EUROPEAN COMMISSION

Brussels, 30.11.2012
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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/1012/1383: Call termination on individual public telephone networks provided at a fixed location in Denmark – imposition of additional remedies on alternative operator (IP Vision)

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

I. PROCEDURE

On 30 October 2012, the Commission registered a notification[1] from the Danish national regulatory authority, the Danish Business Authority (DBA), concerning additional remedies to be imposed on IP Vision as an operator 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. The national consultation[3] ran from 30 July 2012 to 24 September 2012. The deadline for the EU consultation under Article 7 of the Framework Directive is 30 November 2012.

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[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.

On 13 November 2012, a request for information[4] (RFI) was sent to DBA and a response was received on 16 November 2012. Additional information was received from DBA on 20 and 26 November 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

In the current draft measure, DBA proposes further obligations to be imposed on IP Vision as an operator having previously been designated with SMP.

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 IP Vision. 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. IP Vision as part of the group of 16 smaller ANOs was only required to provide access on reasonable request[7]. The Commission commented that NITA should closely monitor the market and in case the ANOs chose not to continue the SPC relationships and charge termination rates themselves, NITA should reconsider its position on this matter by imposing further relevant regulation, such as the obligation of price control.

As to the LRAIC model updated each year (to reflect the latest development in volumes, inflation, WACC etc.), its update setting 2012 prices has been assessed under case DK/2011/1264. The prices for year 2013 are assessed under case DK/2012/1385[8].

Furthermore, in the present notification DBA explains that the 2011 market decisions for Telia and Telenor have been annulled by the Telecommunications Complaints Board[9].

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

5 C(2010)9251.

6 Group 1 is limited to TDC, the largest operator with a fully deployed nationwide network. Group 2 consists of Telenor, Telia and Colt, who have also deployed a nationwide network but possess smaller customer bases than TDC. Group 3 consists of 16 smaller ANOs who do not have a nationwide coverage and base their interconnections on 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 NITA justified the non-imposition of the price control obligation on the ANOs with the fact that these operators do not have a nationwide network and enter into Single Point of Contact agreements (SPCs) with larger operators which handle telephone traffic in and out of the ANO's network and charge a price for termination on behalf of the smaller ANO. The ANOs themselves do not charge for termination.

8 Notified on 1 November 2012 and currently pending.

Consequently, DBA has rescinded the market decision applicable to Colt. The 2011 decision will remain applicable to TDC, IP Vision and the other smaller operators belonging to group 3 identified with SMP in the 2011 decision. Furthermore, DBA explains that until new decisions have been issued with respect to Telia, Colt and Telenor[10], NITA's decision of 18 January 2006[11] will continue to apply, which implies that they will only be obliged to provide access on fair and reasonable request. Moreover, even in cases where ANOs belonging to group 2 levied higher charges than TDC, those charges were not considered as unreasonable by NITA since (i) ANOs did not enjoy the same economies of scale as TDC, and (ii) it was not "unnatural" for ANOs' charges to be above those of TDC given the fact that TDC's charges were LRAIC-based, i.e. stemming from modelling an optimal network providing services based on the latest technology available. As a consequence of the return to the 2006 market decision, Telia, Telenor and Colt are no longer obliged to provide access at regulated prices. In this respect, DBA confirms in its reply to the RFI that they are currently charging FTRs asymmetrical to those of TDC. New draft measures with respect to Colt, Telenor and Telia (and in addition, to TDC, Hi3G and Intelecom), were notified according to the Art.7 consultation procedure on 16 November 2012 and registered under case DK/2012/1400.

II.2. Proposed draft measure

DBA proposes to extend the scope of the remedies imposed on IP Vision in the decision of 20 January 2011. In addition to the current obligation to provide access on reasonable request, DBA proposes to make IP Vision subject to the obligations of: (i) non-discrimination, (ii) transparency, and (iii) price control.

The reason for the proposed extension of remedies is the change of the conditions on IP Vision's market for fixed call termination. IP Vision has now the ability to set its own termination rates, which shows that it no longer faces sufficient countervailing buying power. In particular, DBA considers that FTRs charged by IP Vision are unreasonably high to the detriment of end-users. DBA's conclusion is based on the fact that IP Vision's FTRs are high in comparison to both TDC's regulated prices for 2011 and to LRAIC – based price levels for 2012. This is illustrated in the following table:

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9 The Board had doubts as to whether and to what extent DBA has in its decision taken account of cost/price asymmetries related to operators' differing network structures, e.g. the large difference in the number of POIs in TDC's network as compared with Telia's/Telenor's networks. The Board requested DBA to demonstrate that such asymmetries have been taken into account.

10 DBA explains in the response to the RFI that although Telenor was not on the list of SMP operators of NITA's 2006 decision, the company may be subject to the resulting 2006 regulation. Telenor Group (the parent company in Norway) in 2009 merged its two companies operating in Denmark, i.e. Sonofon A/S and Cybercity A/S under one brand, Telenor A/S.

11 NITA's decision of 18 January 2006 corresponds to the first review of the markets for call termination on individual public telephone networks provided at a fixed location in Denmark. On the basis of its analysis, NITA designated TDC as well as 5 alternative network operators (ANOs) as undertakings with significant market power (SMP). On TDC, NITA imposed the following set of obligations: (i) access, (ii) price control (cost orientation), (iii) cost accounting, (iv) accounting separation, (v) non-discrimination, (vi) publication of a reference offer and (vii) transparency. On the ANOs, NITA imposed only the access obligation. The Commission, in its comments letter, expressed doubts as to NITA's non-imposition of certain obligations on the ANOs and invited the Danish regulator to reconsider its position on this matter.

Comparison FTRs in DK			
FTRs (local termination[12])	**Tariff per minute** (øre/€cent[13])		**Call set up** (øre/€cent)
	Peak	**Off peak**	
IP Vision as at 31/12/2011	2.88/0.39	2.72/0.36	1.64/0.22
TDC (LRAIC-based) as at 1/01/2011	1.40/0.19	0.74/0.10	1.07/0.14
LRAIC-based FTRs as at 1/01/2012[14]	1.48/0.20	0.79/0.11	1.31/0.18

DBA proposes to set the maximum FTRs that IP Vision will be allowed to charge on the basis of LRAIC results as at 1 January 2012, i.e. 0.2 €cents/min for peak traffic, 0.11 €cents/min for off-peak traffic and 0.18 €cents per call set up. The proposed maximum prices are LRAIC-based and symmetrical with the price caps for TDC. Furthermore, DBA explains that the price decision of 7 December 2011 applies until a new one (DBA refers to the price decision notified under case (DK/2012/1385) will enter into force. In this respect, DBA clarifies that proposed LRAIC-based maximum FTRs for IP Vision will be applicable until 1 January 2013 when they should be reduced to pure BU-LRIC level[15].

In exceptional cases (e.g. products/services provided in connection to termination on IP Vision's network introduced 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 the response to the RFI, DBA explains that the purpose of this clause is to ensure that charges newly introduced on the market will be regulated. DBA further states that at the moment there are no fixed termination services regulated according to HCA. DBA (together with consultancies) regularly revises the LRAIC and the fees introduced on the market between two revisions of the model (occurring approximately every three years) will be HCA-based. DBA clarifies that if a new fee has a significant economic impact, it will be introduced in the costing model at the stage of its upcoming amendment/revision. DBA further stresses that it is investigating the possibility for those new fees (introduced between two model's reviews) to be also regulated on the basis of LRAIC. As to the possibility for DBA to introduce in the

12 Current FTRs in Denmark are based on local termination within a network of 64 POIs. DBA specifies in its reply to the RFI that it is currently in the process of analysing operators' data with a view to carrying out the upcoming review of the market for fixed call termination in Denmark. In this context, DBA intends to assess the need to make all fixed operators with a nation-wide coverage subject to an access obligation at a limited number of points of interconnection (i.e.10 POIs). While related market reviews are planned for 2013, DBA states in its response to the RFI that according to the draft decisions notified under Article 7 on the 16 November 2012 (case DK/2012/1400), TDC, Colt, Hi3G, Telenor and Telia will already be obliged to provide fixed call termination at a limited number of regional POIs.

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

14 With respect to the fact that 2012 price caps on FTRs are higher than those for 2011, DBA reiterates (as in case DK/2011/1264) that fixed line traffic volumes are decreasing, which leads to higher unit costs for voice termination.

15 DBA explains in the additional information received on 20 November 2012 that in the decision of 20 January 2011 with respect to TDC, it is stated that the price for call termination on TDC's network will be determined in the annual LRAIC decisions which are based on LRAIC-related executive orders in force. It is also stated in the decision that the Commission's Recommendation of 7 May 2009 should be implemented by 31 December 2012 and that the National IT and Telecom Agency (now DBA) "had initiated work to implement the Commission's recommendation. The work is expected to be completed in early 2012, so as to set prices in line with the recommendation by 1 January 2013".

meantime a clause stating explicitly in the final decision that the imposition of HCA-based price control on new services (i.e. falling under the above exceptional cases) would be subject to the EU consultation in accordance with the article 7 procedure, DBA finds this legally inappropriate. Therefore, in order to comply with the Termination Rates Recommendation[16], DBA confirms, in the additional information provided on 26 November that the provision with respect to new fees based on HCA would be removed from the notified draft measures before the adoption of the final decisions.

III. COMMENTS

The Commission has examined the notification and the additional information provided by the DBA and has the following comments:[17]

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

The Commission notes that 2011 market decisions with respect to Telia, Telenor and Colt are no longer valid. This implies that the termination markets for these three operators are defined differently as compared to those of other fixed operators in Denmark. This further implies that Telia, Telenor and Colt are not obliged to provide access to fixed call termination at regulated prices, which currently results in price asymmetries on the relevant termination market(s). Against this background and in the context of DBA's pending notifications with respect to fixed call termination markets in Denmark, the Commission calls upon DBA to ensure consistency on the relevant termination market(s) and to adopt the draft market decisions notified in cases 1385 and 1400 as soon as possible, and in line with the forthcoming Commission position with respect to those cases.

Use of historical costs for valuing termination-related products

The Commission notes that in specific circumstances services provided in connection to termination on IP Vision’s network could be valued according to historical costs. DBA refers to cases where such services cannot be based on a LRAIC methodology, e.g. because such services are introduced on the relevant market after the finalisation of the LRAIC model.

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 to withdraw the provision related to historical costs accounting before the adoption of the currently notified draft measures (cases DK/2012/1383 and DK/2012/1400). Moreover, the Commission would like to recall that the same principle should apply to all (both fixed and mobile) termination markets.

Furthermore, as regards the imposition of any form of price regulation on new services and/or resulting amendment(s) to the relevant cost model, the

16 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.

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

Commission would like to remind DBA that such measures constitute material changes that might have appreciable impact on the market and should therefore be notified according to the Article 7 consultation procedure.

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[18] 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[19] 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.[20] You should give reasons for any such request.

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

[18] 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.

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

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