EUROPEAN COMMISSION

Brussels, 28.2.2013
C(2013) 1266

Bundesnetzagentur (BNetzA)

Tulpenfeld 4
D-53113 Bonn
Germany

For the attention of:
Mr. Jochen Homann
Präsident

Fax: +49 228 14 6904

Dear Mr Homann

Subject: Commission decision concerning Case DE/2013/1424: Wholesale voice call termination on individual mobile networks in Germany

Opening of Phase II investigation pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC

I. PROCEDURE

On 31 January 2013, the Commission registered a notification from the German national regulatory authority, the Bundesnetzagentur (BNetzA)[1], concerning the markets for wholesale voice call termination on individual mobile networks[2] in Germany.

The national consultation[3] concerning the draft remedies ran from 18 April 2012 for one month. The national consultation concerning the cost methodology for the calculation of cost oriented termination rates and the actual level of these rates ran from 21 November 2012 for one month[4].

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 the Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (Recommendation on Relevant Markets), OJ L 344, 28.12.2007, p. 65.

3 In accordance with Article 6 of the Framework Directive.

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

On 12 February 2013, a request for information[5] was sent to BNetzA followed by an additional request dated 13 February 2013 and responses were received on 15 February 2013.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

The third round of 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[6]. At the time BNetzA notified its proposal for market definition and the assessment of significant market power (SMP).

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[7], namely Vistream GmbH (Vistream)[8], Ring Mobilfunk (Ring)[9], Lycamobile Germany GmbH (Lycamobile) and OnePhone Deutschland GmbH (OnePhone)[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[11].

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

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.

II.2. Current draft measure

The notified draft measures concerns the imposition of remedies on the designated SMP operators. In this respect BNetzA proposes to impose the following set of remedies on T-

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

6 Case DE/2011/1274, C(2011) 10077.

7 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.

8 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.

9 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.

10 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.

11 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.

Mobile, Vodafone, E-Plus[12], O2 and Lycamobile:

- Access obligations, including co-location;
- A non-discrimination obligation;
- Transparency obligations, including the publication of standard reference offers[13]; and
- An obligation to offer mobile call termination at cost-orientation.

Costing methodology for mobile termination rates

With regards to the obligation of cost-orientation, BNetzA, proposes to set (retrospectively) the following symmetric mobile termination rates (MTRs) for all SMP operators[14]:

- For the period of 1 December 2012 to 30 November 2013: **1.85 €ct/min**.
- For the period of 1 December 2013 to 30 November 2014: **1.79 €ct/min**.

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.

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[15]. 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 and the interest of citizens and consumers. Furthermore, in its notification BNetzA states that with regards to the policy objective of

---

[12] In response to the Commission's request for information, BNetzA confirmed that the measures imposed on E-Plus will also apply to OnePhone GmbH as an enterprise legally connected through the same mother company (KPN NV).

[13] 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.

[14] 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.

[15] 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").

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[16].

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.

III. ASSESSMENT

Following the examination of the notification and the additional information provided by BNetzA, the Commission considers that the notified draft measures fall under the Commission's powers of ensuring consistent application of remedies as set out in Article 7a of the Framework Directive, as the notified measures aim at imposing obligation on undertakings in conjunction with Articles 9 to 13 of the Access Directive.[17]

Draft measures imposing regulatory obligations on undertakings with SMP in Germany may have an influence, direct or indirect, actual or potential, on the ability of undertakings established in other Member States to offer electronic communication services. BNetzA's notification comprises measures that have a significant impact on operators or users in other Member States, inter alia measures which affect prices for users. Consequently, such draft measures may affect the patterns of trade between Member States[18].

The Commission has serious doubts as to the compatibility with EU law of BNetzA's draft measures concerning price control remedies for the wholesale markets for voice call termination on individual mobile networks in its current form, in particular with the requirements referred to in Articles 8(4) and 13(2) of the Access Directive in conjunction with Article 8 of the Framework Directive and Article 16(4) of the Framework Directive. Furthermore, the Commission considers, at this stage, that the draft measures may create barriers to the internal market.

On the basis of the notification and the additional information provided by BNetzA the Commission has serious doubts in this regard for the following principal reason:

The need to ensure that customers derive maximum benefits in terms of efficient cost-based termination rates

The Commission agrees that based on the competition problem identified by

[16] 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.

[17] Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, OJ L 108, 24.04.2002, p. 7, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37.

[18] See Recital 38 of the Framework Directive.

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.

The Commission takes note of the fact that BNetzA intends to implement price caps for mobile termination rates based on a LRIC+ methodology for the period of 1 December 2012 until 30 November 2014.

Compliance with Articles 8(4) and 13(2) of the Access Directive in conjunction with Article 8 of the Framework Directive and Article 16(4) of the Framework Directive

The Commission refers to Articles 8(4) and 13(2) of the Access Directive[19], which 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 (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 refers to Article 16(4) of the Framework Directive, which requires NRAs to impose on SMP undertakings appropriate regulatory obligations.

In addition, the Commission would like to stress 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 consistent application of the Framework Directive and the Specific Directives (together, the Regulatory Framework).

In the context of the wholesale markets for voice call termination on individual mobile networks, the Commission underlines that, given its characteristics and the associated competitive and distributional concerns[20], 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.

In this regard, the Commission points out that it may issue recommendations[21] on the harmonised application of the Regulatory Framework in order to further the

[19] 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).

[20] 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.

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

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"), setting out a consistent approach that the NRAs should in principle follow regarding price control obligations for fixed and mobile termination rates.

The Commission recommended to NRAs to ensure that termination rates are implemented at a cost efficient, symmetric level as of 31 December 2012. As stated above, in the context of termination markets and for the reasons set out above, a cost efficient rate is normally the one resulting from a pure BU-LRIC methodology. It is therefore recommended that the cost-oriented level should be determined including only those costs which would be avoided if a wholesale voice call termination service were no longer provided to third parties[22]. Whilst Article 19 (2) of the Framework Directive provides the NRAs the possibility not to follow a recommendation, in such circumstances they have to provide the reasons for such a 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

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

The Commission welcomes the proposed introduction of symmetric MTRs in Germany. However, with regards to the choice of the relevant costing methodology the draft measures notified by BNetzA do not appear to comply with the above principles and objectives set out in the regulatory framework.

In particular, the Commission observes that BNetzA proposes 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

[22] Recommend 6 of the Termination Rates Recommendation.

consumers[23]. 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.

The Commission considers 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.

In addition, for the reasons set out above, the Commission does not share BNetzA's assertion that its proposed method is 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 does 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[24].

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 has 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.

The Commission therefore has 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.

Creation of barriers to the internal market

The Commission further notes that due to the fact BNetzA intends 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

[23] 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.

[24] 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.

Member State 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[25]. 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[26]. Hence, for the period until 30 November 2014 the application of a LRIC+ methodology leads 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.

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

Moreover, the Commission observes 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.

Leaving aside the validity of BNetzA's claim (which the Commission questions) 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 does 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.

In light of the above considerations, the Commission considers, at this stage, that the draft measure would create barriers to the internal market.

---

[25] 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).

[26] 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".

Conclusion

In this particular case, the Commission observes that BNetzA's notification does not provide sufficient justification of why its proposed approach for the markets for voice call termination on individual mobile networks in Germany 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 has serious doubts that BNetzA's proposal on mobile termination rates can 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 believes, at this stage, that the draft measure would create barriers to the internal market.

The above assessment reflects the Commission's preliminary position on this particular notification, and is without prejudice to any position it may take vis-à-vis other notified draft measures.

The Commission points out that, in accordance with Article 7a of the Framework Directive, the draft measures shall not be adopted for a further three months.

Pursuant to Recital 17 of Recommendation 2008/850/EC[27], the Commission will publish this document on its website, together with a notice inviting third parties to submit observations on this serious doubts letter within ten working days. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission[28] within three working days following receipt whether you consider that, in accordance with European Union and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication. You should give reasons for such request.

Yours sincerely,
For the Commission
Neelie Kroes
Vice-President

[27] Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC, OJ L 301, 12.11.2008, p. 23.

[28] Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32.2.298.87.82.