

**BEREC Opinion on  
Phase II investigation  
pursuant to Article 7a of Directive 2002/21/EC as amended  
by Directive 2009/140/EC:**

**Case DE/2013/1527**

**Wholesale voice call termination on individual mobile  
networks (market 7) in Germany**

**15 January 2014**

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## 1. EXECUTIVE SUMMARY

On 6 November 2013, the Commission registered a notification from the German national regulatory authority, the Bundesnetzagentur (BNetzA), concerning the market for wholesale voice call termination on individual mobile networks in Germany (corresponding to market 7 in the Commission's Recommendation 2007/879/EC of 17 December 2007).

In the currently notified draft measure BNetzA proposes to impose on sipgate Wireless the following set of remedies: (i) access obligations, including co-location; (ii) non-discrimination obligation; (iii) transparency obligations, including an obligation to publish relevant information in relation to technical specifications, access conditions and relevant tariffs<sup>1</sup>; and (iv) obligation to offer mobile call termination at cost-oriented prices.

As a result of the proposed national benchmarking, the methodology to set MTRs under the present notification, whilst being symmetrical, will rely on the same LRAIC+ methodology used for fixing the MTRs of other SMP-operators on the relevant market previously notified<sup>2</sup> to the Commission.

Since the current notification is closely related to previous notification of market 7 (Case DE/2013/1424) it has to be reiterated, that on 28 February 2013<sup>3</sup> the Commission already expressed its serious doubts as to the compatibility of the proposals with EU law and stated that it considered that the draft measures, if adopted, may create a barrier to the internal market. In its opinion referring to Case DE/2013/1424 BEREC shared the Commission's serious doubts that BNetzA's proposals could create barriers to the internal market as BNetzA's proposals are based on an alternative methodology to that recommended by the Commission and which as a consequence would likely lead MTRs in Germany to levels which, without valid justification, would be approximately twice as high as the average pure LRIC tariffs from other countries that have set tariffs based on the recommended pure LRIC approach. BEREC has recommended that BNetzA should set the tariffs of the mobile termination rates, of the operators designated as having SMP in the market for wholesale voice call termination on their respective individual mobile networks, on the basis of a pure LRIC costing methodology. Subsequently, on 27 June 2013 the Commission issued a recommendation under Article 7a of the Framework Directive requesting BNetzA to amend or withdraw the draft measures. On 19 July 2013 BNetzA adopted its final measure without amending the proposals as recommended by the Commission.

The Commission recognised that NRAs can deviate<sup>4</sup> from the Termination Rates Recommendation<sup>5</sup> (hereinafter referred to as the TR Recommendation), but an alternative methodology should be duly justified in light of the policy objectives and regulatory principles of the Regulatory Framework. The Commission considered that the measures contained in the draft decision do not appear to comply with these principles and objectives, and that BNetzA departed from the pure LRIC costing methodology without providing sufficient and

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<sup>1</sup> In its response to the Commission's request for information BNetzA specified that it intends to impose on sipgate Wireless the same set of obligations as it has previously imposed on Lycamobile.

<sup>2</sup> Case DE/2013/1424, C(2013) 1266.

<sup>3</sup> Case DE/2013/1503, C(2013) 6942.

<sup>4</sup> See Framework Directive and in particular Article 19(2) thereof.

<sup>5</sup> C(2009) 3359 final: COMMISSION RECOMMENDATION of 7.5.2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU.

compelling economic reasons to show that the LRAIC+ methodology would be better suited to promote efficiency and sustainable competition and maximise consumer benefit in the German market.

In analogy to the previous case DE/2013/1424, the BEREC also considers for the present case, that the Commission's serious doubts are justified in that (i) BNetzA's proposed methodology to set MTRs are not based on a pure LRIC costing methodology, as recommended by the Commission, and (ii) BNetzA has not provided a valid justification for deviating from the TR Recommendation and in particular, has not provided evidence to support its view that applying pure LRIC based tariffs would have a disproportionate effect on German operators and that LR(A)IC+<sup>6</sup> methodology would be better suited to meet the policy objectives of promoting efficiency and sustainable competition and maximize consumer benefits than the pure LRIC. BNetzA therefore did not prove that national circumstances justify the deviation from the recommended MTR costing methodology.

In addition, BEREC shares the Commission's concerns that BNetzA's proposal could create barriers to the internal market if other NRAs set MTRs based on the methodology recommended by the Commission (via a bottom-up model and by benchmarking) and BNetzA deviates from that methodology without valid justification.

## 2. INTRODUCTION

Under Article 7 and 7a of the Framework Directive<sup>7</sup>, and Article 3(1a) of the BEREC Regulation<sup>8</sup>, one of the roles of BEREC is to deliver opinions on draft measures of national regulatory authorities (NRAs) concerning market definition, the designation of undertakings with significant market power and the imposition of remedies, and to cooperate and work together with the NRAs. Article 2(a) of the BEREC Regulation requires BEREC to develop and disseminate among NRAs regulatory best practice, such as common approaches, methodologies or guidelines on the implementation of the EU regulatory framework.

On 6 November 2013, the Commission registered a notification from the German national regulatory authority, BNetzA, concerning the market for wholesale voice call termination on individual mobile networks in Germany (corresponding to market 7 in Commission Recommendation 2007/879/EC of 17 December 2007). On 12 November 2013, a request for information was sent to BNetzA and a response was received on 15 November 2013.

The Commission initiated a phase II investigation, pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC, with a serious doubts letter on 28 November 2013. BEREC Office was informed about the above-mentioned Phase II investigation on 5 December 2013. In accordance with the BEREC rules of procedure the Expert Working Group (EWG) was established immediately after that date with the mandate

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<sup>6</sup> LRIC+ and LRAIC+ have been used interchangeably by the Commission, with the same meaning: broad definition of the relevant increment (total traffic), plus a mark-up for fixed & joint common costs.

<sup>7</sup> Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services.

<sup>8</sup> Regulation (EC) 1211/2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office.

to prepare an independent BEREC opinion on the justification of the Commission's serious doubts on the case.

On 16 December 2013 the EWG sent a list of questions to BNetzA. The EWG met on 18 December 2013 in Tallinn and had at this occasion a conference call with BNetzA. On the basis of the information supplied by BNetzA in the conference call, it was agreed that it was not necessary for BNetzA to provide written answers to the list of questions, as all the issues on the chosen methodology, the economic analyses, the evidence provided and the impact analysis were already provided in the previous case DE/2013/1424. On this basis BNetzA referred the EWG to the answers already provided.

A draft opinion was finalized on 8 January 2014 and a final opinion was presented and adopted by a majority of the BEREC Board of Regulators on 15 January 2014. This opinion is now issued by BEREC in accordance with Article 7a(3) of the Framework Directive.

### 3. BACKGROUND

#### Previous notifications

The third round of market analyses of the German markets for voice call termination on individual mobile networks was previously notified to the European Commission and assessed in 2011<sup>9</sup>. 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<sup>10</sup> 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<sup>11</sup>, namely Vistream GmbH (Vistream)<sup>12</sup>, Ring Mobilfunk (Ring)<sup>13</sup>, Lycamobile Germany GmbH (Lycamobile) and OnePhone Deutschland GmbH (OnePhone)<sup>14</sup>.

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<sup>9</sup> Case DE/2011/1274, C(2011) 10077.

<sup>10</sup> The geographic scope of each market coincides with the geographic coverage of the network concerned and is determined as national.

<sup>11</sup> 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.

<sup>12</sup> 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.

<sup>13</sup> 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.

<sup>14</sup> The full MVNO One Phone is connected with E-Plus via the common mother company KPN NV but it is offering its own voice call termination services.

Furthermore BNetzA notified in January 2013<sup>15</sup> draft measures imposing remedies on the designated SMP operators T-Mobile, Vodafone, E-Plus, O2 and Lycamobile, namely: (i) access obligations, including co-location; (ii) a non-discrimination obligation; (iii) transparency obligations, including the publication of standard reference offers; and (iv) an obligation to offer mobile call termination at cost-orientation. With regards to the obligation of cost-orientation, and based on a LRAIC+ methodology, BNetzA proposed to set (retrospectively) the following symmetric MTRs for all SMP operators: (i) for the period of 1 December 2012 to 30 November 2013: 1.85 €/ct/min and (ii) for the period of 1 December 2013 to 30 November 2014: 1.79 €/ct/min.

On 28 February 2013 the Commission expressed its serious doubts as to the compatibility of the proposals with EU law and stated that it considered that the draft measures, if adopted, may create a barrier to the internal market. In its opinion, BEREC has found<sup>16</sup> that the Commission's serious doubts are justified in that BNetzA's proposed MTRs from December 2012 until November 2014 are not based on a pure LRIC costing methodology and has recommended BNetzA to set MTRs on the basis of a pure LRIC costing methodology, without any glide path. Subsequently, on 27 June 2013 the Commission issued a recommendation under Article 7a of the Framework Directive requesting BNetzA to amend or withdraw the draft measures. On 19 July 2013 BNetzA adopted its final measure without amending the proposals as recommended by the Commission. On 29 October 2013 the Commission sent a pilot letter to Germany.

On 15 October 2013 BNetzA defined an additional market for voice call termination on the network of sipgate Wireless GmbH (sipgate Wireless). The geographic scope of the market coincides with the geographic coverage of sipgate Wireless and is defined as national. BNetzA designated sipgate Wireless as having SMP on the relevant market.

### **Current notification**

The notified draft measures concern the imposition of remedies on sipgate Wireless<sup>17</sup>, namely:

- Access obligations, including co-location;
- A non-discrimination obligation;
- Transparency obligations, including an obligation to publish relevant information in relation to technical specifications, access conditions and relevant tariffs and
- An obligation to offer mobile call termination at cost-oriented rates.

Although the actual level of MTRs for sipgate Wireless will be notified later on in 2014, BNetzA has confirmed that it would impose national benchmarking at the level of the rates imposed on other SMP operators. As a result of the proposed national benchmarking<sup>18</sup>, the price cap proposed for MTRs, whilst being symmetrical, will rely on the same LRAIC+ methodology used for the MTRs for other SMP on their relevant markets.

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<sup>15</sup> Case DE/2013/1424.

<sup>16</sup> BoR (13) 47.

<sup>17</sup> Same set of obligations as those imposed on Lycamobile.

<sup>18</sup> Prices of other M(V)NOs are taken as a reference to establish symmetry. These rates in turn were determined by BNetzA on the basis of an LRAIC+ approach in case DE/2013/1424.

Whilst this approach leads, as recommended by the Commission, to the application of symmetric MTRs across Germany, by proposing a LRAIC+ instead of a pure LRIC costing methodology BNetzA chooses not to follow a core part of the TR Recommendation<sup>19</sup>. 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 TR 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<sup>20</sup>.

### **Commission's serious doubts**

The Commission expresses serious doubts regarding the cost-orientation remedy on the market for wholesale voice call termination on individual mobile networks in Germany for the following principal reasons:

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

*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 reiterates the main issues expressed under case DE/2013/1424.

Namely, the Commission refers to Articles 8(4) and 13(2) of the Access Directive<sup>21</sup>, 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 maximizes 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.

The European Commission in its TR Recommendation 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.

According to this TR Recommendation NRAs should set termination rates based on a pure LRIC cost standard in order to promote competition, ensuring that all users derive maximum benefit in terms of choice, price and quality in line with Article 8(2) of the Framework Directive. The Commission recognised that NRAs can deviate from the TR Recommendation but that an alternative methodology should be duly justified in light of the policy objectives and regulatory principles of the Regulatory Framework. The Commission considered that the

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<sup>19</sup> 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").

<sup>20</sup> See EC serious doubts letter C(2013) 8634 final, Case DE/2013/1527, page 3

<sup>21</sup> 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).

measures contained in the draft decision do not appear to comply with these principles and objectives, and that BNetzA departed from the pure LRIC costing methodology without providing sufficient and compelling economic reasons to show that the LRAIC+ methodology would be better suited to promote efficiency and sustainable competition and maximise consumer benefit in the German market.

In particular, the Commission considered that the proposed national benchmarking using as reference the LRAIC+ methodology may lead to competitive distortions between fixed and mobile operators and/or between mobile 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.

#### *Creation of barriers to the internal market*

The Commission notes that due to the fact that 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 Member State from which the call originates and which do apply fully cost-oriented<sup>22</sup> pure LRIC based MTRs in line with Article 8(2) of the Framework Directive and Articles 8(4) and 13(2) of the Access Directive.

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.

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.

#### *Conclusion*

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 the calculation of mobile termination rates can be considered appropriate in the given termination market 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.

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<sup>22</sup> For example the 5 most populous Member States (leaving aside Germany itself) are all applying a pure 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).



## 4. ASSESSMENT OF THE SERIOUS DOUBTS

In the present case, the Commission's serious doubts correspond largely to those that were raised in the serious doubt letter in case DE/2013/1424. This case was the leading case for all 4 German MNOs and the MVNOs Lycamobile, Vistream and Ring. In this case all the issues upon which the Commission has expressed its serious doubts were dealt with by BNetzA and the BEREC EWG. There are only a few differences on substance: the first refers to the fact that in the serious doubt letter on DE/2013/1424, from the 28<sup>th</sup> of February, the Commission also raised concerns about BNetzA's argument that the third policy objective of Article 8(3) Framework Directive (NRAs shall contribute to the development of the internal market) would be subordinate to the other two, (promotion of interests of the citizens and promotion of competition) and argued further that a competition of [regulatory] systems would be detrimental for the internal market. This argument is not put forward by BNetzA in the present case. Second, in the present case no rates are fixed, as this will be done in a separate decision, according to BNetzA (although the principle of national benchmarking<sup>23</sup> on an LRAIC+ based price is envisaged).

The present notification does not go into detail on the arguments provided in the previous M(V)NO reference cases DE/2013/1424, but builds on its conclusions and regulations. The link between the two cases is the requirement of symmetry on which BNetzA states in section 3.6.5.1.4, that

"An examination of the regulatory objectives according to Section 2 of the TKG has revealed that the wholesale prices should not only include the general abuse limits, but rather they should also include an essentially symmetrical KeL<sup>24</sup> price ceiling."

According to BNetzA, any different treatment (i.e. deviating from a symmetric benchmarking approach) would lead to unfair prices and would not be possible in a competitive situation in which sipgate Wireless could not go beyond the market price (sipgate Wireless would have to accept the prevailing price level in a perfectly competitive situation with homogenous products). So with respect to symmetry BNetzA decision is basically in line with recommend (1) of the EC's TR Recommendation.<sup>25</sup>

BEREC supports this approach by BNetzA as any different treatment for MVNO could lead to arbitrage and economic distortions. It is hence BEREC's opinion that, upon determining the value of rates, a key objective is for symmetry with the established market players to be maintained. However, BEREC is of the opinion that bringing the costing methodology in line with the TR Recommendation simultaneously for all market participants would have presented the least risk for unjustified market distortion.

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<sup>23</sup> As regards benchmarking, it should be noted that in a recent case concerning the imposition of benchmarked MTRs on mobile operators in Ireland, the Irish High Court ruled that the Irish NRA's use of benchmarking was unlawful on the grounds that it was outside the scope of what is provided for in the Irish legislation which transposes Article 13 of the Access Directive. The Irish NRA, ComReg has appealed to the Irish Supreme Court against the Irish High Court's judgment. The appeal has yet to be heard by the Irish Supreme Court.

<sup>24</sup> aka cost of effective service provision, equivalent to LRAIC+.

<sup>25</sup> C(2009) 3359 final: COMMISSION RECOMMENDATION of 7.5.2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU.

Given the anchor of symmetric termination rates via national benchmarking, all the other criticisms put forward by BEREC on case DE/2013/1424,<sup>26</sup> in section 4 “Assessment of the serious doubts” remain fully valid also in this case. These, in principle refer to

- Legal issues, in particular that the starting point of the notification should be the Directives properly implemented into national law and the TR Recommendation, whereby the alternative approach, i.e. other than pure LRIC, if chosen, should be achieved via reasoning the inappropriateness of the TR Recommendation for national conditions in any aspect which deviates from the TR Recommendation. To demonstrate that a deviation is better suited to meet the policy objectives and regulatory principles of the underlying Directives would (at least) require that all arguments of the TR Recommendation are analysed so that it can be effectively demonstrated that the TR Recommendation is less appropriate to fulfil the Directives regulatory principles.
- Methodological issues (how a competitive outcome would look like, the need to reflect on external effects, recovery gap)
- Competition issues like a more detailed investigation of mobile-mobile competition issues, In-out balances between smaller and larger operators, the effects of the KEL based MTR on fixed networks, and on
- Negative impacts the regulation would have in creating barriers to the internal market.

All these concerns are fully supported by BEREC in this case, and hence all relevant conclusions on case DE/2013/1424 can also be drawn for the present case.

## **5. CONCLUSIONS AND RECOMMENDATIONS**

Pursuant to Article 19 (2) of the Framework Directive, NRAs should take utmost account of the Commission’s recommendations but can choose not to follow a recommendation. Thus the assessment and compatibility with European law cannot be based only on non-compliance with the TR Recommendation. However where an NRA chooses not to follow the TR Recommendation, it has to inform the Commission and give the reasons for its position.

On the basis of section 4 above, BEREC considers that the Commission’s serious doubts are justified in that (i) BNetzA’s proposed methodology to set MTRs are not based on a pure LRIC costing methodology which, as recommended by the Commission results in a better competitive outcome, and (ii) BNetzA has not provided a valid justification for deviating from the TR Recommendation and in particular, has not provided evidence to support its view that applying pure LRIC based tariffs would have a disproportionate effect on German operators and that LRAIC+ methodology would be better suited to meet the policy objectives of promoting efficiency and sustainable competition and maximize consumer benefits than the

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<sup>26</sup> BEREC opinion on Phase II investigation pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC: ‘Case DE/2013/1424 – Wholesale voice call termination on individual mobile networks (market 7) in Germany; 10.04.2013.

pure LRIC. BNetzA therefore did not prove that national circumstances justify the deviation from the recommended MTR costing methodology.

In addition, BEREC shares the Commission's concerns that BNetzA's proposal could create barriers to the internal market when other NRAs set MTRs based on the methodology recommended by the Commission (via a bottom-up model and by benchmarking) and BNetzA deviates from that methodology without valid justification.

Given the importance of ensuring symmetry between market players, BEREC is of the opinion that bringing the costing methodology in line with the TR Recommendation simultaneously for all market participants (at the earliest opportunity) would have presented the least risk for unjustified market distortions.