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Telekomunikačný úrad Slovenskej republiky (TÚ SR)

Továrenská 7
810 06 Bratislava 16
Slovakia

For the attention of:
Mr Ladislav Mikuš
Chairman

Fax: +421 2 5293 2095

Dear Mr Mikuš,

Subject: Commission decision concerning Case SK/2012/1313: Voice call termination on individual mobile networks in Slovakia - modification of remedies

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

I. PROCEDURE

On 30 March 2012, the Commission registered a notification from the Slovak national regulatory authority, *Telekomunikačý úrad Slovenskej republiky* (TÚSR),[1] concerning the modification of remedies on the market for voice call termination on individual mobile networks in Slovakia[2].

The national consultation[3] ran from 1 February 2012 to 2 March 2012.

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[1] Under Article 7 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 (Framework Directive), OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

[2] Corresponding to market 7 of 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 of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, (the Recommendation) OJ L 344, 28.12.2007, p. 65.

[3] In accordance with Article 6 of the Framework Directive.

On 3 April 2012, a request for information[4] was sent to TÚSR and a response was received on 10 April 2012.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on notified draft measures to the NRA concerned.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

In its first round review[5] of the market for wholesale voice call termination on individual mobile networks TÚSR designated both mobile network operators (MNOs) operating in Slovakia at that time, Orange Slovensko (Orange) and EuroTel (since May 2005 called T-Mobile Slovensko (T-Mobile)) as having significant market power, and proposed to impose a set of obligations[6].

In its comments letter, the Commission urged TÚSR, among other things, to specify a cost model and the level of wholesale charges as soon as possible.

In its second round market review[7] the TÚSR designated all three MNOs active in Slovakia, Orange, T-Mobile and Telefónica O2, as operators with significant market power and a full set of remedies was imposed on them. As regards the price control, the TÚSR proposed to set the mobile termination rates (MTRs) on the basis of a Fully Allocated Historic Cost (FAHC) model, the details of which were specified in a subsequent notification[8].

In its comments, the Commission reminded the Slovak regulator of the need to set termination rates on the basis of efficient costs and highlighted the importance of Forward-Looking Long Run Incremental Cost (FL-LRIC) models based on current costs. The Commission further noted that asymmetries should be based on objective cost differences and should not apply for an unnecessarily long period, and consequently urged TÚSR to phase out the asymmetry foreseen for Telefónica O2. In view of the failure of Telefónica O2 to reach an agreement with the other two operators on the applicable rates, the Commission also urged TÚSR to consider appropriate transitional price control measures pending finalisation of the cost-orientation obligation, such as international benchmarking[9]. As regards the benchmarking approach, the Commission

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4 In accordance with Article 5(2) of the Framework Directive.

5 Case SK/2005/0136, SG-Greffe(2005)D/200630.

6 However, in the final adopted measure, the price control and cost-orientation obligations were not imposed and termination rates were left unregulated, being subject to negotiations between the operators. In this regard, it has to be noted, that whilst Orange and T-Mobile have been able to reach an agreement, the third entrant Telefónica O2 Slovakia, s.r.o. (Telefónica) has not been able to reach an agreement with the two larger MNOs.

7 Case SK/2009/0902, SG-Greffe (2009) D/2387.

8 Case SK/2009/0955, SG-Greffe (2009) D/5276.

9 On 4 August 2009, TÚSR informed the Commission and the other NRAs that, in accordance with Article 7(6) of the Framework Directive, it adopted provisional (interim) measures concerning MTR dispute settlement procedures. These provisional rates were based on the average MTRs applicable in 32 European countries as published by the European Regulators Group (ERG) and were applied from 1 August 2009 until a final decision was taken. Afterwards, the rates were set at 6.35 eurocents/minute

stressed that such a method should be supported by reference to cost-based termination rates which take efficiency considerations into account, and only those countries should be selected as a benchmark that employ methodologies which provide a suitable and solid basis for estimating the efficient cost.

In November 2010, the TÚSR notified a draft measure concerning details of the price control imposed in the second round market review[10]. The TÚSR proposed to set symmetric MTRs for all three MNOs in Slovakia[11] on the basis of a benchmarking method[12]. In its reply to the Commission's request for information TÚSR confirmed its intention to start the development of a cost model, as required by the Termination Rates Recommendation[13] in 2011 with a view to apply it from 2012.

In line with the Commission's comments made in the previous cases, the Commission reminded TÚSR that NRAs should ensure that termination rates are effectively set at a cost-efficient and symmetric level by 31 December 2012 and that the recommended BU-LRIC model should be fully implemented by that date.

II.2. The notified draft measure

In the notified draft measure the TÚSR proposes to maintain symmetrical regulation of MTRs based on benchmarking. The TÚSR explains that it was not in a position to develop a LRIC cost model for MTRs as indicated in its previous notification due to the fact that it was fully occupied with tasks related to other relevant markets[14].

The TÚSR proposes a modification of the level of MTRs from 31 May 2012[15]. The new MTRs are intended to be in place for a one year period. The TÚSR proposes that the MTRs should not exceed the arithmetic average of MTRs applied in 15 selected countries, using LRIC methodology, as of July 2011 according to BEREC's MTR Benchmark Snapshot[16]. The TÚSR thus bases its calculations on historic rates in place on

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for Orange and T-Mobile, and at 7.68 eurocents/minute for Telefónica regarding the period 1 February 2010 – 31 January 2011.

10 Case SK/2010/1151, SG-Greffe (2010) D/20318.

11 The rate was set at the level of 5.51 eurocents/min with regard to the period 1 February 2011 until 31 January 2012. TÚSR notified its intention to review MTRs every 12 months, a review cycle which was, however, not followed in practice.

12 The price was based on a simple arithmetic average of MTRs in EU Member States pursuant to a document published by the European Regulators Group called 'MTR Benchmark Snapshot' dated 1 July 2011.

13 Commission Recommendation 2009/396/EC of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (Termination Rates Recommendation), OJ L 124, 20.5.2009, p. 67.

14 TÚSR in the response to the request for information highlights that the delay in the adoption of the pure BU-LRIC model is relative to it work in other relevant markets, arguing that it focused on the development of the pure BU-LRIC model for fix termination rate in order to use it for termination and origination market notified earlier.

15 In the response to the request for information TÚSR clarified that the currently applied price decision is valid until the 30 May 2012.

16 Compared to the benchmark, which is currently in place, the TÚSR does not include the MTRs applied in Ireland and, includes the MTRs applied in France:

1 July 2011.

Moreover, TÚSR's benchmark includes also countries which do not apply the recommended pure BU-LRIC costing method.

The TÚSR proposes symmetric MTR levels for the period from 31 May 2012 to 1 June 2013 which amount to 3.67 €ct/min, clarifying in the response to the request for information that MTRs for the later period are planned to be defined according to a pure BU-LRIC methodology.

III. COMMENTS

The Commission has examined the notification and the additional information provided by TÚSR and has the following comment:[17]

Need for an appropriate price control ensuring that customers derive maximum benefits in terms of efficient cost-based termination rates

The Commission notes that for the period from 31 May 2012 until 30 May 2013 TÚSR proposes to set termination rates on the basis of a LRIC benchmarking method.

The Commission notes that the purpose of Recital 22 and of Recommend 12 of the Termination Rates Recommendation is to enable NRAs, in case of limited resources, to come to a cost efficient rate without having to finalise a pure BU-LRIC model in a timely manner. Therefore, as indicated by the Commission in similar cases[18], if the alternative methodology chosen is benchmarking, it should be performed by taking into account average MTRs only of those Member States which have implemented the recommended cost methodology as of 1 January

Country	**€ per min.**
Austria	0.0201
Denmark	0.0443
Germany	0.0337
Greece	0.0495
Hungary	0.0445
France	0.0200
Lithuania	0.0317
Netherlands	0.0420
Romania	0.0506
Sweden	0.0230
Belgium	0.0430
Cyprus	0.0180
Italy	0.0539
Slovenia	0.0422
United Kingdom	0.0338
Average	**0.0367**

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

18 See Commission comments in cases IE/2008/0746 and IT/2008/0779.

2013, which is pure BU-LRIC and not BU-LRIC plus[19]. Further to that, rates used for benchmarking should represent the cost efficient target rates at the end of the respective glide paths[20]. Such an approach has also been recently endorsed by BEREC[21].

In the present case, the Commission however observes that at least until 30 May 2013 the proposed benchmarking method is not consistent with the Termination Rates Recommendation, even if TÚSR proposes to use as sample only EU countries using LRIC, as some of them are not using pure BU-LRIC but BU-LRIC plus cost methodologies. Indeed, the Commission notes that the rates used for benchmarking purposes are historic rates and do not represent the cost efficient target rates at the end of the respective glide paths. This is because TÚSR incorrectly relies on termination rates which were in place on 1 July 2011 which therefore do not represent the target, pure BU-LRIC rate, but only a step on the glide path towards it. As a consequence of the method chosen by the TÚSR, the calculated MTRs to be applied until 30 May 2013 will be set above the average of MTRs set in Member States implementing the pure BU-LRIC model[22].

The Commission also takes note of TÚSR's assurance to implement its pure BU-LRIC model as from 31 May 2013.[23]

Against this background, in order both to bring more quickly the benefits of lower MTRs to the consumers and avoid excessively steep drops in MTRs at the end of the transition, the Commission asks TÚSR to modify its benchmarking method in such a way that it would lead already in the period preceding 31 May 2013 to a reduction of MTRs in line with the Termination Rates Recommendation.

The Commission reminds the TÚSR that if it were to propose a price remedy for the period following 31 May 2013, which would deviate from EU law and the principles of the Termination Rates Recommendation, the Commission could

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19 BU-LRIC plus method includes not only the avoidable costs of termination but also a contribution to the costs that are common to termination and other services.

20 See case EE/2012/1305.

21 See BEREC's opinion in Phase II investigation in cases NL/2012/1284 and NL/2012/1285 on fixed and mobile termination markets in the Netherlands.

22 The following countries have, so far, notified a pure BU-LRIC cost model to set MTRs:

Country	**Target Rate (€ct/min)**	**Deadline**
NL*	1.2	01/09/2012
BE	1.08	01/01/2013
FR	0.8	01/01/2013
IT	0.98	01/07/2013
ES	1.09	01/07/2013
UK**	0.81	01/04/2014

* OPTA renotified MTR remedies following National Court's judgment which required to set MTRs according to a different cost model, resulting in a target rate of 2.4 €ct/min.

** Adopted rate. UK's Competition Commission, with decision of 9 February 2012, endorsed Ofcom's use of a BU-LRIC cost model but asked Ofcom to shorten the glide-path by one year (with a new target date of 1/04/2013).

23 See case BE/2012/1279.

proceed to opening a phase II investigation pursuant to Article 7a of the Framework Directive.

Pursuant to Article 7(7) of the Framework Directive, the TÚSR 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/EC[24] 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 Commission[25] 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 publication[26]. You should give reasons for any such request.

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

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24 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.

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

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