the margin for the provision of an off-net call. This will contribute to approximate the marginal costs of an on-net and of an off-net call, which, in turn, should contribute to the emergence of flat-rate tariffs or bundles with a larger content of “free” communications. Competition based upon more “realistic” price signals, which reflect the true scarcity of the resources used, should be welfare enhancing for consumers, which is of paramount importance bearing in mind Articles 8(4) and 13(2) of the Access Directive and the objectives laid out in Article 8 of the Framework Directive. It should also contribute to higher levels of usage of mobile communications. The gains thus achieved, which will tend to be passed on to consumers in competitive markets, plus the expected increased levels of competition in the market will, in BEREC's view, prevail over any potential “waterbed effect”.

(60) BEREC considered that a pure BU-LRIC method is also more appropriate to lower competitive imbalances between integrated fixed and mobile operators and fixed only operators. BNetzA’s proposed LRIC+ model does in fact include non-traffic related costs in the calculation of wholesale call termination, meaning that MTRs would be set above the level of avoidable costs compared to a pure BU-LRIC approach. Because of a different treatment of the access network and the different sensitivity of the mobile access networks to traffic levels (as compared with fixed networks), the use of a LRIC+ approach means that mobile operators are allowed to recover from regulated termination a much higher cost base than a fixed operator. Such a situation is detrimental to the level playing field between fixed and mobile operators and could fuel fixed-to-mobile substitution. Moreover, the application of a LRIC+ approach is likely to consolidate the net flows of revenues from fixed operators to mobile operators, given the proposed asymmetry levels between MTRs and FTRs in Germany of 1.49 €c/min (based on the proposed level of MTR, 1.79 €c/min and FTR average of 0.3€c/min between peak and off-peak). The overall implication of BNetzA’s argument that the pass-through of previous reductions in MTRs has been incomplete in terms of retail mobile and fixed call rates does not, in BEREC's view, prove that MTRs based on a pure BU-LRIC methodology would not maximise consumer welfare.

(61) BEREC’s economic assessment comparing LRIC+ and pure BU-LRIC methodologies clearly indicates that setting German MTRs on the basis of pure BU-LRIC cost model would provide a better outcome in terms of allocative and dynamic efficiencies. BEREC therefore shares the Commission’s view that the arguments put forward by BNetzA as to the suitability of a LRIC+ approach to meet the policy objectives set out in Article 8 of the Framework Directive are not justified.

(62) In addition, it is BEREC's opinion that the approach proposed by BNetzA is incompatible with Article 8(4) and 13(2) of the Access Directive.

(63) BEREC also shares the Commission's concern that the proposed measure would create barriers to the internal market, through establishing widely different termination rates across EU members. As a result, operators from those Member States where termination rates are based on a pure BU-LRIC methodology would have to pay higher termination rates to German operators. These higher and asymmetric wholesale costs will translate into higher retail prices in competitive retail markets in other Member states. In addition, higher wholesale charges can present potential side-effects of distorting consumer behaviour and amplifying the deficits in the international traffic balance of German mobile operators. Moreover, given the relative size of the German market, significantly higher termination prices to German operators in case of LRIC+ could have a negative effect on the development of pan European offers.

(64) BEREC estimates that in terms of terminated minutes for some Member States it could constitute quite substantial share of outgoing traffic to German mobile networks. In particular for Member States where outgoing traffic mainly flows to German mobile operators this could lead to the negative situation previously discussed for operators from other EU Member States if termination rates where to be set based on different cost methodologies.

(65) Moreover, BEREC is of the opinion that unjustified asymmetries in termination rates across the EU, as proposed here with the use of a LRIC+ methodology, will lead to cross-subsidies of German operators at the expense of foreign operators and consumers.

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

(66) BNetzA, BEREC and 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.

(67) The Commission also received comments from third parties. Whilst individual German MNOs and a German industry group representing telecommunications operators supported the LRIC+ approach proposed by BNetzA, other third parties, such as an association of Polish employers and an industry group representing European network operators, brought forward arguments as to why mobile termination rates should be set applying a pure BU-LRIC methodology.

(68) On 2 May 2013 a meeting between BNetzA, BEREC and the Commission took place in order to identify the most appropriate and effective measure, which could address the Commission's serious doubts in line with Article 7a (4) of the Framework Directive.

(69) The Commission considers that BNetzA's reasons for the adoption of the LRIC+ methodology given during this co-operation phase or the comments it received from third parties did not provide any additional justification as to how the notified measures could be compliant with Articles 8 (2) and 13 (4) of the Access Directive or meet the objectives of Article 8 of the Framework Directive.

(70) At the end of the three month period following the Commission's notification of its serious doubts to BNetzA and BEREC on 28 February 2013, BNetzA did not amend or withdraw its draft measure.

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

(71) 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.

(72) The Commission considers that the reservations expressed in its serious doubts letter are still valid.

(73) 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.

(74) 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.

(75) 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.

(76) The Commission also refers to the reasons provided in BEREC's opinion of why a pure BU-LRIC approach is generally the most appropriate.

(77) 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.

(78) 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.

(79) 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.

(80) The Commission therefore concludes, in line with BEREC's opinion, that BNetzA did not provide sufficient evidence that its notified measure fully complies with the policy objectives and regulatory principles of the Regulatory Framework.

(81) 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. The approach proposed by BNetzA would result in a level of MTRs, which is approximately 80% higher than the average MTR in those countries, which apply a pure BU-LRIC methodology as recommended by the Commission.

(82) 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.

(83) 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.

(84) 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.

(85) 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 containing the price control obligation relating to the rates charged by SMP operators for mobile termination (in market 7) 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 the methodology provided in point 1 without delay and in any event no later than 1 October 2013, 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 consider 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 measure 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 27 July 2013. 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, 27.6.2013

For the Commission
Neelie KROES
Vice-President