



EUROPEAN COMMISSION

Brussels, 17/11/2011

C(2011) 8574

SG-Greffe (2011) D/20004

Urząd Komunikacji Elektronicznej

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01-211 Warsaw

Poland

For the attention of:

Ms Anna Streżyńska

President

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Dear Ms Streżyńska,

Subject: Commission decision concerning Case PL/2011/1260: Revision of dispute settlement decisions concerning voice call termination on the mobile network of AERO2 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 17 October 2011 the Commission registered notification by the Polish National Regulatory Authority, Prezes Urzędu Komunikacji Elektronicznej (UKE), concerning the revision of prior dispute settlement decisions relating to voice call termination on the mobile network of AERO2 sp. z o.o. (AERO2) in Poland under case number PL/2011/1260.

The national consultations¹ ran from 25 August 2011 to 24 September 2011. The deadline for the EU consultations is 17 November 2011.

A request for information was sent to UKE on 24 October 2011 and the reply was received on 27 October 2011.

Pursuant to Article 7a(1) of the Framework Directive, the Commission may notify the

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).

national regulatory authority (NRA) and Body of European Regulators for Electronic 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) Polska Telefonia Komorkowa Sp. z o.o. (PTK), Polkomtel S.A. (Polkomtel) and Polska Telefonia Cyfrowa Sp. z o.o.. (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.

II.2. Notified decisions

The notified draft decisions concern the revision of the previously notified dispute settlement decisions (which were finally adopted by UKE in December 2010). UKE acts on its own motion, as there is no ongoing dispute between the operators². Further, UKE does not provide a specific justification for the need to amend its previous decisions at this point in time. UKE does not invoke any change of existing circumstances or other reasons for urgent regulatory intervention. Rather, UKE invokes its general competence to act in the interest of consumer protection, safeguarding of effective competition and interoperability of networks and services. UKE further justifies the need for amendment of its previous dispute settlements by the decrease of MTRs of other new entrants. According to UKE maintaining the current MTRs would grant unjustified advantages to AERO2, as compared to other new entrants.

UKE does not carry out a market analysis or SMP designation. In the response to the request of information 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 another case, according to which a market cannot be defined in the absence of any transactions on such market.

In the notified draft decisions UKE sets the glide-path towards symmetric MTRs to be reached by 1 January 2015 for calls originating on the networks of the three largest MNOs (PTK, Polkomtel, PTC) and terminating on the network of AERO2. The calls originating on other networks, and terminating in the network of AERO2, are not

² In its response to the request for information UKE explained that the currently notified draft measures, which UKE considers to be a dispute settlement under Article 20 of the Framework Directive, should be seen as a follow up to the previously consulted measures (PL/2010/1127), notified however in application of Article 5 of the Access Directive.

covered by UKE's notified decisions.

In its decisions UKE sets the glide path³, which results in significant asymmetries in favour of AERO2, well beyond the January 2013 deadline for the implementation of the Termination Rates Recommendation⁴:

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 ⁵	0.300 PLN/min	0.240 PLN/min	0.188 PLN/min	0.145 PLN/min	0.100 PLN/min	Symmetry with large MNOs ⁶

UKE's draft measures do not provide any detailed justification of the proposed 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. In its reply to the request for information UKE stated that the proposed MTRs reflect historical costs of P4 Sp. z o.o. (P4) (another new entrant on the mobile market), 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.

III. ASSESSMENT

The Commission considers that the notified draft measures fall under the Commission's powers of ensuring consistent application of remedies as set out in Article 7a of the Framework directive. Although UKE's measures are not in application of Article 16 (to the contrary they appear to be in contravention of Article 16) and UKE does not formally invoke Article 5 again in the context of the currently notified draft measure, they amend previous decisions taken under Article 5 of the Access Directive and aim at the imposition of obligations set out in Articles 9-13 of the Access directive.

The Commission has examined the notifications and the additional information provided by UKE. UKE's draft measures concerning amendments of the dispute settlements concerning the voice call termination on the network of AERO2 fall within Article 7a(1)

³ The proposed glide path is in line with UKE's recommended MTRs published on the regulator's website on 10 November 2010.

⁴ Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU, OJ L 124, 20.05.2009, p. 67.

⁵ 1 EURO~4 PLN.

⁶ The level of symmetric MTRs is not yet known. UKE will calculate the MTRs based on a BU LRIC model before 1 January 2013.

of the Framework Directive and would affect trade between Member States, because the conditions for the 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 States⁷.

The Commission considers that UKE's draft decisions concerning the amendments of prior dispute settlements relating to the voice call termination in the network of AERO2 in their 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)*”.

Firstly, 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.

⁷ See Recital 38 of the Framework Directive.

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. The Commission considers that UKE has not justified how its notified draft measures promote efficiency, as the high MTRs do not provide the incentives for new entrants to become efficient over time, since it can recover his inefficiently incurred costs by means of MTRs. Therefore, by giving distorted entry signals, the proposed measures do not guarantee the development of sustainable competitions. Finally, UKE does not explain how the proposed measures would grant maximum benefits to end users, since the significantly higher MTRs are passed-on to the consumers by means of higher retail prices.

Furthermore, 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 measures 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 "statement", which lacks any detailed assessment of AERO2'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 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.

The Commission therefore considers that the justification provided by UKE is insufficient to justify higher MTRs for AERO2 and consequently, the proposed measures are 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 permanence 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 view of the Commission, in exceptional circumstances NRA can 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 when in fact adequate access and interconnection are already ensured by the previously adopted dispute settlement decisions (see Case PL/2010/1127).

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 regulatory obligations in the absence of a market review, an actual dispute, or an access or interconnection problem, 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. Furthermore the imposition of regulatory remedies on any entity, in the absence of its SMP designation or any other specific legal basis, may create barriers to the internal market resulting from legal uncertainty among the market players, and consequently a serious disincentive to invest in the Polish market. 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.

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/EC⁸, 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 Commission⁹ 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
Cecilia Malmström
Member of the Commission

⁸ 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.

⁹ Your request should be sent either by email: INFSO-COMP-ARTICLE7@ec.europa.eu or by fax: +32.2.298.87.82.