

BEREC Opinion

Phase II investigation

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

Case: DK/2012/1283: Wholesale SMS termination on individual mobile networks – New entrant

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1. INTRODUCTION

On 11 January 2012, the Danish NRA (Danish Business Authority, DBA) presented to the European Commission (the Commission) a short notification concerning a new operator (Lycamobile) on the market for wholesale SMS termination on individual mobile networks¹.

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 13 February 2012². 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.

On 21 February 2012 the EWG sent a first list of questions to the DBA. Answers were received from the DBA on 23 February 2012.

The EWG met on 27 February in Rome. During this meeting the EWG held a conference call with the DBA to gather further information and clarification in response to the questions sent the week before and to additional questions. The objective of the EWG was to reach clear conclusions on whether or not the Commission's serious doubts are justified.

On 8 March EWG held a conference call with the Commission upon the latter's request. In this occasion the Commission explained in deep detail to the EWG the reasons behind its serious doubts. This gave the group a more complete understanding of the case.

A draft opinion was finalized on 19 March 2012 and a final opinion was presented and adopted by a majority of the BEREC Board of Regulators on 23 March 2012. This opinion is now issued by BEREC in accordance with Article 7a(3) of the Framework Directive.

¹ This market is not listed in the 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.

² Available at [https://circabc.europa.eu/d/d/workspace/SpacesStore/c6ab49e5-10bc-4368-a973-9748665f027e/DK-2012-1283%20Acte\(4\)_EN%2bdate%2bnr.pdf](https://circabc.europa.eu/d/d/workspace/SpacesStore/c6ab49e5-10bc-4368-a973-9748665f027e/DK-2012-1283%20Acte(4)_EN%2bdate%2bnr.pdf)

2. BACKGROUND

2.1 Previous notification

On 2 July 2010, the Danish NRA, the NITA (nowadays DBA), notified to the Commission its first proposal to regulate wholesale SMS termination on individual mobile networks. NITA defined a separate market for SMS termination for each of the five mobile operators' networks active on the market at the time (the four MNOs TDC, Telenor, Telia and H3G and one full-MVNO, Barablu, no longer active in the Danish market). The five operators were designated as having significant market power (SMP) on the relevant markets and were subject to the same regulatory obligations of access, transparency, non-discrimination, price control and regulatory cost accounting based on LRAIC method.

On February 2011, however, the NITA notified again to the Commission the measure (not including Barablu, which had left the market) deciding to modify the previously proposed price control obligation in that it would cover only SMS traffic originating on networks of operators competing with the "Danish operators"³ at retail level, that is to say originating from other "Danish operators". Hence, the termination rates for SMS originating from foreign operators would be unregulated. To support its modified proposal, the NITA argued that the termination rates of international SMS were subject to a higher dynamic. In particular, the NITA noted that a high proportion of the agreements with "foreign operators" were bill and keep agreements and that the termination rates among "Danish operators" have been kept constant since 2002. This, according to the NITA, was a proof that the contractual conditions with foreign operators were not affected by the incentives to increase wholesale tariffs that existed among operators which competed in the same retail market. Therefore, the application of regulated termination tariffs, irrespective of SMS origin, was not justified and proportionate.

In its comments⁴, the Commission questioned the conclusion that agreements between "Danish" and "foreign" operators were more dynamic⁵ and expressed its concerns about the scope of price regulation foreseen by the draft measure which might not be in line with the

³ In this opinion, the expression "Danish operators" designates the operators acting in the Danish market. As underlined by the DBA, the differentiation regarding the scope of the price control obligation is not based on the "nationality" of the operator, as an operator established in another Member State that would enter the Danish market as MVNO or a new operator and exchange SMS sent by Danish customers would get access to regulated SMS termination rate.

⁴ Available at https://circabc.europa.eu/d/d/workspace/SpacesStore/ec971b0e-bf01-4614-9021-93b6122e08a6/DK-2011-1181%20Acte_3__EN%2bdate%2bnr.pdf

⁵ Data collected by NITA showed that, absent regulation, the price for terminating a foreign SMS was up to twice as high as terminating a national SMS, and that the termination bottleneck affected the termination of foreign SMS probably in an even stronger manner.

non-discrimination principle and was likely to hamper the development of the internal market for SMS services.

The Commission asked NITA to reconsider its proposed price regulation and refrain from introducing regulatory measures which might create incentives for excessive pricing of cross-border SMS termination. Nevertheless, the NITA adopted the measures as initially proposed. On September 2011, the NITA proposed to adjust the price ceilings imposed as part of an annual review process. Once again, the NITA confirmed that only operators which compete at retail level on the Danish market would be granted these regulated tariffs.

2.2. Current notification and the Commission's serious doubts

On 11 January 2012, the Commission registered a short notification from the DBA (former NITA) concerning a new MVNO operator, Lycamobile, hosted on the network of the mobile operator TDC, that entered in the Danish market in the first half of 2010. The draft measure proposes to designate Lycamobile as having SMP in the wholesale market for SMS termination on its own network and to impose it the same set of remedies previously established for the four existing Danish MNOs.

With the current draft measure, the DBA reiterates its market definition that includes SMS termination regardless of where the SMS originates and the type of the SMS (standard SMS or push SMS).

The price control obligation – that is to say the price ceiling already in place for the other “Danish mobile operators” calculated on the basis of the existing LRAIC model - will be applied also to Lycamobile. According to this, until 29 February 2012, the average SMS termination rate on Lycamobile network should not exceed DKK 0.16 (around 2.2 Eurocent per SMS); from 1 March 2012 to 31 December 2012 the maximum price will be set at DKK 0.12 (1.6 around Eurocent per SMS).

Similarly to the other “Danish mobile operators”, the price control imposed to Lycamobile shall only apply to those operators which compete with “Danish mobile” operators at retail level, that is to say to “Danish mobile operators”.

The Commission expressed its serious doubts regarding the validity of the limitation on the scope of the price regulation proposed by the DBA for Lycamobile and the compatibility of this measure with EU law, namely the principle of non-discrimination. Furthermore the Commission considers that such limitation would create a barrier to the single market.⁶

⁶ The Commission's serious doubts are available at:

3. ASSESSMENT OF THE SERIOUS DOUBTS

3.1 The task of the BEREC

According to the Articles 2(a) and 3(a) of BEREC Regulation⁷, the BEREC shall develop and disseminate among NRAs regulatory best practice, such as common approaches, methodologies or guidelines on the implementation of the EU regulatory framework. The task of BEREC is to deliver opinions on draft measures of NRAs concerning market definition, the designation of undertakings with significant market power and the imposition of remedies, and to cooperate with the NRAs, in accordance with Articles 7 and 7a of the Framework Directive (FD).

The procedures for the elaboration of the BEREC opinion in Article 7 and 7a Phase II states the task of the BEREC EWG. The opinion of the BEREC shall contain a summary of the notification and the serious doubts, the analysis, clear conclusions on whether the draft regulatory measure is compatible with the EU Regulatory Framework and possible alternative proposals from the BEREC, pursuant to Article 7a provisions. BEREC opinion will be outlined in this chapter while recommendations are provided in chapter four.

3.2 Serious doubts as to the compatibility of the draft measure with EU law

3.2.1 Infringement of the non-discrimination principle

Concerns of the Commission

The Commission states that the non-discrimination principle is a general principle of the EU law, mandating equal treatment of similar situations. Moreover, the Commission notes that Article 56 of the TFEU guarantees the freedom to provide cross-border services within the Union and, in the context of the regulatory framework, Article 8 (5) (b) of the Framework Directive imposes an obligation on NRAs to apply, *inter alia*, non-discriminatory principles to ensure that there is no discrimination in the treatment of operators in similar circumstances.

[https://circabc.europa.eu/d/d/workspace/SpacesStore/c6ab49e5-10bc-4368-a973-9748665f027e/DK-2012-1283%20Acte\(4\)_EN%2bdate%2bnr.pdf](https://circabc.europa.eu/d/d/workspace/SpacesStore/c6ab49e5-10bc-4368-a973-9748665f027e/DK-2012-1283%20Acte(4)_EN%2bdate%2bnr.pdf)

⁷ REGULATION (EC) No 1211/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 November 2009, establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office.

The Commission takes the view that the limitation on the scope of the price obligation would lead to an indirect discrimination of operators established in Member States other than Denmark, prohibited by both the Treaty and the Framework Directive. According to the Commission the measure will in practice result in a considerably different treatment of “Danish” and other EU operators, as it would place EU operators established outside Denmark in a less favourable position by not granting them access to regulated SMS termination tariffs.

According to the Commission both operators competing and not competing at the retail level are in essence in the same position and face the same competitive bottleneck when they terminate SMS in Lycamobile network, as the latter would not dispose of higher (countervailing) market power to negotiate the price for wholesale SMS termination services requested by foreign operators than that it has to negotiate the price with operators competing with “Danish operators” in the retail market. The Commission expressed its doubts that the evidence provided by the DBA would reject this finding that a similar bottleneck situation exists for all SMS termination regardless of its origin. Thus the Commission has serious doubts that the competition problem identified in relation to the termination of SMS originating from Denmark would not equally exist in relation to the termination of SMS originating abroad, and believes that the notified regulatory measure may infringe the non-discrimination principle.

DBA's view

The DBA found the circumstance of competing with Lycamobile in the retail market being the objective criterion of differentiation of the regulation conditions for telecommunications operators willing to terminate in the Lycamobile network SMS originated in their network. To put the point another way, the DBA's decision not to include the international arrangements within the scope of the SMS termination rate regulation is based upon the assertion that firms which compete in the same retail market will have different incentives to increase wholesale prices compared to firms not competing in that retail market. In this regard, the DBA points out that, therefore, the price discrimination is not based on the operators' nationality.

The underlying DBA's economic reasoning, which is to a great extent a discussion on the nature of competition dynamics in two-way access markets, is included in section 4.8.2 of the draft market analysis of effective competition in the wholesale market for SMS termination on Lycamobile's mobile network.

To sum up, according to the DBA, three main factors influence the pricing of termination: 1) the presence traffic unbalance among operators; 2) possible collusive incentives and 3) the presence of asymmetric market shares. In the DBA's view, while the first factor

(presence of traffic unbalance) applies irrespective of whether the operators compete in the same retail market or not, both the second and the third factor apply precisely to the case where operators compete in the same retail market.

As regards the second factor (possible collusive incentives), according to the DBA, high termination rates may limit the level of competition as they increase the cost associated with lowering retail prices. If an undertaking reduces its SMS retail price, it will, *ceteris paribus*, generate a greater number of outgoing SMS messages. The higher the termination rate, the DBA claims, the more expensive it is to lower retail prices and the greater the anticompetitive effect. Even if the anticompetitive incentive may be partially countered by the fact that a greater number of outgoing SMS will result in an increase in the number of incoming SMS received in response, the DBA concludes that high termination rates affect an undertaking's marginal consideration of whether it is profitable to reduce the retail price.

The DBA further mentions that it can be shown theoretically that two undertakings of the same size, competing at the retail level, under specific assumptions about the type of price competition in the market, may use termination rates as a strategic variable to reduce competition in the retail market thereby achieving a higher profit. The undertakings in this situation, the DBA concludes, will have a common interest in higher termination rates.

A different situation occurs when operators have different market shares (third factor). In this case, operators with a small market share will be particularly hit by high termination rates as they have a significant competitive advantage in lower retail prices in order to gain market share. However, this strategy generates a relatively large amount of off-net traffic. This anticompetitive effect can be further exacerbated if there is network-based price discrimination. In any case, the DBA is not aware of undertakings using differentiated retail SMS rates in the Danish mobile market, although it also mentions that network-based price discrimination exists on the Danish market for mobile voice telephony and, therefore, in principle, it is not inconceivable that one could see it in the SMS market.

Given the nature of the underlying incentives, the DBA considers that these factors do not fully apply to the case where operators do not compete in the same retail market.

DBA's data evidence

In the DBA's view, the evidence submitted by the operators, both in the course of the market analysis and later, supports the theory about the underlying rationale for limiting the benefit of the regulated tariff to the operators competing on the same retail market. In particular, the DBA alleges that a large variation of prices for the termination of international SMS is observed, in contrast with the fact that operators competing on the Danish retail market have kept the wholesale market price at the same level since 2002.

The DBA claims that, while “Danish operators” charge each other regulated tariffs for SMS termination, when they enter into agreements with foreign MNOs, the most widespread form of agreement is bill-and-keep (B&K). Generally these agreements are made when the traffic volumes between operators are small and symmetric. On the contrary, when SMS traffic volumes are higher and unbalanced, interworking agreements (IW) are stipulated among “Danish” and “foreign” undertakings. In the course of the current notification the DBA provided to the Commission data on the number of B&K and IW agreements between “Danish” and “foreign” operators. According to the Commission such data failed to prove the DBA’s conclusions as it showed that there are no B&K agreements concluded by the mobile operators in Denmark with other EU operators. In addition, the Commission points out that the maximum termination rate for an international SMS is up to three times higher than the termination rate for a national SMS, absent regulation. Moreover the Commission noticed that no information was provided on the volumes of SMS exchanged under each type of agreement, which would be the relevant information to assess whether the absence of regulation of termination of foreign originated SMS would lead to an indirect discrimination.

Further data provided by the DBA to the EWG showed that interworking agreements with European MNOs were an important proportion of the overall agreements and that the price for terminating a foreign SMS can be up to three times higher than the termination tariff for a national SMS. In any case, there are B&K agreements between “Danish” and “foreign” operators, although the BEREC notes that the proportion within the EEA/EU is lower than the figure mentioned by the DBA in its market analysis (which is 80% - 95%) for the whole of the agreements between “Danish” and “foreign” operators.

In addition, the data provided by the DBA show that the balance between outgoing and incoming SMS from other European operators, within the IW agreements, is typically to the favor of the international operators which should confirm the DBA’s statement according to which when SMS traffic volumes are higher and unbalanced, interworking agreements (IW) are stipulated among “Danish” and “foreign” undertakings. Therefore it is likely that foreign operators have a stronger incentive than “Danish operators” to set high termination rates.

In what follows, the BEREC critically assesses the DBA’s economic reasoning and whether the economic evidence provided by the DBA in this regard supports its reasoning.

BEREC assessment of DBA’s economic reasoning

The presence of unbalanced traffic flows, according to the DBA, is a factor that does not justify a difference of treatment between operators which compete at the same retail level and those which do not. Indeed, if one assumes reciprocal termination rate agreements, the BEREC shares this understanding and notes that, on a general level, any operator who

benefits (suffers) from a net inflow (outflow) of traffic will gain from agreeing on higher (lower) termination rates, irrespective of its relative size and of whether it competes or not in the same retail market. The situation where there are unbalanced traffic flows, therefore, does not render a difference between operators competing at the same retail market and those which do not.

The second factor (possible collusive incentives stemming from high termination rates), is an argument which can be found in the early literature regarding mobile termination rates, where it has been shown that, under certain assumptions, a collusive behaviour between two firms will be more likely (and stable) in the presence of high termination rates. This happens because firms would have less to gain from breaking a collusive agreement and unilaterally setting lower retail prices, as this would generate a larger outflow of off-net traffic, which is charged at a high termination rate.⁸

The BEREC notices, however, that different results emerge in the literature when some of the assumptions of the underlying model are changed and that therefore from a purely theoretical point of view, it is not altogether clear whether high termination rates will result in a *significantly* higher probability of collusion taking place when operators which reciprocally buy wholesale termination also compete at the retail level.

Hence, the BEREC believes that the fact that there could be possible collusive incentive among undertakings does not seem to be sound enough to justify a difference of treatment among operators according to whether they compete or not at the retail level.

With regards to the third factor, the BEREC acknowledges that, even in the absence of on-net/off-net retail price discrimination, a small operator or a new entrant may be inhibited or even prevented from competing in the presence of high termination rates, as these will push up average cost per SMS. Market research data and econometric estimates point to the fact that smaller operators may in fact need to lower retail prices in order to gain market share, but this will very likely cause traffic to become unbalanced. With high termination rates and a high average cost per SMS, this strategy may prove very difficult or even altogether impossible, thereby severely reducing the capacity of the smaller operator to compete, especially if it has not the means to endure through the time period (and the uncertainty) inherent to the process of lower prices translating into a higher market share and balance to be eventually restored. If there is discrimination of on-net and off-net prices, in the presence of termination rates significantly above costs, the competitive disadvantage of the small operator is further enhanced.

In any case, the DBA claims that it is not aware of undertakings using differentiated SMS price in the Danish mobile market and the fact that it renders a difference according to

⁸ Armstrong, M., 1998. "Network interconnection in telecommunications", *Economic Journal*, 108: 545–64

whether operators compete or not at the retail level, so this may not be a significant issue in Denmark. Even if the BEREC acknowledges the importance of this issue (namely, the perverse effects inherent in the dynamic of competition between operators which compete at the retail level), there is another related relevant aspect, not mentioned by the DBA: pan-European operators present in the Danish retail market (in this case Lycamobile itself, Telia Sonera, Telenor and Hi3G), also competing at the retail level with the “Danish operators”, may have an incentive to charge higher international SMS termination rates in order to diminish other rival pan-European operator’s profits or to raise their rival’s international SMS prices, if they also compete with them on another foreign retail market. In this case, the same reasoning presented beforehand for operators competing in the same retail market may apply.

Furthermore, it should be noticed that the difference of treatment cannot be justified by a difference regarding the technical aspects or the cost of SMS termination which is similar, if not identical, in the case of an SMS originating in Denmark or in another Member State.

Finally it should be noted that as Lycamobile, in the relevant market, totally controls access to its users⁹, it has a stronger position in determining the SMS termination conditions for every client, irrespective of whether the client competes or not in the Danish retail market. In other words, the competitive bottleneck that Lycamobile’s wholesale clients face is, in the BEREC’s view, in essence the same irrespective of whether the client is “Danish” or “foreign”.

In light of the above, the BEREC acknowledges that, under certain assumptions, the incentives for collusion will apply only to operators which compete at the same retail level and also that smaller operators which compete at the retail level will tend to be further harmed by high termination rates. However, the BEREC believes that the former factor will not be so pressing as to render a difference of treatment. Moreover, with regards to the latter, the BEREC notes that the most serious case (on-net / off-net price discrimination) seems not to be present in Denmark. In addition, the existence of pan-European operators in Denmark may introduce further room for strategic behaviour between operators in the Danish retail market and elsewhere.

All in all, the BEREC considers that the competitive distortion is based on a bottleneck which is in essence the same irrespective of nature of the operator which seeks to buy

⁹ The nature of the MVNO agreement between Lycamobile and TDC was not very clear to the EWG, particularly as far as Lycamobile’s capacity of independently negotiating SMS termination rates is concerned. In particular, it has been noted that the hosting operator, TDC, levies the termination charges for SMS that are terminated on Lycamobile’s network. This also applies to international SMS, which implies that the agreements among Lycamobile and operators in other Member States are similar to the ones TDC has set.

termination of SMS from an operator in Denmark. Therefore the BEREC concludes that operators which do not compete at the retail level should not be in essence treated differently from those which do.

BEREC assessment of DBA's data evidence

The BEREC assess whether the DBA provided enough evidence to support its conclusion that the “Danish operators” have a more dynamic pricing policy towards operators with whom there is no competition at the retail level. Data hints that, as soon as traffic becomes meaningful, operators resort to interworking agreements, possibly pointing towards the situation described in the section of economic principles of this document with regards to operators with asymmetric traffic flows. Prices in these agreements are significantly higher than regulated prices, therefore showing little effective dynamic and in fact evidence of excessive pricing.

The BEREC agrees with the Commission on the fact that what matters in this case is not the type or the number of agreement in place, but rather the volumes of SMS exchanged under each type of agreement among Lycamobile and other operators, but the DBA did not provide this kind of data.

It should be also noted that the evidence provided by the DBA to the Commission does not regard Lycamobile network but refers to other “Danish MNOs”. Thus the evidence is not based directly on the relevant market circumstances.

In light of the above, the BEREC concludes that the evidence provided by the DBA is not strong enough to support its conclusion that the “Danish MNOs” have a more dynamic pricing policy towards operators with whom there is no competition at the retail level.

Nevertheless, data provided does not allow to conclude whether this insufficient competition dynamics is induced mostly by Danish market operators or by foreign market operators. Economic theory combined with the existence of aggregated imbalanced traffic in favor of foreign market operators would tend to suggest that, in this case, it might go against the interests of Danish market operators to maintain high termination rates. Further data on individual contracts would be needed to assess this.

In conclusion, the BEREC takes the view that the assessment of the economic reasoning of the DBA, in conjunction with the data evidence provided, do not allow to agree with the DBA on the fact that the circumstance of competing with Lycamobile in the retail market can be considered as the objective criterion justifying different regulatory conditions for operators willing to terminate in the Lycamobile network SMS originated in their network.

BEREC assessment of the alleged infringement of the non-discrimination principle

In the previous paragraph, the BEREC agreed with the Commission on the fact that there are not relevant competitive differences among operators competing or not competing with Lycamobile in the Danish retail market. The absence of such differences would, *per se*, lead to the conclusion that the non-discrimination principle is violated. However, the BEREC reckons a more thorough legal analysis is required before reaching such conclusion.

Non-discrimination is a general principle of EU Treaty, mandating equal treatment of similar situations. The same principle is further provided for both in the Framework Directive and in the Access Directive. It does not prevent to treat differently undertakings that are in objectively different situation in terms, for example, of generated volume or in terms of cost differences in providing services.¹⁰

The similar circumstances which underlay the equal treatment should be strictly objective, thus avoiding discriminating nature. In particular it is not allowed to base the circumstances on nationality or the fact that the undertaking is established in a Member State other than that in which the service is to be provided.¹¹ According to the European Court of Justice Article 56 of the TFEU requires not only the elimination of all discrimination against a person providing services on the grounds of his nationality, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services. The freedom to provide services may be limited only by provisions which are justified by imperative reasons relating to the public interest and which apply to all persons or undertakings pursuing an activity in the State of destination, in so far as that interest is not protected by the rules to which the person providing the services is subject in the Member State in which he is established. In particular, those requirements must be objectively necessary in order to ensure compliance with professional rules and to guarantee the protection of the recipient of services and they must not exceed what is necessary to attain those objectives.¹² In several cases, the European Court of Justice has held that the protection of a specific economic sector cannot, by itself, constitute an imperative reason of

¹⁰ However, it should be noted that, in this case, the differentiation is not based on the nationality of the operator, as an operator established in another Member State that would enter the Danish market and exchange SMS sent by Danish customers would get access to regulated SMS termination rate (and normally be regulated for his own SMS termination service).

¹¹ Case 279/80 Webb [1981] ECR 3305, paragraph 14.

¹² Case C-76/90 Säger v Dennekemeyer [1991] ECR I-4221, paragraph 13 and 15.

public interest¹³. The Court has also held that consumer protection could constitute an imperative reason of public interest under article 56 of the TFEU.^{14, 15}

The NRAs should be able to prove that the circumstances by which they regard the undertakings are objective, namely they result from applying the same transparent criteria based on empirically verifiable evidence. The criteria should be sufficiently distinctive to ensure clear demarcation between undertakings being subject to (or affected by) the different regulation. It implies that the alleged differences should be explicitly stronger than the similarities.

In the case in question the DBA found the circumstance of competing with Lycamobile (and other “Danish operators”) in the retail market being the objective criterion of differentiation of the regulation conditions for telecommunications operators willing to terminate in the Lycamobile network SMS originated in theirs network.

The BEREC takes the view that both operators competing and not competing at the retail level are considerably in the same position and encounter the same problems willing to terminate SMS in Lycamobile network. Thus the BEREC believes that there are more similarities between all operators terminating SMS in Lycamobile than any sufficiently distinctive differences. Therefore no objective difference of situations between the two categories of operators can justify a difference of treatment regarding the scope of the price control obligation that would be imposed to Lycamobile.

3.2.2 Infringement of Article 8(4) of the Access Directive

Concerns of the Commission

The Commission points out that the remedies imposed under Article 16 of the Framework Directive in conjunction with Article 8 (4) of the Access Directive must be based on the nature of the competition problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive.

The Commission stated serious doubts that a mobile operator would not charge higher prices for its SMS termination service to foreign operators, that therefore a competition problem that should be addressed by an appropriate remedy, such as the imposition of price

¹³ SETTG v. Ypourgos Ergasias, 5 june 1997, C-398/95.

¹⁴ See e.g. the judgement of 4 December 1986, Commission v French Republic, C- 220/83.

¹⁵ It cannot be excluded that the Danish authorities would invoke such imperatives reasons related to public interest (such as consumer protection) in the frame of an infringement procedure in order to justify the limitation of the scope of the price control obligation. However, it is not for BEREC to assess whether such justification could be admitted, and if this limitation could be regarded as necessary and proportionate to reach those objectives.

control, does not exist. In fact, the Commission highlights that every SMS termination market is likely to be characterized by similar competition problems.

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Article 8 (4) of the Access Directive provides that obligations imposed shall be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 7 of Framework Directive.

According to Article 5(2) of the Access Directive, obligations and conditions imposed after the market analysis must be transparent, proportionate and non-discriminatory, and shall be implemented in accordance with the procedures referred to in Articles 6, 7 and 7a of Framework Directive.

Moreover, Commission Recommendation C(2007) 5406 states that regulatory obligations must be appropriate and be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Framework Directive.

In light of the above, the BEREC maintains that the differentiated pricing obligation imposed by the DBA fails to be appropriate and based on the nature of the problem identified as it assumes the existence of different competitive conditions which are neither justified by economic theory nor demonstrated by data evidence.

The BEREC therefore concludes that the Commission's serious doubts about the infringement of Article 8 (4) of the Access Directive are justified.

3.2.3 Infringement of Article 8(5) (c) of the Framework Directive

Concerns of the Commission

Article 8(5) (c) of the Framework Directive requires NRAs to safeguard competition to the benefit of consumers. The Commission takes the view that the draft measure is not compatible with EU law. Absent price regulation, a mobile operator would not be prevented from charging excessively high prices vis-à-vis foreign operators. Such prices would be detrimental to end users in Denmark as well as in other Member States, as the operators will most likely pass-on the increased costs to end-users, which will have to pay a higher retail price for cross-border SMS.

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According to Article 8(5) (c) to the Framework Directive, the NRAs shall apply objective, transparent, non-discriminatory and proportionate regulatory principles by safeguarding competition to the benefit of consumers and promoting, where appropriate, infrastructure-based competition.

As one of the main regulatory goal provided for by the Framework is to maximize consumer benefits, the BEREC believes that the notified measure may prevent to reach such goal in the sense that it would probably result in foreign operators passing on increased termination charges to their end users' retail tariffs.

The BEREC therefore concludes that the Commission's serious doubts about the infringement of Article 8 (5) (c) of the Framework Directive are justified.

3.2.4 Draft measure would create a barrier to the single market

Concerns of the Commission

The Commission notes that Article 56 of the TFEU opposes the implementation of national regulatory measures that may have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State. In the context of the regulatory framework, the Commission further notes that Article 8(5) (b) of the Framework Directive imposes an obligation on NRAs to apply, *inter alia*, non-discriminatory regulatory principles to ensure that there is no discrimination in the treatment of operators in similar circumstances. Finally, the Commission reminds that Article 8(3) of the Framework Directive obliges the NRAs to contribute to the development of the internal market.

According to the Commission, the proposed draft measure may have an influence on the pattern of trade between Member States in a manner which might create a barrier to the internal market. In fact only "Danish operators" will be able to benefit from the regulated tariff, whereas a higher (commercial) tariff is likely to be charged to foreign operators. The Commission takes the view that the proposed partial regulation of SMS termination may increase the costs and lower the ability of operators established in Member States other than Denmark to provide electronic communication services in Denmark. The Commission believes that measure in question would create a barrier to the single market.

BEREC Opinion

Draft measure would create a barrier to the single market.

Article 18 TFEU prohibits discrimination on grounds of nationality within the scope of application of the TFEU. Although Article 18 is directly effective in its own right, there are other provisions of the TFEU supplementing the principle of non-discrimination on grounds of nationality, mainly related to aspects of the free movements of goods, services, persons and capital. These more detailed provisions contribute to the attainment of the internal market described in Article 26 as "*an area without internal frontiers*".

Focusing on service provision, Article 56 and 57 TFEU require that limits on the freedom to provide and receive services in other member States, or originating from other Member States, shall be abolished.

In particular, Article 57 states that the freedom to provide services involves the right of a service provider to “*temporarily pursue his activities in the State where the service is provided under the same conditions as are imposed by the State on its own nationals*”.

In the context of electronic communication services, the same principle is provided for also by the Framework Directive. Indeed, according to Article 8 (3) (a) of the Framework Directive, the NRAs shall contribute to the development of the internal market by, *inter alia*, removing remaining obstacles to the provision of electronic communications networks, associated facilities and services and electronic communications services at European level. Furthermore, according to Article 8 (3) (b) NRAs shall encourage the establishment and development of trans-European networks, the interoperability of pan-European services and end-to-end connectivity. Pursuant Article 8 (5) (b), NRAs shall impose transparent, non-discriminatory and proportionate regulatory principles by, *inter alia*, ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks and services.

The regulation applied by the NRAs should therefore support the development of the internal market in a way it would prevent unequal treatment in similar circumstances. In the similar circumstances all undertakings providing telecommunications services in Member States should be treated equally by the measures imposed by the NRAs. Above does not imply that the undertakings should be treated absolutely the same. Article 8 arises implicitly that the undertakings can be regarded differently, if there are also different circumstances subject to the regulation.

Based on the assessment included in the preceding sections, the BEREC reckons that the preconditions for different treatment are not met in the analyzed case. In effect, even if the differentiation of prices is not based on nationality, the Danish draft measure would result in discriminating against operators and consumers in other Member States, would place a barrier to the provision of electronic communications networks and services at the European level, and would also hinder both the emergence of new and the prospects of existing pan-European operators. Therefore the BEREC concludes that Commission’s serious doubts about the creation of a barrier to the single market are justified.

4. FINAL CONSIDERATIONS

On the basis of the economic analysis set out in section 3 above, the BEREC considers that the Commission's serious doubts regarding the draft decision of the Danish regulator on the wholesale SMS termination on Lycamobile's individual mobile network - as expressed in the EC's letter to the DBA of 13 February 2012 - are justified.

In particular, according to the BEREC the DBA did not provide an economic reasoning and data evidence sound enough to demonstrate that the circumstance of competing with Lycamobile in the retail market can be considered as the objective criterion justifying different regulatory conditions for operators willing to terminate in the Lycamobile network SMS originated in their network. Therefore the BEREC believes that the limitation on the scope of the price control obligation may violate the non-discrimination principle and create a barrier to the single market.

As to whether the BEREC considers that the draft measures should be amended or withdrawn, the BEREC takes the view that the draft measure should be amended so as not exclude international SMS from the scope of the price control obligation.

For the analyzed case, where the NRA has considered the three cumulative criteria for the ex-ante regulation of SMS termination are met, BEREC notes also that, even if, absent regulation, the competitive conditions are the same regardless whether operators compete or do not compete at the retail level, unilateral regulation by one particular Member State may result in a considerable loss of bargaining power by national undertakings on their interconnection negotiations with unregulated foreign operators, if reciprocal termination rates among countries are not in some way guaranteed. This loss of bargaining power is likely to occur because national undertakings would be forced to charge regulated prices, but no such obligation would be met on the side of the foreign operator. This one-way regulation applied only to "Danish operators" would result in asymmetric rates, allowing the "free to price" operator to set his termination rate at a higher level than the regulated Danish one resulting in severe competitive distortions, hence proving to be disproportionate and discriminatory and goes against the objectives of symmetry of termination rates regulation¹⁶. Not only national undertakings might incur financial losses as a result of this,

¹⁶ As mentioned by the Commission in its Recommendation C (2009) 3359 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU and common position of ERG (07) 83 on symmetry of fixed call termination rates and symmetry of mobile call termination rates

but also national consumers, *vis-a-vis* the consumers from other Member States, could be harmed in regards to the retail price of cross-border SMS messages.¹⁷

Moreover, the BEREC further notes that it has to be taken into account that if the DBA modifies the decision in line with EC's doubts the result is that Lycamobile is going to be worse-off *vis-a-vis* the Danish MNOs, as the latter are regulated by a price control obligation which does not apply towards foreign operators. This in turn would result in a similar situation being treated differently.

In conclusion, according to Article 7a of the Framework Directive, if the DBA decides to maintain the notified draft measure, the Commission may either issue a recommendation requiring the DBA to amend or withdraw the draft measures within one month following the end of the three months period under Article 7a (1), or take a decision to lift its reservations. In the meantime, the BEREC intends to cooperate closely with the DBA and the Commission, in accordance with Articles 7a (2) and 7a (4) of the Framework Directive, to identify the most appropriate and effective way forward to address the competition problem identified regarding the asymmetrical regulation of international SMS in the follow of the procedure but also, in the BEREC work program 2012. BEREC notes that similar cases are likely to arise in the future in other Member States, and that an effective resolution to this case that reduces the likelihood of similar cases arising in the future would therefore be welcomed.

¹⁷ However both the significance of these losses and their negative influence on the consumers need to be assessed and may vary depending on various factors.