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Urząd Komunikacji Elektronicznej

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Poland

For the attention of:
Ms Anna Streżyńska
President

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Dear Ms Streżyńska,

Subject: Commission decision concerning Case PL/2011/1273: Dispute settlement between Telekomunikacja Polska S.A. and AERO2 sp. z o.o. relating to voice call termination on the mobile network of AERO2 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 14 November 2011 the Commission registered a notification by the Polish National Regulatory Authority, Prezes Urzędu Komunikacji Elektronicznej (UKE), concerning the dispute settlement between Telekomunikacja Polska S.A. and AERO2 sp. z o.o. (AERO2) relating to voice call termination on the mobile network of AERO2 in Poland under case number PL/2011/1273.

The national consultations¹ ran from 30 August 2011 to 29 September 2011. The deadline for the EU consultations is 14 December 2011.

Pursuant to Article 7a(1) of the Framework Directive, the Commission may notify the national regulatory authority (NRA) and Body of European Regulators for Electronic

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).

Communications (BEREC) of its reasons that the draft measure would create a barrier to the internal market or its serious doubts as to its compatibility with EU law.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Previous notifications

On 6 September 2010 UKE notified draft measures concerning the dispute settlements between a new entrant on the mobile market - AERO2 - and the fixed incumbent operator Telekomunikacja Polska S.A (TP), as well as the mobile network operators (MNOs) PTK, Polkomtel and PTC (case PL/2010/1127). UKE proposed to impose on AERO2 a mobile termination rate (MTR) of 0.57 PLN/min (approx 0.15 Euro/min), which was higher than those of the other MNOs.

At that time AERO2 had not started to provide services on the retail market and was still rolling out its network.

In its comments the Commission urged UKE to fix AERO2's termination rate only for a short, transitional period and to carry out a full market analysis for the termination of voice calls on AERO2's mobile network without delay. The Commission has also highlighted the need to thoroughly justify any deviation from symmetrical MTRs.

UKE has never adopted a final decision resolving the dispute between AERO2 and TP, contrary to the decisions regarding the three mobile operators. On 17 October 2011 UKE notified to the Commission the revision of the dispute settlement decisions concerning AERO2 and three Mobile Network Operators (PTK, Polkomtel, and PTC; previously assessed under case PL/2010/1127); the Commission opened phase II investigation concerning that notification on 17 November 2011 and it will last until 17 March 2012 (PL/2011/1260).

II.2. Notified decision

The notified draft decision concerns UKE's second proposal to resolve a dispute between AERO2 and TP, as UKE has not adopted the previously notified dispute settlement decision.²

In the notified draft decision UKE sets the glide path towards symmetric MTRs to be reached by 1 January 2015 for calls originating on the network of the fixed incumbent and terminating on the network of AERO2. The calls originating on other networks and terminating in the network of AERO2 are not covered by UKE's notified draft decision.³

In its draft decision UKE proposes to set prices in a form of a glide path⁴, which result in significant asymmetries in favour of AERO2, well beyond the January 2013 deadline for the implementation of the Termination Rates Recommendation⁵:

² See PL/2010/1127.

³ In a recently notified draft decision UKE proposes to regulate the prices for call termination on AERO2's network for calls originating in the networks of the 3 largest MNOs in Poland (see PL/2011/1260). Calls originated in other Polish fixed and mobile networks and terminated on AERO2's network are not regulated.

⁴ The proposed glide path is in line with UKE's recommended MTRs published on the regulator's website on 10 November 2010.

⁵ Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile

UKE's draft measure does not provide any detailed justification for the proposed

Up to 31 December 2011	1 January 2012	1 June 2012	1 January 2013	1 June 2013	1 January 2014	1 June 2014	1 January 2015
270.12% of the price charged by large MNOs	0.350 PLN/min ⁶	0.300 PLN/min	0.240 PLN/min	0.188 PLN/min	0.145 PLN/min	0.100 PLN/min	Symmetry with large MNOs ⁷

asymmetry. It is stated, however, that AERO2 is a new entrant whose costs are high due to the need to develop its network. With regard to the justification of the actual prices UKE states that the proposed MTRs are in accordance with UKE's non-binding "statement" concerning the MTRs of new entrants as published by UKE on its website on 10 November 2010. The statement on UKE's website does, however, not provide any detailed assessment of AERO2's costs of providing voice call termination services, or a detailed justification of the proposed asymmetry.

UKE does not carry out a market analysis or SMP designation.⁸ Although UKE has notified its previous proposal to resolve the dispute between TP and AERO2 more than a year ago and has not adopted a final decision, UKE now proposes to regulate (on a permanent basis) the levels of MTRs in the concerned networks again by means of individual dispute settlement.

III. ASSESSMENT

The Commission considers that the notified draft measure falls under the Commission's powers of ensuring consistent application of remedies as set out in Article 7a of the Framework Directive. UKE's proposal aims to impose a permanent price control by means of Article 5 of the Access Directive.

UKE's draft measure concerning the dispute settlement relating to the voice call termination on the network of AERO2 falls within Article 7a(1) of the Framework Directive and would affect trade between Member States, because the conditions for the

Termination Rates in the EU, OJ L 124, 20.05.2009, p. 67.

⁶ 1 EURO~4 PLN.

⁷ The level of symmetric MTRs is not yet known. UKE will calculate the MTRs based on a BU LRIC model before 1 January 2013.

⁸ In the response to the request of information in a recent case concerning the same issue but relating to other operators, UKE stated that it can not assess the market for call termination since AERO2 does not provide such services. In addition, UKE pointed to the opinion of the national competition authority expressed in yet another case, according to which a market cannot be defined in the absence of any transactions on such market. Moreover, in its draft measure UKE claims that the Commission, in its comment letter (never published on UKE's website) stated that "*because of lack of possibilities to analyse the termination market for AERO2, as AERO2 has not commenced its activity, the President of UKE should fix AERO2's termination rate only for a short, transitional period.*" According to UKE the Commission "*also stated that once AERO2 launched its activity carry out a full market analysis for the termination of voice calls on AERO2's mobile network without delay*" UKE, however, misquotes the Commission in its draft decision. In its comments the Commission urged UKE to fix AERO2's termination rate only for a short, transitional period and to carry out a full market analysis for the termination of voice calls on AERO2's mobile network without delay.

access to the call termination provided by AERO2 determine the costs and the ability of other operators and service providers (including those established in other Member States), to provide electronic communication services.

Draft measures imposing regulatory obligations on AERO2 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 decision relating to the voice call termination in the network of AERO2 in its current form may create barriers to the internal 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 8(5) (a) of the Framework Directive, and in Articles 5 and 8(3) of the Access Directive.

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

Imposition of permanent price control remedies without market analysis

Infringement of Article 5 of Access Directive in conjunction with Article 8 of the Framework Directive; regulatory objectives and principles

According to the Commission the provision of Article 5 of the Access Directive does not grant to the NRA unlimited powers with respect to (i) ensuring adequate access irrespective of the market position of the undertaking concerned, and (ii) the kind of obligations imposed.

It is to be pointed out that the general power of the NRAs under Article 5(1), first indent, to “*encourage and where appropriate ensure, in accordance with the provisions of this Directive, adequate access and interconnection, and interoperability of services*” is clearly limited by the reference to “*the objectives set out in Article 8 of Directive 2002/21/EC (Framework Directive)*”, the need to promote efficiency, sustainable competition and giving maximum benefits to end users according to Article 5(1) of the Access Directive, as well as by the requirement of Article 5(2) of the Access Directive according to which “*obligations and conditions imposed in accordance with paragraph 1 shall be objective, transparent, proportionate and non-discriminatory, and shall be implemented in accordance with the procedures referred to in Articles 6 and 7 of Directive 2002/21/EC (Framework Directive)*”.

First, it must be noted that UKE has not demonstrated how the proposed draft measure promotes efficiency, sustainable competition and maximum benefit to end users given the fact that UKE proposes MTRs which are considerably higher than those applied to the four main Polish MNOs. This would appear unjustified in view of the objectives set out in Article 5(1) of the Access Directive as well as Article 8(5) of the Framework Directive.

In particular, the Commission considers that UKE has not justified how its notified draft measures promote efficiency, as the high MTRs do not provide the

⁹ See Recital 38 of the Framework Directive.

incentives for new entrants to become efficient over time, since they can recover their inefficiently incurred costs by means of high MTRs. Therefore, by giving distorted entry signals, the proposed measures do not guarantee the development of sustainable competition. Finally, UKE does not explain how the proposed measure would provide maximum benefits to end users, since the significantly higher MTRs are passed-on to the consumers by means of higher retail prices.

Furthermore, as set out in the Termination Rates Recommendation, the objectives of efficiency, sustainable competition and benefits of end users are ensured when MTRs are implemented at cost-efficient, symmetric levels. Any asymmetry, although permissible in exceptional circumstances, should be adequately and thoroughly justified. In the Commission's Termination Rates Recommendation it is recognised that such justification could relate to objective cost differences which are outside the control of the operators concerned.

However, in its notified draft measure UKE fails to justify the need for departing from symmetric MTRs (i.e. the MTRs levels as set for the other MNOs in Poland) by way of the proposed glide path. Instead, UKE has pointed to its non-binding "statement", which lacks any detailed assessment of AERO2's costs.

The Commission therefore consider that the justification provided by UKE is insufficient to justify higher MTRs for AERO2 and consequently, the proposed measure is not in line with the principles and objectives of Article 8(5) of the Framework Directive and of Article 5 of the Access Directive.

Secondly, it is also questionable whether setting of a glide path until 2015 and symmetric rates beyond that date would be reasonable and proportionate to achieving the goal of end-to-end connectivity. It appears that the permanent nature of the proposed price control would therefore be in violation of Article 5(2) of the Access Directive as well as Article 8(1) of the Framework Directive. In the Commission's view, in exceptional circumstances, and if necessary, the NRA can always issue a simple interconnection order, for a limited period of time and until a full market review is carried out. Such short-term interconnection order would be sufficient and proportionate to achieve end-to-end connectivity. According to general principles however, stipulated in Article 8(3) of the Access Directive, NRAs shall not impose the obligations set out in Articles 9 to 13 of that Directive (which includes price control and cost orientation) on operators that have not been designated with SMP. The Commission considers that UKE's plans to impose permanent price control remedies without having first defined and analysed a market for mobile call termination in the network of AERO2, and without designating the operator as having significant market power (SMP), circumvents the provision of Articles 15 and 16 of the Framework Directive. Furthermore, the Commission emphasises that the market for voice call termination on individual mobile networks is considered – by the Commission's Recommendation on relevant product and service markets – to be susceptible to ex ante regulation, and therefore shall be periodically analysed by UKE.

Finally, the Commission points out that the imposition of the proposed permanent price regulation does not appear to be reasonable and proportionate to achieve adequate access, end-to-end connectivity and network interoperability. As already stated by the Commission (see case PL/2010/1127) an adequate access and interconnection could have been ensured by the adoption of the previously notified dispute settlement decision, for the short time necessary to conduct a full market assessment.

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.

The Commission considers that UKE's proposal to impose permanent regulatory obligations in the absence of a market review does not ensure regulatory predictability for market players. Article 8(3) of the Access Directive states that the general rule for imposing any obligation is to conduct a market analysis and SMP assessment. This is underpinned by Recital 27 of the Framework Directive which states that "*it is essential that ex ante regulatory obligations should only be imposed where there is not effective competition, i.e. in markets where there are one or more undertakings with significant market power, and where national and Community competition law remedies are not sufficient to address the problem.*" The proposed approach creates uncertainty particularly among those operators which are not designated as having SMP and under normal circumstances would not expect to be subject to ex ante regulatory obligations.

Creation of barriers to the internal market

The imposition of far-reaching price control remedies on an undertaking, in the absence of its designation as SMP operator, may limit that undertaking's ability to act on the market which is – in the absence of UKE's decision to the contrary – deemed to be competitive. Moreover, the lack of proper market assessment and designation of AERO2 as SMP operator would further unnecessarily increase the rate of 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 provided by AERO2. Such operators would also be obliged to engage in time consuming negotiations concerning MTRs.

Further, the Commission considers that UKE's approach of imposing price regulation for call termination in AERO2's network only with regard to voice calls originating in some, but not in other networks, creates a significant barrier to the development of an internal 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 selective (partial) regulation of voice call termination in AERO2's network 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.

Moreover, the Commission considers that UKE's practice of proceeding for several months (in the current case for at least 22 months, since 3 February 2010) on individual dispute settlements creates a significant barrier to entry and therefore to the development of internal market. As a general rule the NRAs should resolve the dispute in the shortest possible time frame.

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 amendments of the prior dispute settlements concerning the voice call termination on the mobile network of AERO2 shall not be

adopted for a further three months.

Pursuant to Point 17 of Recommendation 2008/850/EC¹⁰, 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 Commission¹¹ 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 sincerely,
For the Commission
Neelie Kroes
Vice-President of the Commission

¹⁰ 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.

¹¹ Your request should be sent either by email: INFSO-COMP-ARTICLE7@ec.europa.eu or by fax: +32.2.298.87.82.