



EUROPEAN COMMISSION

Brussels, 4/11/2011
C(2011)8073

SG-Greffe (2011) D/18688

Urząd Komunikacji Elektronicznej

ul. Kasprzaka 18/20
01-211 Warsaw
Poland

For the attention of:
Ms Anna Strezynska
President

Fax : + 48 22 53 49 253

Dear Ms Strezynska,

Subject: Commission decision concerning cases PL/2011/1255-1258: Voice call termination on individual mobile networks of Polska Telefonia Cyfrowa Sp. z o.o., P4 Sp. z o.o., Polkomtel S.A. and Polska Telefonia Komórkowa Sp. z o.o. in Poland

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

I. PROCEDURE

On 4 October 2011 the Commission registered notifications by the Polish National Regulatory Authority, Prezes Urzędu Komunikacji Elektronicznej (UKE), concerning the wholesale markets for voice call termination on individual mobile networks of Polska Telefonia Cyfrowa Sp. z o.o., P4 Sp. z o.o., Polkomtel S.A. and Polska Telefonia Komórkowa Sp. z o.o. under case numbers PL/2011/1255, PL/2011/1256, PL/2011/1257 and PL/2011/1258 respectively.

The national consultations¹ ran from 12 August 2011 to 12 September 2011. The deadline for the EU consultations is 4 November 2011.

A request for information was sent to UKE on 11 October 2011 and the reply was

¹ In accordance with Article 6 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC (Better Regulation Directive), OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12 (Framework Directive).

received on 19 October 2011.

On 24 October 2011 the Commission services held a conference with UKE's services.

Pursuant to Article 7a(1) of the Framework Directive, the Commission may notify the national regulatory authority (NRA) and BEREC of its reasons that the draft measure would create a barrier to the single market or its serious doubts as to its compatibility with EU law.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Previous notifications

In its previous market reviews (case number PL/2009/0904) UKE proposed to designate the three MNOs Polkomtel SA (Polkomtel), Polska Telefonia Cyfrowa Sp. z o.o. (PTC) and Polska Telefonia Komórkowa Sp. z o.o. (PTK) as having significant market power on their respective networks. For all three operators UKE proposed obligations of transparency, non-discrimination, access, and price control (based on costs incurred).

The first review of the market for voice call termination on P4's mobile network was notified to the Commission under case number PL/2008/0794. In this case UKE proposed to impose on P4 the obligations of access, non-discrimination, transparency, and non-excessive pricing.

Under case PL/2011/1195, assessed by the Commission between 3 March and 4 April 2011, UKE notified its draft measures concerning the details of the price control obligation imposed on Polkomtel, PTC, and PTK. UKE proposed to set symmetrical termination rates of 0.966 PLN/min (around 0.025 EUR) for the three SMP operators. This decision was, however, never adopted. Instead, under case number PL/2011/1204 UKE consulted a new draft measure concerning voluntary commitments by four² MNOs to invest in areas with no or limited coverage (white spots) in exchange for less steep glide paths for MTRs. In its comments the Commission pointed out³ that the proposed measures were not in line with Article 8(4) of the Access Directive, namely that they were neither based on the nature of the problem identified nor proportionate and justified.⁴ Moreover, the Commission pointed out that the proposed measure does not take into account the Termination Rates Recommendation, which states that MTRs should be oriented towards the cost of an efficient operator. The latter decision, despite negative comments from the Commission, was adopted.

II.2. Market definition

The notified draft measures concern the third review of the wholesale markets for voice call termination on individual mobile networks. UKE considers that the provision of wholesale voice call termination by MNOs, regardless of the origination of the call (fixed

² Polkomtel, PTC, PTK, and P4.

³ Those measures were notified under the "old" Framework where the Commission's powers with regard to remedies were limited to comments.

⁴ The problem identified by UKE related to a SMP position and excessive prices for mobile termination, whereas according to UKE the remedy was devised to resolve another unrelated problem of insufficient mobile network coverage.

or mobile)⁵, belongs to the relevant product market.

UKE analyses the provision of the services in question by four established⁶ MNOs and, accordingly, identifies four relevant markets:

- (1) wholesale voice call termination provided by Polkomtel S.A.,
- (2) wholesale voice call termination provided by Polska Telefonia Cyfrowa Sp. z o.o.,
- (3) wholesale voice call termination provided by Polska Telefonia Komórkowa Sp. z o.o.
- (4) wholesale voice call termination provided by P4 Sp. z o.o.

Regarding the geographic scope of the markets, UKE considers that the area covered by each mobile network constitutes a separate relevant market.

II.3. Finding of significant market power (SMP)

UKE concludes that each of the MNOs should be designated as having SMP in its respective market.

The criteria considered by UKE when reaching its conclusion are: market shares⁷, control of infrastructure difficult to duplicate, technological advantage, absence of or low countervailing buying power, easy or privileged access to capital markets/financial resources, economies of scale and of scope, vertical integration, developed distribution and sales network, absence of potential competition as well as barriers to entry.

II.4. Regulatory Remedies

UKE proposes to maintain the following obligations previously imposed on the three largest SMP operators⁸: (i) non-discrimination, (ii) transparency and (iii) price control (based on costs incurred until 31 December 2012). UKE proposes to introduce only minor amendments with regard to the access obligation.

As far as P4 is concerned, UKE maintains the previously imposed obligations of (i) non-discrimination and (ii) price control (i.e. prohibition to charge excessive prices) which would be valid until the end of 2012. On top of that UKE proposes to introduce minor amendments to access and transparency obligations.

With regard to the termination rates after 31 December 2012, UKE proposes to impose on all four operators an obligation to set and apply prices resulting from a BU LRIC model built for an efficient operator. In addition, the SMP operators are required to submit to UKE, by 30 April 2012, data in electronic form, needed to create a profile of an efficient operator.

⁵ At the corresponding retail level UKE considered exclusively the calls originated in fixed (F2M) and in mobile (M2M) networks. In its reply to the request for information UKE confirmed that at the wholesale level all call termination services are included, irrespectively of the origination network (hence it includes the termination of calls originating from VoIP/VoB providers).

⁶ The first market review for new entrants i.e. the fourth MNO and the MVNO operator were notified to the Commission under cases PL/2008/0794 and PL/2008/0855.

⁷ Each operator has a monopoly position on its own network.

⁸ Polkomtel, PTC, and PTK

In its draft measure and response to the request for information UKE confirmed that it does not intend to further consult the rates resulting from the application of the BU LRIC model (i.e. the actual levels of MTRs). UKE explained that operators were informed about the new regulatory approach during dedicated workshops organized in May and June 2011 and that the proposals were formally consulted during national consultations.

Therefore UKE does not intend to adopt legally binding decisions setting MTRs resulting from the BU LRIC model. Instead, UKE will publish non-binding (recommended) levels of MTRs on its web site. UKE explained in its reply to the request for information that price setting in the form of a non-binding "statement" published on its website results from the provisions of the Polish legal system (without providing a specific reference). Further to that, UKE intends to leave the implementation of prices to the operators' individual interconnection agreements. Only if there is no agreement, then UKE intends to impose prices by way of individual dispute settlement decisions, but only after a 90 day period (prescribed by law for negotiations) has expired. UKE intends to consult at national and EU levels such dispute settlement decisions, prior to their adoption. Since 2009 alone UKE notified 21 draft measures concerning bilateral dispute settlement in the markets for mobile termination services.

III. ASSESSMENT

The Commission has examined the notifications and the additional information provided by UKE. UKE's draft measures concerning the markets for voice call termination on individual mobile networks fall within Article 7a(1) of the Framework Directive and would affect trade between Member States, because the conditions for the access to the abovementioned markets determine the costs and the ability of other operators and service providers (including those established in other Member States) dependent on those particular markets, to provide electronic communication services.

Draft measures imposing regulatory obligations on undertakings with SMP in Poland may have an influence, direct or indirect, actual or potential, on the ability of undertakings established in other Member States to offer electronic communication services. They comprise measures that have a significant impact on operators or users in other Member States, inter alia measures which affect prices for users. Consequently, such draft measures may affect the pattern of trade between Member States⁹.

The Commission considers that UKE's draft decisions concerning the markets for voice call termination on individual mobile networks in their current form, may create barriers to the single market. Moreover the Commission has serious doubts as to the compatibility of these draft measures with the EU law and in particular with the requirements referred to in Articles 16(4) and 16(6) in conjunction with Article 6 and 7 of the Framework Directive, Article 8(5) (a) of the Framework Directive, Article 4 of the Framework Directive.

The Commission expresses serious doubts in this regard for the following principal reasons:

Creation of barriers to the single market

The Commission considers that UKE's approach of not adopting legally binding,

⁹ See Recital 38 of the Framework Directive.

immediately enforceable measure(s) for SMP operators creates a significant barrier to the development of a single market for electronic communications services. Mobile termination services are an indispensable wholesale input for the provision of fixed and mobile telephony services. The Commission therefore believes that the lack of transparency on mobile termination markets in Poland may increase the costs and lower the ability of other operators and service providers (including those established in other Member States) to provide electronic communication services in Poland. The lack of legally binding MTRs would further unnecessarily enlarge intervention of public administration (in this case UKE), which will be resolving individual disputes at the expense of operators seeking access to mobile call termination services in Poland. Such operators would also be obliged to engage in time consuming negotiations concerning MTRs.

Infringement of Article 8(5) (a) of the Framework Directive; regulatory predictability

Under Article 8(5) (a) of the Framework Directive, NRAs should promote regulatory predictability.

UKE's approach not to formally impose MTRs, but to publish them on its website does not create regulatory predictability as it cannot be excluded that at least some operators, in the absence of a proper imposition of price control obligations, would voluntarily agree to charge prices higher than those merely "recommended" by UKE, without resorting to dispute settlements.

Moreover, the Commission is further of the view that UKE's proposal to regulate termination rates does not take full account of the Termination Rates Recommendation, i.e. that MTRs are implemented at cost-efficient, symmetric levels by 31 December 2012. Despite nominal imposition of a BU LRIC model, MNOs may face a lack of predictability concerning the exact levels of MTRs to be applied as of 1 January 2013. Operators are likely to charge higher and/or asymmetrical rates, instead of those resulting from a BU LRIC model. Against this background the Commission considers that a key objective of the Termination Rates Recommendation, i.e., symmetric, cost-efficient rates as of 1 January 2013, may not be attained.

Infringement of Article 16(4) of the Framework Directive; appropriateness of specific regulatory obligations

The Commission recalls that Article 16(4) of the Framework Directive requires the NRAs to impose on the SMP operators "appropriate specific regulatory obligations." The proposed price control, according to which MTRs will be published on UKE's website in the form of a non-binding "statement", is not imposed by way of regulatory measures and does not oblige the SMP operators to comply with such "recommended" prices in their interconnection agreements¹⁰. First, the mobile network operators will be free to negotiate and agree on prices significantly higher than UKE's non-binding

¹⁰ The Commission has already in the past criticised UKE's approach to set MTRs by way of publishing prices on its website and enforcing them by individual dispute settlements. In case PL-2011-1203 the Commission stated that in order to promote regulatory efficiency, transparency, certainty, and non-discrimination, UKE should avoid setting MTRs by way of a dispute settlement decision which regulates only the interconnection between two operators, while leaving the MTRs between other operators unregulated. In its comments letter the Commission had urged UKE to impose without delay regulatory measures which will formally impose mobile termination rates, and to notify such measures under Article 7 of the Framework Directive.

recommendations. Secondly, as already pointed out by the Commission in cases PL/2011/1206, PL/2011/1208, PL/2011/1209, PL/2011/1212, PL/2011/1215, PL/2011/1216 UKE's approach is likely to create disputes rather than avoiding them. It further requires unnecessarily frequent regulatory interventions and is, therefore, overly bureaucratic and leading to unjustified regulatory costs in Poland. The observed large numbers of dispute settlements concerning prices for regulated services which have to be resolved by UKE, confirm that in Poland operators are usually not able to agree to set prices on a voluntarily basis.

Further to that, in case UKE decides to impose MTRs by means of resolving individual disputes (implying their consultations at national and EU level), the Commission considers that this could in each case lead to the following delays:

- (i) 90 days required by the law for negotiations between operators;
- (ii) up to 4 months for resolving the dispute by UKE;
- (iii) a reasonable period for national consultation;
- (iv) one month for the consultation at EU level.

During this time the market would be characterised by a patchwork of different pricing schemes applied by various operators who normally should comply with the same symmetric pricing structure.

The Commission therefore considers that the proposed draft measure is not appropriate to resolve the identified competition problem of excessive MTRs.

Infringement of Article 16(6) in conjunction with Article 6 and 7 of the Framework Directive; imposition and consultation of specific regulatory obligations

The Commission considers that the setting of MTRs by means of a non-binding "statement" is not in line with the procedural requirements of Article 16(6) in conjunction with Articles 6 and 7 of the Framework Directive. According to Article 16(4) there is a clear requirement to impose appropriate specific regulatory obligations in the market determined as not effectively competitive, and where individual or joint SMP was identified. According to Article 16(6) of the Framework Directive such measures should only be imposed after having been duly consulted at national and EU levels in accordance with Articles 6 and 7. The Commission considers that Articles 6 and 7 apply since the imposition of detailed price remedies, including MTRs, is a measure which has a significant impact on the relevant market, and affects trade between Member States.

The only notification on the level of MTRs which would be carried out according to UKE would be the results of dispute settlements by the regulator. In cases where no dispute arises (i.e. MNOs would follow the non-binding price recommendation, or voluntarily agree on a different price level), the Commission, BEREC and other NRAs would not have the opportunity to make comments on the level of MTRs. Equally, such detailed price remedies would not be consulted at national level.

Infringement of Article 4 of the Framework Directive; appeals

As the level of MTRs will not be formally imposed as part of legally binding, immediately enforceable regulatory measures, the Commission believes that parties concerned will not be in a position to effectively challenge the level of MTRs in national courts, which is however a requirement under Article 4 of the Framework Directive, which calls for an effective appeal mechanism. The Commission understands that the only possibility for operators to contest the results of a BU LRIC model before the court

will be either at the stage of adoption of the currently notified draft measures (without any knowledge about the results of the model, i.e. the actual level of MTRs) or once UKE adopts individual dispute decisions concerning prices resulting from the model (if they arise). As a consequence those operators who would normally immediately comply with regulatory obligations formally imposed on them, while challenging them in court, may under the proposed regime choose to open dispute settlement procedures (delaying the price implementation) for the sole purpose to obtain a challengeable decision from UKE.

The above assessment reflects the Commission's preliminary position on this particular notification, and is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

The Commission points out that, in accordance with Article 7a of the Framework Directive, the draft measures regarding the market for voice call termination on individual mobile networks shall not be adopted for a further three months.

Pursuant to Point 17 of Recommendation 2008/850/EC¹¹, the Commission will publish this document on its website, together with a notice inviting third parties to submit observations on this serious doubts letter within ten working days. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission¹² within three working days following receipt whether you consider that, in accordance with Community and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication. You should give reasons for such request.

Yours faithfully,
For the Commission
Joaquín ALMUNIA
Vice-President of the Commission

¹¹ Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC, OJ L 301, 12.11.2008, p. 23.

¹² Your request should be sent either by email: INFSO-COMP-ARTICLE7@ec.europa.eu or by fax: +32.2.298.87.82.