EUROPEAN COMMISSION

Brussels, 17.12.2012
C(2012) 9844

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/2012/1400: Call termination on individual public telephone networks provided at a fixed location in Denmark – Imposition of further remedies on Intelecom and TDC; Full market analysis for Hi3G, Telia, Telenor and Colt

Comments pursuant to Article 7(3) of Directive 2002/21/EC

I. PROCEDURE

On 16 November 2012, the Commission registered a notification[1] from the Danish national regulatory authority, the Danish Business Authority (DBA), concerning (i) additional remedies to be imposed on TDC and Intelecom as operators previously identified with significant market power (SMP) on the market for call termination on individual public telephone networks provided at a fixed location[2] in Denmark, and (ii) the full market analysis of the fixed termination markets of Hi3G, Telia, Telenor and Colt. The respective national consultations[3] ran as follows:

---

1 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 (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 Corresponding to market 3 in 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.

3 In accordance with Article 6 of the Framework Directive.

- from 30 July to 24 September 2012 with respect to Intelecom;
- from 8 February to 11 April 2012 with respect to Hi3G, Telia, Telenor and Colt;
- from 16 October to 6 November 2012 for TDC.

On 29 November 2012, a request for information[4] (RFI) was sent to DBA and a response was received on 4 December 2012.

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

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

The second review of the markets for call termination on individual public telephone networks provided at a fixed location in Denmark was previously notified to and assessed by the Commission under case DK/2010/1150[5]. NITA identified 20 separate relevant markets limited respectively to the coverage of TDC, Telia, Telenor, Colt and 16 smaller alternative network operators (ANOs), including Intelecom. NITA designated all 20 network operators as having SMP on their respective markets. NITA divided operators into three groups[6] and imposed on each group a different set of remedies. The incumbent operator, TDC, and the three bigger operators (Telia, Telenor and Colt) were made subject to non-discrimination, transparency, price control and cost-accounting, whereas TDC alone was additionally made subject to the requirement to publish a reference offer and to the obligation of accounting separation. The third group of operators were only required to provide access on reasonable request. The Commission commented that NITA should closely monitor the market and in case the ANOs started charging fixed termination rates (FTRs) themselves, NITA should consider to impose price control on smaller operators.

In the light of further market developments (i.e. increase of FTRs by some smaller operators, including IP Vision and Intelecom), DBA followed the Commission's comments and proposed to impose on IP Vision the additional obligations of transparency, non-discrimination and price control (case DK/2012/1383[7]). The Commission commented on the need for DBA to ensure consistency in its decisions with regard to the fixed voice call termination market in Denmark[8]. With respect to the

[4] In accordance with Article 5(2) of the Framework Directive.

[5] C(2010)9251.

[6] Group 1 was limited to TDC, the largest operator with a fully deployed nationwide network. Group 2 consisted of Telenor, Telia and Colt, who had also a nationwide network but possessed smaller customer bases than TDC. Group 3 consisted of 16 smaller ANOs who not having a nationwide coverage and interconnecting on the basis of Single Point of Contact (SPC) agreements, i.e. the larger operator handles telephone traffic in and out of the ANOs' networks, which implies that operators belonging to this group are subject to countervailing buying power and don't have the ability to set their own termination rates.

[7] C(2012) 9109.

[8] In particular, the Commission noted that the 2011 decision with respect to Telia and Telenor was overturned in courts which lead DBA to also rescind the market decision applicable to Colt. This implied (i) different market definitions for these three operators (now subject to the 2006 decision) as compared to those of other fixed operators in Denmark (subject to the 2011 decision), and (ii) price asymmetries on the relevant termination market(s) (resulting from the fact that in the 2006 decision Telia, Telenor and Colt were not obliged to provide access to fixed call termination at regulated prices.

potential use by DBA of historical costs for valuing termination-related products, the Commission welcomed DBA's commitment to withdraw the provision related to historical costs accounting before the adoption of draft measures under cases DK/2012/1383 and DK/2012/1400 (i.e. the present case).

The LRAIC update and resulting FTRs for the year 2012 have been assessed under case DK/2011/1264[9]. The LRAIC update, transition to a pure BU-LRIC model and resulting FTRs to be applied as of 1 January 2013 have been assessed under case DK/2012/1385[10].

II.2. Proposed draft measure

II.2.1 Hi3G, Telia, Telenor and Colt

Market definition

The relevant product market comprises the termination of voice telephony calls to geographic numbers via PSTN or ISDN telephony as well as via managed Voice over Broadband (VoB) and IP interconnection. The market also includes termination to cross-ported numbers, i.e. calls to fixed numbers terminated on a mobile network (home zone products).

DBA further explains that the proposed market definition does not include transit and that therefore there are no changes of the boundaries delineating call origination, call termination and transit markets.

SMP assessment

DBA intends to designate Hi3G, Telia, Telenor and Colt as having SMP on their respective markets for fixed voice call termination.

The main criteria considered by DBA when reaching its conclusion on the SMP designation are: market shares (each operator has 100% market share on its own network), control of bottleneck resources, persistence of high barriers to entry as well as lack of countervailing buying power.

Remedies

DBA proposes to impose the following obligations on all four operators: access, transparency, non-discrimination and price control.

Colt, Hi3G, Telenor and Telia will be obliged to terminate calls at regional level in their respective networks. The proposed access obligation implies that in case the receiving network has end-users connected to local POIs, the SMP operator will be obliged to provide transit at no charge for the calling operator from the regional points of interconnection (POIs) to the local POIs.

As to the price control, it will be based on the LRAIC model for 2012 and on a pure BU-LRIC model as of 1 January 2013. Resulting price caps are symmetrical with the price caps for TDC, according to the following table:

Against this background and in the context of DBA's (at the time) pending notifications with respect to fixed call termination markets in Denmark (i.e. case DK/2012/1385 and present DK/2012/1400), the Commission called upon DBA to ensure consistency on the relevant termination market(s) and to adopt the draft measures notified in case DK/2012/1385 and in the present case as soon as possible, and in line with the Commission position with respect to these two cases.

[9] C(2011)9158.

[10] C(2012) 9219.

Maximum FTRs (applicable to Colt, Hi3G, Telenor, Telia, TDC and Intelecom)			
FTRs (local termination)	**Tariff per minute** (øre/€cent[11])		**Call set up** (øre/€cent)
	Peak	**Off peak**	
LRAIC-based FTRs as at 1/01/2012 (case DK/2012/1264 and 1383)	1.48/0.20	0.79/0.11	1.31/0.18
BU-LRIC based FTRs as of 1/01/2013 (case DK/2012/1385)	0.45/0.060	0.24/0.032	0.47/0.063

II.2.2 TDC

DBA proposes to extend the access obligation currently in force and to require TDC to provide fixed voice call termination in a limited number of regional POIs. In particular, TDC will be required to terminate calls to (i) TDC's PSTN and ISDN users in the regional POI closest to the end-user; (ii) TDC's VoB end-users in one or more regional POIs (it is for the operator requesting termination to decide in which of the regional POIs to deliver traffic). The proposed draft measure complements the market decision issued in January 2011 (case DK/2011/1150), according to which TDC is obliged to provide interconnection at local level. The obligation to terminate calls at regional level should be provided at regulated prices corresponding to FTRs at local level, in accordance with the above table on maximum FTRs.

As regards the definition applicable to TDC's termination market, DBA specifies that it has not been changed[12]. DBA rather considers the extended access obligation (requiring TDC to terminate calls at regional level) as an obligation to provide access to an ancillary service. Also, DBA is of the view that the amended access obligation implies more symmetry on the market. According to DBA, since only a few operators have more than one POI in their network, the obligation to provide fixed call termination at local level will be symmetrical (or at least comparable) with the obligation to provide fixed termination at regional level in TDC’s, Colt’s, Hi3G’s, Telenor’s and Telia’s networks. The proposed obligation is intended to reflect the on-going transition towards a modern, effective, IP based telephony network with a relatively limited number of POIs[13] (or even a single POI).

II.2.3 Intelecom

DBA proposes to extend the scope of the remedies imposed on Intelecom in the decision of 20 January 2011. In addition to the current obligation to provide access on reasonable request, DBA proposes to make Intelecom subject to the obligations of non-discrimination, transparency, and price control. The reason for the proposed extension of remedies is the change of the conditions on the market for fixed call termination in Intelecom’s network. Intelecom has now the ability to set its own termination rates, and no longer faces sufficient countervailing buying power. In particular, FTRs charged by

---

11 ECB’s Euro foreign exchange reference rates as at 13 November 2012: 1€ = 7.4572 DKK.

12 According to the 2011 decision, the fixed termination markets are defined as delivery of traffic from the local exchange (to which the end-user is connected) to the end-user.

13 Current FTRs in Denmark are based on local termination within a network of 64 POIs. Already in case DK/2012/1383, DBA expressed its intention to assess in future market reviews planned for 2013 the need to make all fixed operators with a nation-wide coverage subject to an access obligation at a limited number of POIs (e.g. 10 POIs).

Intelecom are higher than TDC's regulated prices for 2011 and 2012 (LRAIC–based), and significantly higher than the pure BU-LRIC levels as calculated for 2013. Consequently and as for the other operators subject to the price control obligation on the relevant market, DBA proposes to base the maximum FTRs that Intelecom will be allowed to charge according to the above table on maximum FTRs.

II.2.4 Horizontal issues

Similarly to case DK/2012/1383, the present draft measures (already notified under Art.7 at the time of the issuance of Commission's "comments" letter on case DK/2012/1383) include a safeguard clause stating that in exceptional cases (e.g. products/services introduced in connection with termination after the finalisation of the LRAIC model), historical cost valuation (HCA) shall apply as it might not be possible, for practical reasons, to model new fees according to LRAIC. In order to comply with the Termination Rates Recommendation[14], DBA confirmed (in its written submission in the context of case DK/2012/1383) that the provision relating to new fees based on HCA would be removed from the notified draft measures before the adoption of the corresponding final decisions.

DBA confirms in the reply to the RFI that it has launched the next round of full market reviews of the wholesale market(s) for fixed voice call termination in Denmark and that in the context of this review DBA intends to align market definitions for all fixed voice call termination markets. DBA expects to adopt new market decisions before the end of 2013.

III. COMMENTS

The Commission has examined the notification and the additional information provided by the DBA and has the following comments:[15]

Need for consistency in DBA's decisions for fixed voice call termination

As regards the proposed amendment of obligations requiring TDC to provide termination at regional level, DBA argues that it should be considered as an obligation of access to an ancillary service and that it does not imply changes in the delineation of the termination market of TDC.

The Commission acknowledges that NRAs can under certain circumstances impose remedies in an area outside but closely related to the defined market. However, the Commission notes that the proposed access obligation implies that in case the receiving network has end-users connected to local POIs, the SMP operator will be obliged to provide transit, at no additional charge for the calling operator, from the regional POIs to the local POIs. The Commission is therefore concerned that the proposed remedy may result in the inclusion of the (competitive) transit component in the relevant market, thus going (with respect to TDC) beyond the market delineation as notified in 2011.

However, the Commission notes that the notified measure intends to ensure symmetry between TDC and alternative networks not only with regard to prices, but also to network topology. In that regard DBA considers that a modern,

---

[14] Commission Recommendation 2009/396/EC of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (Termination Rates Recommendation), OJ L 124, 20.5.2009, p. 67.

[15] In accordance with Article 7(3) of the Framework Directive.

efficient operator of a fixed telephony network would interconnect with other operators in only a limited number of POIs.

In this context, the Commission notes that DBA intends to carry out the full assessment of fixed call termination services of all operators in Denmark in 2013. The Commission urges DBA to finalise the forthcoming review of the relevant market and to adopt the resulting decisions as soon as possible in 2013, thereby ensuring a consistent delineation of the markets for fixed voice call termination in Denmark.

The Commission also reminds DBA that remedies imposed under Article 16 of the Framework Directive in conjunction with Article 8 of the Access Directive 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. Therefore, the Commission requests DBA to justify in the finally adopted measure why the proposed access obligation is proportionate and in particular why it does not affect the boundaries of the call origination, call termination and transit markets.

Use of historical costs for valuing termination-related products

The Commission notes that, similarly to DBA's approach to IP Vision (in case DK/2012/1383), in specific circumstances services provided in connection to termination on SMP operators' networks could be valued according to historical costs.

The Commission would like to stress that, according to the Termination Rates Recommendation, termination services should be valued on the basis of a BU-LRIC model, which neither allows compensation for cost elements outside the model, nor the use of historical cost accounting. The Commission is of the view that the above provision should be aligned with the Termination Rates Recommendation at the latest when the pure BU-LRIC model is implemented, i.e. as of 1 January 2013.

Against this background, the Commission welcomes DBA's commitment, provided in the context of the assessment of case DK/2012/1383, to withdraw the provision related to historical costs accounting before the adoption of the currently notified draft measures with respect to all SMP operators on their respective termination markets. Moreover, the Commission recalls that the same principle should apply to all (both fixed and mobile) termination markets.

Need for clarity with respect to price control methodology

Based on additional explanations from DBA the Commission has no doubts as to the fact that FTRs will be based on a BU-LRIC model as of 1 January 2013. However, the Commission notes that DBA's measures as notified refer to LRAIC as the price setting methodology, while the transition to pure BU-LRIC is only evident by means of reference to other DBA decisions, which should be adopted in the future. Given the complete set of legal instruments and complex interaction among them, the Commission invites DBA to amend the wording in all final decisions applicable to the period after 1 January 2013 clearly stating that FTRs will be resulting from a BU-LRIC model, thus bringing more clarity with respect to the cost model used.

Pursuant to Article 7(7) of the Framework Directive, DBA shall take the utmost account of the comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measure; where it does so, shall communicate it to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC[16] the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission[17] within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication.[18] You should give reasons for any such request.

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

---

16 Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 301, 12.11.2008, p. 23.

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

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