



Brussels, 19.11.2012
C(2012) 8573

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 Cases DK/2012/1376 and DK/2012/1377: Voice call and SMS termination services on individual mobile networks in Denmark

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

I. PROCEDURE

On 19 October 2012, the Commission registered a notification from the Danish national regulatory authority, the Danish Business Authority (DBA)¹, concerning the market for voice call termination on individual mobile networks² and the market for wholesale SMS termination on individual mobile networks³ in Denmark.

On 31 October 2012, a request for information⁴ was sent to DBA and a response was received on 6 November 2012.

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 7 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 This market is not listed in the Recommendation on Relevant Markets.

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

The national consultation⁵ ran from 3 July 2012 to 11 September 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

Market for voice call termination

This market was previously notified to and assessed by the Commission under cases DK/2009/1013 and DK/2009/1014⁶. DBA (then NITA) designated the four mobile network operators (MNOs) TDC, Telenor, TeliaSonera and Hi3G and the mobile virtual network operator (MVNO) Barablu with significant market power (SMP) and imposed a full set of remedies. The Commission invited DBA to identify any objective cost differences that would justify the asymmetry allowed for Barablu and to ensure the symmetry of mobile termination rates as soon as possible.

In 2010⁷ and in 2011⁸, DBA notified details of the price control remedy. Later, DBA extended the existing remedies to the MVNOs Lycamobile⁹ and Mundio Mobile¹⁰, respectively.

In 2012 DBA set for the period from 1 January 2013 until 31 December 2013 a price cap of DKK 0.08/min (1.07c€/min) on the following SMP operators: TDC, Telenor, Telia, Hi3G, Lycamobile and Mundio Mobile. This maximum price was calculated using the pure long-run incremental cost (LRIC) methodology, in line with the Termination Rates Recommendation¹¹. The Commission had no comments¹².

Market for wholesale SMS termination

This market was previously notified to and assessed by the Commission under case DK/2011/1181¹³. DBA defined separate markets for Short Messaging System (SMS) termination services on the individual mobile networks of the five mobile operators active on the market at the time. DBA carried out the three criteria test and concluded that the market was susceptible to ex-ante regulation and all mobile operators were found to have SMP. DBA proposed to impose the obligations of access, transparency, non-discrimination, price control in the form of a symmetric price ceiling, and cost accounting. However, the proposed price control obligation was of limited scope, applying only to operators competing with Danish operators at retail level. In its

⁵ In accordance with Article 6 of the Framework Directive.

⁶ C(2009)10651.

⁷ Case DK/2010/1124, C(2010)6741.

⁸ Case DK/2011/1250, C(2011)7432.

⁹ Case DK/2012/1282, C(2012)1028.

¹⁰ Case DK/2012/1315, C(2012)3195.

¹¹ 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.

¹² Case DK/2012/1342, C(2012)4923.

¹³ C(2011)1799.

comment, the Commission expressed concerns that the price regulation foreseen might not be in line with the non-discrimination principle. Nevertheless, DBA adopted the measures as initially proposed on 12 May 2011. On 3 January 2012, the Commission sent an administrative letter¹⁴ to the Danish authorities regarding the imposed limited price control regulation.

Later, DBA proposed to extend the existing wholesale SMS termination regulation to a new entrant, the MVNO Lycamobile, in the draft decision notified to and assessed by the Commission under the case DK/2012/1283¹⁵. On 13 February 2012, the Commission decided to open a Phase II investigation, considering that the limited scope of the price control remedy, which would apply only to operators competing on the Danish retail market, raised serious doubts as to the compatibility with EU law, namely the non-discrimination principle, and could create a barrier to the single market. On 16 May 2012 the Commission adopted a decision lifting its serious doubts¹⁶, taking into account the revised version of the draft measure submitted by DBA on 20 April 2012.

In the last notified draft measure concerning this market DBA proposed for the period from 1 January 2013 until 31 December 2013 a price cap of DKK 0.08/SMS (1.07c€/SMS) on the following SMP operators: TDC, Telenor, Telia, Hi3G, Lycamobile and Mundio Mobile. This maximum price was calculated using the long-run average incremental cost plus (LRAIC+) methodology. DBA concluded that, given that there is no recommended model for pricing of SMS termination, the termination rate should continue to cover a part of the common costs. DBA decided to reduce the prices gradually and give the operators an opportunity to adjust its business models to lower wholesale prices. Therefore, the proposed maximum rate is a step on the glide path towards cost based prices. The Commission had no comments¹⁷.

II.2. Market analysis

II.2.1 Market for voice call termination

Market definition

The notified draft measure concerns the third round review of the market for voice call termination on individual mobile networks.

DBA finds separate markets for voice call termination in each individual mobile network.

Finding of significant market power

DBA concludes that each of the four MNOs, namely TDC, Telenor, Telia, Hi3G and the two MVNOs Lycamobile and Mundio Mobile should be designated as having SMP on their respective markets for voice call termination.

Regulatory Remedies

DBA proposes to impose the following obligations: (i) network access, (ii) non-discrimination, (iii) transparency and (iv) price control¹⁸.

With regard to the price control remedy DBA is proposing to set the MTRs on the basis

¹⁴ Transmitted via the EU Pilot system; case 2838/11/INFSO.

¹⁵ C(2012)3395.

¹⁶ C(2012)1283.

¹⁷ Case DK/2012/1342, C(2012)4923.

¹⁸ The price control obligation no longer includes the requirement that the operators shall prepare a cost accounting system.

of a pure bottom-up long-run incremental costs model (BU LRIC) in line with the Termination Rates Recommendation¹⁹. The termination rates were set in the decision notified and assessed by the Commission under the case DK/2012/1342 and DBA confirmed in its response to the request for information (RFI) that this decision will remain in place.

II.2.2 Market for wholesale SMS termination

Market definition

The draft notification concerns the second review of the market for SMS termination service on individual mobile networks

DBA confirmed that SMS termination services on each individual mobile network constitute a separate market. DBA does not find that Mobile Instant Messaging service (MIM), push e-mail services or Multimedia Messaging Service (MMS) are substitutes for SMS from the end users' perspective. Differently from SMS, MIM requires the two communicating end-users to have smartphones and the corresponding data subscription or a WiFi connection. At the current stage DBA considers that these mobile connections are not sufficiently wide-spread. The same conclusion applies to the push e-mail service. MMS is considered to be significantly more expensive than SMS.

DBA concludes that the market includes the provision of SMS termination irrespective of where the SMS is originated, thereby including the provision of termination of SMS originating abroad, as well as the termination of both standard SMS²⁰ and application generated SMS²¹

The three criteria test

As the market for wholesale SMS termination is not listed in the Recommendation on Relevant Markets, DBA carries out the three criteria test and concludes that they are met.

As to the first criterion, DBA concludes that there are high structural market entry barriers because each mobile operator has a monopoly position in the provision of SMS termination on its own network and there is not an alternative for the provision of such termination service on each individual mobile network.

As to the second criterion DBA is of the opinion that, in the absence of regulation, the SMS termination rates stemming from commercial agreements do not tend towards cost oriented prices.²² DBA argues that the penetration of new services such as MIM and MMS or push e-mail does not lead to effective competition given the functional

¹⁹ 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.

²⁰ Standard SMS are those SMS which are originated by other mobile network operators.

²¹ These so called 'push SMS' are not originated on mobile networks but on fixed networks by e.g. internet access providers via a computer. Push SMS allow other players than mobile (virtual) network operators to send SMS or deliver content and services to mobile telephones (e.g. for direct marketing, content transmission, message services, closed user groups).

²² DBA notes that no change is observed in the level of SMS termination rates. Before the regulatory intervention the prices remained stable from the 2002 to the 2010 while after the implementation of the cost orientation obligation prices decreased by 40% from 2010 to 2012. DBA does not provide reliable figures on the evolution of retail SMS prices. In the reply to RFI DBA explains that it is difficult to derive such price trend of SMS because mobile services are increasingly provided on a bundle basis. In January 2012 84% of the offers on the mobile market were bundles including voice and "free SMS". DBA clarifies that this percentage is calculated with respect to advertised bundled offers not sold bundled offers.

differences between these products and SMS, also with regard to user friendliness. DBA further considers that although the take-up of 'smart phones' with such functionality is increasing as well as mobile broadband subscriptions,²³ the penetration should be close to 100% to exert an indirect competitive constraint on the provision of the SMS termination services²⁴. Against this background, DBA concludes that the penetration of these new services is insufficient to exercise a constraint during the market review period.

As to the third criterion, DBA concludes that Competition Law based *ex post* intervention would not be sufficient to meet the regulatory objectives, and in particular to achieve regulatory certainty in relation to the conditions under which SMS termination is purchased.

Finding of significant market power

DBA finds TDC, Telenor, Telia, Hi3G, Lycamobile and Mundio Mobile to have SMP in their respective markets. The main criteria considered by NITA are: (i) market shares²⁵, (ii) entry barriers and bottlenecks, (iii) lack of price competition and (iv) lack of countervailing buyer power.

Remedies

DBA proposes to impose the following obligations on all operators: (i) wholesale access to termination of SMS; (ii) transparency; (iii) non-discrimination; (iv) price control²⁶.

With regard to the price control remedy DBA is proposing to set the MTRs on the basis of a long-run incremental costs model (LRAIC+) which includes a contribution to cover common costs²⁷. The rates were set in the decision notified and assessed by the Commission under the case DK/2012/1342 and in the response to the RFI DBA confirmed that this decision will remain in place.

III. COMMENTS

The Commission has examined the notification and the additional information provided

²³ The number of smart phones has grown significantly in Denmark. At the end of 2009 there were approximately 125.000 smartphones in Denmark, whereas in June 2011 there were more than 2 million. This means that almost half of the Danish mobile users had a smartphone in 2011 compared to 2010, where this figure was at around a quarter. In the reply to the RFI, DBA explains that the firm in charge of collecting this data has not reported updated figures for 2012. DBA further refers to the figures coming from a recent survey which shows that the numbers of smartphones in Denmark has increased from 1.5 million to 2.1 million in 2012. Another survey shows that the percentage of the Danish population with a smart phone will increase from 43% in 2011 to 58% in 2012. Mobile broadband subscriptions raised by 26% from the end of 2010 to the end of 2011 and the trend is reinforced in 2012 with an increase to more than 5.1 million subscribers in mid-2012 from under 4.5 million in the end of 2011.

²⁴ The use of these services requires the availability of relevant equipment on both the sender and receiver's side. Therefore, given the current penetration of approximately 50% of smart phones the effective penetration of these services is, according to DBA, only 25%.

²⁵ Each operator has a 100% market share on its own network

²⁶ The price control obligation no longer includes the requirement that the operators shall prepare a cost accounting system

²⁷ In the reply to the RFI DBA argues that similar competition problems and market dynamics on the markets of voice and SMS termination do not automatically require the application of the same LRIC principles. DBA outlines that the recommended pure LRIC methodology would not result in significant different outcomes.

by the DBA and has the following comments:²⁸

The need to monitor developments on the retail market and, in particular, the take up of smartphones and mobile broadband connections

When assessing the second criterion DBA explains that SMS termination rates did not change prior to the imposition of the price control obligation and they remained stable at a level well above costs. According to DBA, it was only because of the price control obligation that SMS termination rates were reduced. DBA, therefore, concludes that the SMS termination rates set on a commercial basis would not tend towards costs within the timeframe of the review.

The Commission points out that retail services such as MIM or push e-mails could potentially exercise an indirect constraint on wholesale SMS prices. Where such constraint exists, an increase of wholesale termination rates would not be profitable, because the subsequent increase in retail rates could steer demand away from SMS towards the new retail services.

DBA argues that the take-up of smartphones, mobile broadband subscriptions, and the resulting use of new services such as MIM and push e-mails is not sufficient to ensure that the market for wholesale SMS termination tends towards effective competition. DBA argues that the current level of penetration falls short of the required level of penetration of 100% for such constraints to materialise. DBA explains that the percentage of end-users being able to send *and* receive MIM would be less than 25%.

As to the evolution of some key indicators in the assessment of the second criterion on the market for wholesale SMS termination, the Commission notes that (i) the traffic of originated SMS has been reduced from 6.6 billion in the first half of 2010 to 6.2 billion in the second half of 2011, and 5.7 billion in the first half of 2012, (ii) almost half of the Danish mobile users had a smartphone in 2011 compared to 2010, where this figure was at around a quarter, and (iii) the percentage of *advertised* bundles including free SMS increased from 76% in May 2011 to 84% in January 2012. DBA explains it that does not collect data on the number of users *subscribing* to bundled offers including free SMS, and that it cannot accurately and reliably estimate the evolution of retail SMS prices.

Given the clear trends away from SMS and towards alternative means to convey text messages, the Commission questions whether a level of penetration of smartphones and mobile broadband connections close to 100% is required to conclude that MIM and SMS are substitutes or, at least, that MIM exerts a sufficient competitive constraint on SMS on the retail market to impede operators setting SMS termination rates independently of their customers and competitors.

Although the above mentioned developments indicate a growing importance of said constraints, in view of the lack of information on bundled offers and retail price evolution the Commission does not propose to challenge DBA's findings at this stage. The Commission welcomes that DBA will closely follow the development of smartphone subscriptions and mobile broadband connections and it is committed to develop a methodology for collecting data on revenues from bundled offers.

Against this background, the Commission encourages DBA to collect the missing information, to closely monitor the market developments, and to lift regulation as

²⁸ In accordance with Article 7(3) of the Framework Directive.

soon as market conditions show a clear tendency towards effective competition and the three criteria a no longer met.

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/EC²⁹ 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 Commission³⁰ 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.³¹ You should give reasons for any such request.

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

²⁹ 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.

³⁰ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

³¹ The Commission may inform the public of the result of its assessment before the end of this three-day period.