

**BEREC Opinion on**

**Phase II investigation**

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

**Case DE/2014/1605**

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

**24 July 2014**

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## 1. EXECUTIVE SUMMARY

On 20 May 2014, the Commission registered a notification 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 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 GmbH (sipgate) the maximum rates for mobile call termination (MTR), resulting from the application of the previously adopted national benchmarking measure<sup>1</sup>, as well as the obligation to grant collocation. The proposed MTR is 1.79 €ct for the period 3 February – 30 November 2014.

As a result of the proposed measure, the MTR under the present notification, whilst being symmetrical, will effectively rely on the same LRAIC+ methodology used for setting the MTRs of other SMP-operators on the relevant markets previously notified<sup>2</sup> to the Commission.

Since the current notification is closely related to previous notifications of market 7 (cases DE/2013/1424 and DE/2013/1527), it has to be reiterated that, on two previous occasions, 28 February 2013<sup>3</sup> and 28 November 2013<sup>4</sup>, 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 opinions, referring to Case DE/2013/1424 and Case DE/2013/1527, 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. As a result of BNetzA's LRAIC+ methodology, MTRs in Germany are, without valid justification, approximately twice<sup>5</sup> as high as the average MTRs from other countries that have set tariffs based on the recommended pure LRIC approach. Furthermore, BEREC has recommended on both occasions that BNetzA should set the MTRs of the operators designated as having SMP in the markets 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 and on 4 April 2014, the Commission issued two distinct 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 and 11 April 2014, BNetzA adopted its final measures in cases DE/2013/1424 and DE/2013/1527 respectively without amending the proposals as requested by the Commission and recommended by BEREC.

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<sup>1</sup> Case DE/2013/1527, C(2013) 8634.

<sup>2</sup> Case DE/2013/1424, C(2013) 1266 and case DE/2013/1503, C(2013) 6942.

<sup>3</sup> *ibidem* footnote 2.

<sup>4</sup> *ibidem* footnote 1.

<sup>5</sup> Either considering the Commission's reference and examples to the 5 most populous Member States (leaving aside Germany itself) which are all applying a pure BU-LRIC rate, or by considering the (simple or weighted) average of all pure BU-LRIC cost model results employed in all BEREC countries as of January 2014, as per BoR (14) 57.

The Commission recognised that NRAs can deviate<sup>6</sup> from the Termination Rates Recommendation<sup>7</sup> (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 compelling economic reasons to show that the LRAIC+ methodology would be better suited to promote efficiency and sustainable competition and to maximise consumer benefit in the German market.

In the present case, BEREC appreciates that symmetry is implemented. Nevertheless, analogous to the previous cases, DE/2013/1424 and DE/2013/1527, BEREC also considers for the present case that the Commission's serious doubts are justified in that (i) BNetzA's proposed 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 why this decision, when read with the previous decision to set MTRs at LR(A)IC+ or KEL<sup>8</sup>, would be better suited to meet the policy objectives of promoting efficiency and sustainable competition and maximize consumer benefits than 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>9</sup>, and Article 3(1a) of the BEREC Regulation<sup>10</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 20 May 2014, the Commission registered a notification from the German national regulatory authority, BNetzA, concerning the market for wholesale voice call termination on individual

<sup>6</sup> See Framework Directive and in particular Article 19(2) thereof.

<sup>7</sup> C(2009) 3359 final: COMMISSION RECOMMENDATION of 7.5.2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU.

<sup>8</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. BNetzA also uses the acronym KeL (Kosten der effizienten Leistungsbereitstellung) with the same meaning.

<sup>9</sup> Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services.

<sup>10</sup> Regulation (EC) 1211/2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office.

mobile networks in Germany (corresponding to market 7 in Commission Recommendation 2007/879/EC of 17 December 2007).

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 19 June 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.

The EWG met on 2 July 2014 in Bucharest and had a conference call with BNetzA. On the basis of the information supplied by BNetzA, it was agreed that all the issues on the chosen methodology, the economic analyses, the evidence provided and the impact analysis were already provided in the previous cases DE/2013/1424 and DE/2013/1527. On this basis BNetzA referred the EWG to the answers already provided in the previous cases. In addition, BNetzA has also expressed the view that such issues were no longer relevant as the current notification was only proposing the application of a benchmark (symmetry) and did not cover the underlying costing method, upon which decisions have been made on previous occasions.

A draft opinion was finalized on 17 July 2014 and a final opinion was presented and adopted by a majority of the BEREC Board of Regulators on 24 July 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>11</sup>. At that 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>12</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>13</sup>, namely

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<sup>11</sup> Case DE/2011/1274, C(2011) 10077.

<sup>12</sup> The geographic scope of each market coincides with the geographic coverage of the network concerned and is determined as national.

<sup>13</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.

Vistream GmbH (Vistream), Ring Mobilfunk (Ring)<sup>14</sup>, Lycamobile Germany GmbH (Lycamobile) and OnePhone Deutschland GmbH (OnePhone)<sup>15</sup>.

Furthermore, BNetzA notified in January 2013<sup>16</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>17</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 16 September 2013 BNetzA notified an additional market for voice call termination on the network of sipgate Wireless GmbH (sipgate)<sup>18</sup>. Subsequently on 6 November 2013, BNetzA notified a draft measure imposing on sipgate the full set of remedies, including *inter alia* an obligation to offer mobile call termination at cost oriented prices. Although it did not notify any proposed MTR level, BNetzA indicated at the time symmetrical rates are envisaged, benchmarked against the same LRAIC+ methodology employed for the other SMP operators.

### **Current notification**

The notified draft measures concern, *inter alia*, the MTRs to be applied by sipgate, namely 1.79 €/ct/min for the period 3 February – 30 November 2014. The figure relies on the LRAIC+ methodology employed for other SMP operators.

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<sup>14</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>15</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.

<sup>16</sup> Case DE/2013/1424.

<sup>17</sup> BoR (13) 47.

<sup>18</sup> Case DE/2013/1503, C(2013) 6942.

While 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.

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

The Commission in its letter C(2014) 4291 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 and DE/2013/1527.

Namely, the Commission refers to Articles 8(4) and 13(2) of the Access Directive<sup>19</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 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 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.

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<sup>19</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).

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 MTRs 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 States from which the call originates and that do apply fully cost-oriented<sup>20</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 MTRs 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 MTRs 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 MTRs 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>20</sup> Mentioning the 5 most populous Member States (leaving aside Germany itself) which are all applying a pure LRIC rate, the Commission gives the following examples: 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 doubts letters in cases DE/2013/1424 and DE/2013/1527. While DE/2013/1424 was the leading case for all 4 German MNOs and the MVNOs Lycamobile, Vistream and Ring, DE/2013/1527 specified the remedies for an additional MVNO (sipgate), but did not determine the actual MTR level.

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 cases<sup>21</sup>. Second, in the case DE/2013/1527 no rates have been set, although the principle of national benchmarking<sup>22</sup> on a LRAIC+ based price has already been envisaged.

The current case *inter alia* 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. Therefore, the present notification does not go into detail on the arguments provided in the previous M(V)NO reference cases. The link between the three cases is the requirement of symmetry on which BNetzA states in section 4.1.1., that

*“The reason for the regulatory prioritisation of benchmarking is, that this method allows the application of the access fees for the respective mobile host network to MVNOs. This approach ensures the achievement of symmetrical KeL charges. In comparison, more laborious approaches to calculate charges on the basis of cost information and/or according to para. 2 sec. 2 of the Termination Recommendation by means of an analytical cost model, must come secondary to the adopted procedure.”*<sup>23</sup> (Translation courtesy of the BEREC EWG).

BEREC supports the use of a national benchmarking approach by BNetzA to regulate sipgate MTRs because of the benefits associated with the implementation of symmetry in line with recommend (1) of the TR Recommendation, and not because of the laboriousness of other methods. A different treatment for MVNOs (as compared with established market players) could lead to arbitrage and economic distortions. Hence, it is BEREC's opinion that, upon determining the value of rates, maintenance of symmetry with the established market players is crucial.

<sup>21</sup> On the "competition of [regulatory] systems" ("Wettbewerb der Systeme").

<sup>22</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>23</sup> Original text in German: „Grund für die verfügte vorrangige Verwendung der Vergleichsmarktmethode ist, dass diese Methode es erlaubt, die insbesondere für das jeweilige Mobilfunk-Wirtnetz geltenden Zugangsentgelte auf den MVNO-Bereich zu übertragen. Dieses Vorgehen sichert das Erreichen symmetrischer KeL-Entgelte. Als demgegenüber aufwändigere Methoden müssen Entgeltermittlungen anhand von Kosteninformationen und/oder gemäß Nr. 2 Halbs. 2 Terminierungsempfehlung mittels eines analytischen Kostenmodells hinter die verfügte Vorgehensweise zurücktreten“.

However, since any benchmark is performed against an underlying (set of) reference(s), the application of the benchmark produces effects not in itself, but by virtue of the underlying benchmarked references to a certain costing methodology. Therefore, the application of the benchmark cannot be dissociated from the references upon which the benchmark is built.

In the current case, BNetzA's national benchmark effectively takes as reference LRAIC+ /KeL costs (instead of pure BU-LRIC ones) and in this sense it deviates, without valid justification, from a core part of the TR Recommendation. This, and the related consequences, represent the core of the critique from the European Commission expressed in its serious doubts letter, and it is these concerns on which BEREC fully agrees with the European Commission. BEREC is of the opinion that implementing symmetry while bringing the costing methodology in line with the TR Recommendation (i.e. pure LRIC), simultaneously for all market participants, would have presented the least risk for unjustified market distortion.

Given the anchor of symmetric termination rates via national benchmarking, all the other criticisms put forward by BEREC on case DE/2013/1424,<sup>24</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 analysis 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, for example what a competitive outcome would look like, the need to reflect on external effects, recovery gap.
- Competition issues, for example 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.
- Negative impacts which the regulation would have in creating barriers to the internal market.

As a result of BNetzA's LRAIC+ methodology, MTRs in Germany are, without valid justification, approximately twice<sup>25</sup> as high as the average MTRs from other countries that have set tariffs based on the recommended pure LRIC approach.

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<sup>24</sup> BoR (13) 47 - 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.

<sup>25</sup> See footnote 5

BEREC has already raised all the concerns above in case DE/2013/1424 and has reiterated them in case DE/2013/1527. These concerns are fully supported by BEREC also in this case, and hence all relevant conclusions on case DE/2013/1424 and DE/2013/1527 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, appreciating that symmetry is implemented, considers nevertheless that the Commission's serious doubts are justified in that (i) BNetzA's proposed 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 why this decision, when read with the previous decision to set MTRs at LRAIC+, would be better suited to meet the policy objectives of promoting efficiency and sustainable competition and maximize consumer benefits, than 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 pure-LRIC model and/or by benchmarking pure-LRIC model results) and BNetzA deviates from that methodology without valid justification.

Given the importance of ensuring MTRs are both symmetric between market players and reflective of the pure BU-LRIC costs of an efficient operator, 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.