BoR (16) 22

# BEREC Opinion on

## Phase II investigation

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

## Case DE/2015/1816

## Wholesale call termination on individual public telephone networks provided at a fixed location in Germany

27 January 2016

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## 1. EXECUTIVE SUMMARY

On 18 November 2015, the Commission registered a notification from the German national regulatory authority, Bundesnetzagentur (BNetzA), concerning the markets for wholesale call termination on individual public telephone networks provided at the 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 19 SMP operators at a uniform tariff of 0.24 €ct/min (peak and off-peak). As a result of the proposed national benchmarking, the price cap proposed for FTRs under the present notification, whilst being symmetrical, will rely on the same LRAIC+ methodology used for the FTRs of Deutsche Telekom (DT). This methodology has previously been investigated by the Commission in cases DE/2013/1430, DE/2013/1460, DE/2014/1642, DE/2014/1660, DE/2014/1685 and DE/2015/1713.

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 six previous occasions, 6 March 2013, 21 May 2013, 11 August 2014, 7 October 2014, 17 December 2014, and 18 March 2015[1], 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 opinions[2], 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 deviate[3] from the Termination Rates Recommendation[4] (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 was 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, DE/2014/1685, and DE/2015/1713, 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

[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, DE/2014/1685, C(2014) 10126; and DE/2015/1713, C(2015) 1954.

[2] BoR(13) 47, BoR(14) 07, BoR(14) 105, BoR(14) 206, BoR (15) 21 and BoR (15) 56.

[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.

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 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. Indeed, according to the Commission, for the period until 31 December 2016, the application of a LRAIC+ methodology leads to a considerable difference in absolute terms between German FTRs and those of other Member States, which are calculated in accordance with Articles 8(4) and 13(2) of the Access Directive. Again, BEREC shares the concern that this considerable difference will be incurred at the eventual expense of consumers in the Members States from where the calls originate.

BEREC proposes that BNetzA shall provide sufficient evidence 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 November 2015, the Commission registered a notification from the German national regulatory authority, BNetzA, concerning the markets for wholesale call termination on individual public telephone network provided at the fixed location[5] in Germany.

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 16 December 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, DE/2014/1685, and DE/2015/1713), 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 6 January 2016 with the objective of sharing understanding of the notified documents and deciding whether 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 finalised on 25 January 2016 and a final opinion was presented and adopted by a majority of the BEREC Board of Regulators on 27 January 2016. This opinion is now issued by BEREC in accordance with Article 7a(3) of the Framework Directive.

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

## 3. BACKGROUND

### Previous notifications

The market for call termination on individual public telephone networks provided at a fixed location in Germany was previously notified to and assessed by the Commission in 2012[6]. The Commission had no comments on the market definition or the SMP assessment. Furthermore, BNetzA notified to the Commission (case DE/2014/1570[7]) a draft measure defining 19 additional markets and designating the new entrants, not covered by the 2012 decision, with SMP. The Commission made no comment on 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, DE/2014/1685, and DE/2015/1713. All previous cases were closed[8] with a Commission Recommendation under Article 7a of the Framework Directive. And in all these cases the final decision was adopted by BNetzA with a reasoned justification, pursuant to Article 7a of the Framework Directive, for not following the Recommendation

### Current notification

In the currently notified draft measures BNetzA proposes to set the actual level of FTRs for 19 SMP operators at a uniform tariff of 0.24 €ct/min (peak and off-peak) to apply retrospectively, as of May 2015, and limited until 31 December 2016. As a result of the proposed national benchmarking, the price cap proposed for FTRs under the present notification, whilst being symmetrical, will rely on the same LRAIC+ methodology used for the FTRs for DT. This LRAIC+ methodology has been challenged in all previous cases (DE/2013/1430, DE/2013/1460, DE/2014/1642 DE/2014/1660, DE/2014/1685, and DE/2015/1713).

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(2015) 9580 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*

[6] Case DE/2012/1359, C(2012) 5904.
[7] See footnote 1.
[8] C(2013) 5112; C(2013) 6884; C(2014) 9568; C(2015) 1477; C(2015) 2574; C(2015) 4962.

The Commission reiterates the main issues expressed under the previous cases[9].

Whilst the Commission recognises that NRAs can deviate[10] from the TR Recommendation[11], in such circumstances they have to provide the reasons for such a position. The Commission considered that BNetzA did not provide convincing justification as to 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[12]. 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 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 cases[13]. 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 while there had been a deviation from the TR Recommendation, the alternative methodology had not been sufficiently justified by BNetzA.

While BEREC recognises that NRAs can deviate from the TR Recommendation, it 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*

[9] See footnote 1.
[10] See footnote 3.
[11] See footnote 4.
[12] See the BEREC Report "*Termination rates at European level – July 2015*", BoR (15) 211, for a list of Member State FTRs and the underlying models.
[13] See footnote 1.

*the recommended model addresses the identified market failure better than the German LRAIC+ model'*[14].

Indeed, the Commission, in both the current[15] and previous[16] case has made reference, albeit it for the mobile sector, to academic studies, which on the one hand[17], appear to confirm the Commission's expectation that the introduction of termination rates based on a pure BU-LRIC methodology results in significant consumer welfare gains, and on the other hand[18], did not find evidence that a BU-LRIC approach caused a reduction in operators' profits or had an appreciably negative impact on investment.

The concerns already raised in previous cases[19] are 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, DE/2014/1685, and DE/2015/1713 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.

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

[14] See footnote 2.
[15] DE/2015/1816, C(2015) 9580
[16] DE/2015/1713, C(2015) 1954
[17] Harbord, D. and Hoernig, S., 2014, 'Welfare Analysis of Regulating Mobile Termination Rates in the UK', Journal of Industrial Economics; and "The welfare effects of mobile termination rate regulation in asymmetric oligopolies: The case of Spain", by Sjaak Hurkens and Angel L. Lopez, October 2011.
[18] Genakos, C. and Valletti T., 2014, 'Evaluating a decade of mobile termination rate regulation', December 2013.
[19] See footnote 1.

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.