

BEREC Opinion on

Phase II investigation

pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC:

Case DE/2015/1713

**Wholesale voice call termination on individual public telephone networks provided at
a fixed location in Germany - remedies**

28 April 2015

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1. EXECUTIVE SUMMARY

On 18 February 2015, the Commission registered a notification from the German national regulatory authority, Bundesnetzagentur (BNetzA), concerning call termination on individual public telephone networks provided at a fixed location in Germany (corresponding to **Market 1** in Commission Recommendation 2014/710/EU of 9 October 2014).

In the currently notified draft measure, BNetzA proposes to set the actual level of FTRs for 53 SMP operators (not including DT) at a uniform tariff. The proposed tariff is based on a national benchmarking approach with regards to the rate imposed on DT (which is relied on the same LRAIC+ methodology that has been investigated by the Commission in cases DE/2013/1430, DE/2013/1460, DE/2014/1642, DE/2014/1660 and DE/2014/1685).

Since the current notification is closely related to previous notifications concerning the market for call termination on individual public telephone networks provided at a fixed location in Germany, it has to be reiterated that, on all five previous occasions, 6 March 2013, 21 May 2013, 11 August 2014, 7 October 2014, and 17 December 2014¹, the Commission 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 opinions², BEREC shared the Commission's serious doubts that BNetzA's proposals could create barriers to the internal market as BNetzA's proposals regarding Fixed Termination Rates (FTRs) in Germany are based on a methodology that deviates from the methodology recommended by the Commission.

The Commission recognises that NRAs can deviate³ from the Termination Rates Recommendation⁴ (the TR Recommendation), but the reasons for not following the recommendation would have to be sufficiently explained. The Commission considered that the justification provided by BNetzA for choosing LRAIC+ approach were not convincing. Furthermore, the Commission did not share BNetzA's assertion that the recommended BU-LRIC approach would not serve the interests of telecoms operators or end-users any better than the LRAIC+ approach, against which BNetzA intended to benchmark the proposed FTRs.

Analogous to the previous cases, DE/2013/1430, DE/2013/1460, DE/2014/1642 DE/2014/1660 and DE/2014/1685, BEREC also considers for the present case that the Commission's serious doubts are justified in that (i) BNetzA's proposed FTRs 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 FTR 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 FTRs based on the methodology

¹ Cases: DE/2013/1430, C(2013) 5112; DE/2013/1460, C(2013) 6884; DE/2014/1642, C(2014) 9568; DE/2014/1660, C(2014) 8366 and DE/2014/1685, C(2015) 2574 respectively.

² BoR(13)47, BoR(14) 07, BoR(14) 105, BoR(14) 206 and BoR(15) 21.

³ See Framework Directive and in particular Article 19(2) thereof.

⁴ C(2009) 3359 final: Commission Recommendation of 7.5.2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU.

recommended by the Commission (via a bottom-up BU-LRIC model or benchmark based on BU-LRIC) and BNetzA deviates from that methodology without valid justification.

BEREC proposes that BNetzA shall provide sufficient reasons to the Commission why national circumstances justify the deviation from the TR Recommendation as stipulated in Article 19 (2) of the Framework Directive.

2. INTRODUCTION

On 18 February 2015, the Commission registered a notification from the German national regulatory authority, BNetzA, concerning Market 1⁵.

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 18 March 2015. 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 this case is very similar to other cases (DE/2013/1430, DE/2013/1460, DE/2014/1642, DE/2014/1660, and DE/2014/1685), 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 24 March 2015 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 17 April 2015 and a final opinion was presented and adopted by a majority of the BEREC Board of Regulators on 28 April 2015. This opinion is now issued by BEREC in accordance with Article 7a(3) of the Framework Directive.

3. BACKGROUND

Previous notifications

The market for call termination on individual public telephone networks provided at a fixed location in Germany were previously notified to and assessed by the Commission in 2012⁶. The Commission had no comments as to the market definition and the SMP assessment. Furthermore, BNetzA notified to the Commission under case DE/2014/1570⁷ a draft measure

⁵ Commission Recommendation 2014/710/EU of 9 October 2014.

⁶ Case DE/2012/1359, C(2012) 5904.

⁷ see footnote 1.

defining 19 additional markets and designating the new entrants, not covered by the 2012 decision, with SMP. The Commission had no comments to the BNetzA proposal.

The remedies were notified to and assessed by the Commission under cases DE/2013/1430, DE/2013/1460, DE/2014/1642 DE/2014/1660, and DE/2014/1685. The first four cases were closed⁸ with a Commission Recommendation under Article 7a of the Framework Directive.

Current notification

In the currently notified draft measure, BNetzA proposes to set the actual level of FTRs for 53 SMP operators (not including DT) at a uniform tariff. As a result of the proposed national benchmarking, the FTR proposed for FTRs under the present notification, whilst being symmetrical, will rely on the same LRAIC+ methodology⁹ that has been challenged in all previous cases (DE/2013/1430, DE/2013/1460, DE/2014/1642 DE/2014/1660, and DE/2014/1685). BNetzA remains of the view, as expressed in previous cases, that a LRAIC+ approach should be used as the basis for the calculation of termination rates. As a consequence, it remains BNetzA's position that, in order to apply the pure BU-LRIC model recommended by the Commission, it would have to prove that the recommended model addresses the identified market failure better than the German LRAIC+ model.

Commission's serious doubts

The Commission, in its letter C(2014) 10126 final, expresses serious doubts regarding the price control remedy on Market 1 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 the previous cases¹⁰.

Whilst the Commission recognises that NRAs can deviate¹¹ from the TR Recommendation¹², 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 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.

Creation of barriers to the internal market

The Commission notes that the approach proposed by BNetzA results in a level of FTRs, which is significantly higher than the average FTR in those Member States that employ a pure BU-LRIC methodology. Hence, for the period until 31 December 2016 the application of LRAIC+ methodology leads to a considerable difference in absolute terms between German FTRs and

⁸ C(2013) 5112; C(2013) 6884; C(2014) 9568; for case DE/2014/1660, the final decision was adopted with a Reasoned Justification for not following the Recommendation on 13 April 2015.

⁹ see footnote 8 of the serious doubts letter C(2014) 10126 final, p2.

¹⁰ see footnote 4.

¹¹ see footnote 6.

¹² see footnote 7.

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 other Member States from where the calls originate.

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 doubts letters in previous cases¹³. 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. 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; and
- 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.

BEREC considers that BNetzA shall provide evidence for the chosen FTR calculation method, not the other way around as BNetzA expressed in its position: '*in order to apply the pure BU-LRIC model recommended by the Commission, it [the Commission] would have to prove that the recommended model addresses the identified market failure better than the German LRAIC+ model*'¹⁴.

The concerns already raised in previous cases¹⁵ are fully supported by BEREC also in this case, and hence all relevant conclusions on the previous cases DE/2013/1430, DE/2013/1460, DE/2014/1642, DE/2014/1660 and DE/2014/1685 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 sufficient justification for its position.

¹³ see footnote 4.

¹⁴ see footnote 2.

¹⁵ see footnote 4.

On the basis of section 4 above, BEREC considers that the Commission's serious doubts are justified in that (i) BNetzA's proposed FTRs 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 as to why national circumstances justify the deviation from the TR Recommendation and in particular, has not provided evidence to support its view 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.

BEREC considers that BNetzA should provide sufficient reasons to the Commission why national circumstances justify the deviation from the TR Recommendation as stipulated in Article 19 (2) of the Framework Directive.

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