



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

Cases DE/2014/1666-1667
Wholesale voice call termination on individual mobile networks
(market 2) in Germany

14 January 2015

Table of Contents

1. EXECUTIVE SUMMARY	3
2. INTRODUCTION	4
3. BACKGROUND	5
4. ASSESSMENT OF THE SERIOUS DOUBTS	7
5. CONCLUSIONS AND RECOMMENDATIONS.....	8

1. EXECUTIVE SUMMARY

On 24 October 2014, the Commission registered two notifications from the German national regulatory authority, Bundesnetzagentur (BNetzA), concerning the markets for wholesale voice call termination on individual mobile networks in Germany (corresponding to market 2 in Commission Recommendation 2014/710/EU of 9 October 2014).

In the currently notified draft measures, BNetzA proposes to impose on all SMP operators (MNOs and MVNOs) the following MTRs: as of 1 December 2014 until 30 November 2015 a rate of **1.72 €ct/min** and from 1 December 2015 until 30 November 2016 a rate of **1.66 €ct/min**. The proposed MTRs, whilst being symmetrical, are based on the same LRAIC+ cost model as applied in cases DE/2013/1424, DE/2013/1527 and DE/2014/1605, respectively.

Since the current notifications are closely related to previous notifications 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), it has to be reiterated that, on all three previous occasions, 28 February 2013¹, 28 November 2013² and 19 June 2014³, the Commission has expressed its serious doubts on the compatibility of the respective proposals with EU law and stated that the draft measures, if adopted, may create barriers to the internal market. In its opinions⁴, BEREC shared the Commission's serious doubts that BNetzA's proposals could create barriers to the internal market as BNetzA's proposals regarding MTRs in Germany are based on a methodology that deviates from the methodology recommended by the Commission. Subsequently, on 27 June 2013, on 4 April 2014, and on 17 October 2014 the Commission issued recommendations under Article 7a of the Framework Directive, requesting BNetzA to amend or withdraw the draft measures in the individual cases mentioned above. On 19 July 2013, 11 April 2014, and 24 October 2014, BNetzA adopted its final measures in cases DE/2013/1424, DE/2013/1527, and DE/2014/1605 respectively without amending the proposals as requested by the Commission and recommended by BEREC.

The Commission recognised that NRAs can deviate⁵ from the Termination Rates Recommendation⁶ (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 BU-LRIC costing methodology without providing sufficient and compelling economic reasons to show that the LRAIC+ methodology would be better suited (than pure BU-LRIC) to promote competition and to protect EU citizens' interest.

In the present cases, BEREC appreciates MTRs being identical for all SMPs (MNOs and MVNOs). Nevertheless, analogous to the previous cases, DE/2013/1424, DE/2013/1527, and DE/2014/1605, BEREC also considers for the present case that the Commission's serious

¹ Case DE/2013/1424, C(2013) 1266 final.

² Case DE/2013/1527, C(2013)8634 final.

³ Case DE/2014/1605, C(2014) 4291 final.

⁴ BoR(13)47, BoR(14) 07, and BoR(14) 105.

⁵ See Framework Directive and in particular Article 19(2) thereof.

⁶ C(2009) 3359 final: Commission Recommendation of 7.5.2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU.

doubts are justified in that (i) BNetzA's proposed MTRs are not based on a pure BU-LRIC costing methodology, and (ii) BNetzA has not provided a valid justification for deviating from the TR Recommendation and in particular, has not provided evidence to 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

On 24 October 2014, the Commission registered two notifications from the German national regulatory authority, BNetzA, concerning the markets for wholesale voice call termination on individual mobile networks in Germany (corresponding to market 2 in Commission Recommendation 2014/710/EU of 9 October 2014).

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 21 November 2014. In accordance with the BEREC rules of procedure, the Expert Working Group (EWG) was established immediately after that date with the mandate to prepare an independent BEREC opinion on the justification of the Commission's serious doubts on the case.

Since these cases are very similar to other cases (DE/2013/1424, DE/2013/1527, and DE/2014/1605), the rapporteur decided in agreement with the experts of the EWG and in accordance with point B. III. b) of the Internal Guidelines for the elaboration of BEREC Opinions in Article 7 and 7a Phase II cases (BoR(13) 112) to exercise the work without an initial meeting. Instead, the EWG held a videoconference on 2 December 2014 with the objective of sharing understanding of the notified documents and deciding whether, based on the information available thus far, it could reach clear conclusions on whether or not the Commission's serious doubts are justified. The EWG reached preliminary conclusions on the issues by analyzing the relevant documents.

A draft opinion was finalized on 5 January 2015 and a final opinion was presented and adopted by a majority of the BEREC Board of Regulators on 14 January 2015. 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 and assessed by the Commission in 2011⁷. The Commission had no comments as to the market definition and the SMP assessment.

Furthermore, BNetzA notified in January 2013⁸ draft measures imposing remedies on the designated SMP operators. 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 €/min and (ii) for the period of 1 December 2013 to 30 November 2014: 1.79 €/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 found⁹ that the Commission's serious doubts are justified. 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.¹⁰

On 15 October 2013 BNetzA notified an additional market for voice call termination on the network of sipgate Wireless GmbH (sipgate)¹¹. BNetzA designated sipgate as having SMP on the relevant market. The Commission had no comments on the draft measure.

Subsequently on 6 November 2013, BNetzA notified a draft measure imposing on sipgate the full set of remedies, including an obligation to offer mobile call termination at cost-orientation. The price methodology proposed by BNetzA at the time whilst being symmetrical, relied on the same LRAIC+ methodology used for the MTRs for other SMP on the relevant market previously notified to the Commission. The Commission expressed its serious doubts similarly to the one expressed on 28 February 2013. BEREC supported the serious doubts. As a result, on 4 April 2014 the Commission issued a recommendation similar to the previous case requesting BNetzA to amend or withdraw the draft measure. On 11 April 2014, BNetzA adopted its final measure without amending the proposal as recommended by the Commission.

On 20 May 2014, BNetzA notified its proposal concerning the rates for mobile termination and granting of collocation to be imposed on sipgate with retroactive effect from 3 February 2014 until 30 November 2014¹². The proposed MTR was set at 1.79 €/min and was based on the previously notified LRAIC+ model. Again, the Commission expressed its serious doubts, similar to the earlier cases. After obtaining a supportive BEREC Opinion in the case, the

⁷ Case DE/2011/1274, C(2011) 10077.

⁸ see footnote 1.

⁹ BoR (13) 47.

¹⁰ see section II.1 of the serious doubts letter C(2014) 8962 final, p2

¹¹ Case DE/2013/1503, C(2013) 6942.

¹² Case DE/2014/1605, C(2014) 4291.

Commission issued a recommendation requesting BNetzA to amend or withdraw the draft measure. On 24 October 2014, BNetzA adopted its final measure without amending the proposal as recommended by the Commission.

Current notification

With regard to the obligation of cost-orientation, BNetzA proposes to set for all SMP operators (MNOs and MVNOs) the following MTRs: as of 1 December 2014 until 30 November 2015 a rate of 1.72 €/ct/min and from 1 December 2015 until 30 November 2016 a rate of 1.66 €/ct/min. The proposed MTRs, are based on the same LRAIC+ cost model as applied in cases DE/2013/1424, DE/2013/1527 and DE/2014/1605, respectively. BNetzA indicates in the draft measure that its approach is not in accordance with Recommends 2 and 6 of the Commission's TR Recommendation¹³.

BNetzA also states in its draft measure that the relevant provisions of the German Telecommunications Act (TKG) have to be interpreted in light of EU law in general and the TR Recommendation in particular and that in case of conflict the methods set out by the Commission prevail over the regulatory default model set out by national law.

However, BNetzA remains of the view, as expressed in cases DE/2013/1424, DE/2013/1527 and DE/2014/1605 that LRAIC+ should be used as a basis for the calculation of termination rates. In order to apply the pure BU-LRIC model recommended by the Commission, BNetzA claims that it would have to be proven that the recommended model addresses the identified market failures better than the German LRAIC+ model.

Commission's serious doubts

The Commission, in its letter C(2014) 8962 final, 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 cases DE/2013/1424, DE/2013/1527, and DE/2014/1605.

Whilst the Commission recognises that NRAs can deviate¹⁴ from the TR Recommendation¹⁵, in such circumstances they have to provide the reasons for such a position. The Commission considered that BNetzA did not provide convincing justification why it departed from the pure BU-LRIC costing methodology and why the LRAIC+ methodology would be better suited to promote efficiency and sustainable competition and to maximise consumer benefit in the German market.

¹³ see footnote 6.

¹⁴ see footnote 5.

¹⁵ see footnote 6.

Creation of barriers to the internal market

The Commission notes that the approach proposed by BNetzA results in a level of MTRs, which is higher than the average MTR in those Member States that employ a pure BU-LRIC methodology. Hence, for the period until 30 November 2016 the application of LRAIC+ methodology leads to a considerable difference in absolute terms between German MTRs and those of other Member States, which are calculated in accordance with 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 originate¹⁶.

4. ASSESSMENT OF THE SERIOUS DOUBTS

In the present cases, the Commission's serious doubts correspond largely to those that were raised in the serious doubts letters in cases DE/2013/1424, DE/2013/1527, and DE/2014/1605. In these cases all the issues upon which the Commission has expressed its serious doubts have already been 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 doubts letter on DE/2013/1424, the Commission also raised concerns about an argument which is no longer put forward by BNetzA in the later cases¹⁷. Second, in the case DE/2013/1527 no rates have been set, although the principle of national benchmarking¹⁸ on a LRAIC+ based price had already been envisaged. Third, in the case DE/2014/1605, BNetzA sets the actual MTR at the level of LRAIC+ costs, building explicitly on the conclusions and regulations in cases DE/2013/1424 and DE/2013/1527. However, in all these previous cases the underlying concern was that there was a deviation from the TR Recommendation but the alternative methodology was not duly justified by BNetzA.

While BEREC recognises that NRAs can deviate from the TR Recommendation, BEREC considers that the NRA shall provide evidence to highlight why national circumstances justify the deviation. Instead, BNetzA seems to consider that it only needs evidence if it were to deviate from LRAIC+. The Commission's serious doubts letter states that: *'in order to apply the pure BU-LRIC model recommended by the Commission, BNetzA claims that it would have to be proven that the recommended model addresses the identified market failures better than the German LRAIC+ model'*¹⁹. However, BNetzA also stated in its draft measure *'that the relevant provisions of the TKG have to be interpreted in light of EU law in general and the Termination Rates Recommendation in particular and that in case of conflict the methods set out by the Commission prevail over the regulatory default model set out by national law'*²⁰. BNetzA has not assessed whether pure BU-LRIC might address identified market failures better than LRAIC+, which may have resolved the conflict between these two positions.

Taking the above into account, the concerns already raised in cases DE/2013/1424, DE/2013/1527, and DE/2014/1605 are fully supported by BEREC also in this case, and hence

¹⁶ see footnote 20 of the serious doubts letter C(2014) 8962 final, p7

¹⁷ On the "competition of [regulatory] systems" ("Wettbewerb der Systeme").

¹⁸ 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.

¹⁹ see section II.2 of the serious doubts letter C(2014) 8962 final, p3

²⁰ see footnote 19.

all relevant conclusions on case DE/2013/1424, DE/2013/1527, and DE/2014/1605 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 a 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 MTRs are not based on a pure BU-LRIC costing methodology which, as recommended by the Commission, generally 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 as to why this decision would be better suited to meet the policy objectives of promoting efficiency and sustainable competition and maximize consumer benefits, than pure BU-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 pure BU-LRIC model and/or by benchmarking pure-LRIC model results) and BNetzA deviates from that methodology without valid justification.