



EUROPEAN COMMISSION

Brussels, 3/02/2012
C(2012) 750

SG-Greffe (2012) D/2165

Urząd Komunikacji Elektronicznej
(UKE)

18-20 Kasprzaka Street
01-211 Warsaw
Poland

For the attention of:
Ms. Magdalena Gaj
President

Fax: +48 22 53 49 253

Dear Ms Gaj,

Subject: Commission decision concerning Case PL/2012/1280: Dispute settlement concerning voice call termination on the mobile networks of P4 and Mobyland in Poland

Comments pursuant to Article 7(3) of Directive 2002/21/EC¹

I. PROCEDURE

On 3 January 2012, the Commission registered a notification from the Polish national regulatory authority, Urząd Komunikacji Elektronicznej (UKE), concerning the settlement of a dispute between the two mobile operators P4 and Mobyland relating to mobile termination rates.

The national consultations² ran from 24 October 2011 to 24 November 2011. The deadline for the EU consultation is 3 February 2012.

A request for information was sent to UKE³ on 9 January 2012 and the response was received on 12 January 2012.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs),

¹ Directive 2002/21/EC of the 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).

² In accordance with Article 6 of the Framework Directive.

³ Pursuant to Article 5(2) of the Framework Directive.

BEREC and the Commission may make comments on notified draft measures to the NRA concerned.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

Under case PL/2010/1162 UKE concluded that Mobyland has SMP in the market for call termination in its mobile network and imposed regulatory remedies, including an access obligation, non-discrimination, transparency and price control, in the form of a prohibition of excessive pricing. Furthermore, UKE stated that it will consider Mobyland's mobile termination rates (MTRs) non-excessive as long as they do not exceed the charges published on UKE's website in the form of a non-binding 'position'. This position was published by UKE on 10 November 2010, and was last amended on 29 November 2010. UKE's position, which was however not part of any draft measures, provides a detailed analysis, including the actual level of charges (which are asymmetric and significantly above the regulated MTRs of the established mobile operators) and the glide path towards symmetric MTRs.

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 number PL/2011/1204 UKE consulted a new draft measure concerning voluntary commitments by four MNOs (including P4) 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 out⁴ 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.⁵ 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. The notified draft measure

The currently notified draft measure results from the fact that Mobyland refrains from implementing UKE's 'position' and adopt the rates published on the website. The draft decision concerns UKE's proposal to resolve a dispute between P4 and Mobyland. UKE proposes to issue a regulatory decision which to a large extent incorporates the commercially agreed interconnection contract between P4 and Mobyland. UKE explains that the level of MTRs in Mobyland's network was the only outstanding issue between the parties, and would therefore require UKE's intervention.⁶

UKE justifies its decision by referring to its position of 10 November 2010, published on UKE's website, in which the Polish regulator presented its new approach to set the MTRs of new entrants⁷. In particular, UKE states that it needs to introduce glide paths for new entrants

⁴ Those measures were notified under the "old" Framework where the Commission's powers with regard to remedies were limited to comments.

⁵ 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.

⁶ The other issues e.g. MTRs of P4, termination rates for SMS/MMS were agreed by both parties and UKE simply introduced them into its decision.

⁷ In this position UKE published its recommended MTRs.

which will create competitive conditions comparable to those previously granted to other operators, i.e. a temporary asymmetry. In its reply to the request for information UKE further stated that the proposed MTRs for Mobyland reflect historical, confidential costs of P4, which are used as a proxy in order to allow small new entrants to benefit from a similar level of asymmetric MTRs as P4 in the past. The reference to P4's costs is however not included in the proposed draft measure.

Against this background UKE proposes to set the following levels of mobile termination rates⁸ in Mobyland's network coming into force on the indicated dates:

1 July 2011	1 January 2012	1 July 2012	1 January 2013	1 July 2013
0.280 PLN/min	0.180 PLN/min	0.140 PLN/min	0.137 PLN/min	Symmetry with MTRs of three established MNOs

III. COMMENTS

The Commission has examined the notifications and the additional information provided by UKE and has the following comments⁹:

Need to promote regulatory efficiency, transparency, certainty, and non-discrimination in MTR regulation in Poland

In the context of recent Phase II investigations¹⁰ and UKE's subsequent withdrawal of draft measures the Commission, BEREC, and UKE agreed that regulatory obligations, including the level of MTRs, should be legally binding for the addressees of SMP decisions and should be executed and implemented immediately after the relevant decisions are issued, without any additional need for the regulator to intervene in disputes concerning the introduction of such regulated MTRs into bilateral interconnection agreements¹¹.

The Commission welcomes this commitment by UKE and expects, therefore, that in the future MTRs will be effectively imposed by UKE and immediately applied by operators, without the need for dispute resolution. The currently proposed draft measure should therefore only be transitory in nature and subsequently be replaced by a single MTR decision governing termination rates of individual MNOs vis-à-vis all other operators. To that end UKE should be able to effectively enforce its decisions, and apply dissuasive penalties in case its decisions are not implemented on time.

Need for cost-oriented, symmetric termination rates

The Commission reiterates its previous comments¹² and urges UKE to take full

⁸ Corresponding to approximately €0.07, €0.05, €0.04, and €0.03 respectively.

⁹ In accordance with Article 7(3) of the Framework Directive.

¹⁰ PL/2011/1255-1258, PL/2011/1260 and PL/2011/1273

¹¹ See the Common Statement of the Commission, BEREC and UKE published on 20 January 2012 on the respective websites of the three above-mentioned entities (the Common Statement).

¹² See case PL/2010/1162, PL/2011/1206-1216

account of the Termination Rates Recommendation and to set cost-oriented termination rates also for new entrant mobile operators. In the presently notified draft measure UKE fails to justify the need for departing from symmetric MTRs by way of the proposed glide-path. Instead, UKE has pointed to its non-binding "position" of 2010, which lacks any detailed assessment of Mobyland's costs. The only explanation with regard to costs was submitted by UKE in its response to the request for information. There UKE argues that in order to set MTRs for Mobyland it uses historical costs of P4 as a proxy but no further details are provided and this information is anyway not included in the draft measures.

In this respect, the Commission does not see the need to launch a further investigation under Article 7a of the Framework Directive in view of UKE's commitment, as set out in the Common Statement, to notify new draft SMP decisions for all mobile operators in mid-2012 and to implement symmetric and BU-LRIC-based rates starting from 1 January 2013.

Pursuant to Article 7(7) of the Framework Directive, UKE may adopt the draft measure and, where it does so, shall communicate it to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take vis-à-vis other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC¹³ the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission¹⁴ within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication¹⁵. You should give reasons for any such request.

Yours sincerely,
For the Commission,
Robert Madelin
Director-General

¹³ 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 of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 301, 12.11.2008, p. 23.

¹⁴ Your request should be sent either by email: INFSO-COMP-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

¹⁵ The Commission may inform the public of the result of its assessment before the end of this three-day period.