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Agencija za pošto in elektronske
komunikacije Republike Slovenije
(APEK)

Stegne 7, p.p. 418
1001 Ljubljana
Slovenia

For the attention of:
Mr Franc Dolenc
Director

Fax: +386 1 511 11 01

Dear Mr Dolenc,

Subject: Commission Decision concerning Case SI/2012/1360: Access and call origination on public mobile telephone networks in Slovenia

Article 7(3) of Directive 2002/21/EC: No comments

I. PROCEDURE

On 31 July 2012, the Commission registered a notification from the Slovenian regulatory authority, Agencija za pošto in elektronske komunikacije RS (APEK)¹, concerning the market for wholesale access and call origination on public mobile telephone networks² in Slovenia.

The national consultation³ ran from 22 June 2012 to 23 July 2012.

On 9 August 2012, a request for information⁴ was sent to APEK and a response was received

¹ 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 15 in Commission Recommendation 2003/311/EC of 11 February 2003 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, OJ L 114, 8.5.2003, p. 45.

³ In accordance with Article 6 of the Framework Directive.

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

on 14 August 2012.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

The latest review of this market was notified to and assessed by the Commission under case SI/2009/0913. The relevant product market was defined as the market for wholesale mobile access and voice call origination for the purpose of offering services to mobile network operators (MNOs) (in the form of national roaming), mobile virtual network operators (MVNOs), and service providers/resellers. Self-supply and SMS origination services were included in the market. APEK carried out the three criteria test, and concluded that the market was still susceptible to ex-ante regulation, namely because of: (i) the existence of high and non-transitory barriers to entry and expansion due to superiority of Mobitel's (now Telekom Slovenije) and Si.mobil's network compared to that of later entrants; (ii) the lack of tendency towards effective competition due to the incumbent's high market shares both on the retail and wholesale level⁵ and the fact that it was the sole supplier of wholesale mobile access; and (iii) the insufficiency of competition law to remedy the identified market failures.

APEK designated the incumbent, Mobitel, with significant market power (SMP), imposing on it the following regulatory remedies: (i) obligation to provide access to and use of certain network elements and associated facilities; (ii) non-discrimination obligation, (iii) transparency obligation; and (iv) price control obligation, according to which Mobitel was obliged to make sure that no margin squeeze occurs. However, APEK retained the right to require wholesale price amendments if needed.

Lastly, APEK at the time considered the proposed obligations as temporary, expecting that by the next market review the smaller MNOs could become sufficiently independent by rolling out their own networks. It noted that such a development could lead to a different conclusion as regards the existence of tendency towards effective competition.

II.2. Market definition

APEK includes in the relevant market access to all public mobile telephone networks irrespective of the technology used (GSM, UMTS or LTE)⁶, and origination of all types of voice calls and SMS messages on these networks for business and residential users, pre-payment users and subscribers. The following types of operator access are included: (i) self-supply of services; (ii) supply of services to virtual mobile networks operators; (iii) supply of services to service providers/resellers; and (iv) supply of national roaming services.

APEK does not consider data services (except for SMS) provided on mobile networks as part of the same product market as these are additional services and not substitutes for access and call origination on public mobile telephone networks.

The relevant geographic market is national.

The following operators have been active on the relevant market as defined above: (i) MNO Telekom Slovenije (previously Mobitel, the SMP operator during the previous review); (ii)

⁵ The incumbent had, at the time, almost 60% of all subscribers at the retail level and around 60% of wholesale voice traffic (70% in terms of voice revenues).

⁶ In its reply to the RFI, APEK explains in more detail that currently Si.mobil is the only operator offering LTE services in Slovenia, although it does so in a very limited geographic area and through limited commercial offers since July 2012. APEK also states that it has no detailed information on the expected future development of LTE networks.

MNO Si.mobil; (iii) MNO Tušmobil (using national roaming services from Telekom Slovenije in the areas where it does not have coverage) (iv) MNO T-2 (previously used national roaming services from Telekom Slovenije, as of April 2012 switched to Si.mobil in the areas where it does not have coverage) (v) service provider Telemach (wholesale access provided by Tušmobil); (vi) service provider Debitel (wholesale access provided by Telekom Slovenije); and (vii) service provider Izimobil (wholesale access provided by Telekom Slovenije).

II.3. The three criteria test

As the market for wholesale access and call origination on public mobile telephone networks is no longer listed in the Recommendation on Relevant Markets⁷, APEK carries out the three criteria test⁸ with regard to the notified market.

The first criterion: high and non-transitory barriers to entry

APEK concludes that there are no structural, legal or regulatory high and non-transitory barriers to entry and expansion present in the relevant market under consideration.

More specifically, with regard to structural barriers to entry in terms of control over the infrastructure not easily duplicated, APEK concludes that these are considerably lower compared to the previous market analysis, supporting its finding by that fact that all operators have, since 2009, improved their networks in terms of area and population coverage. On 2G networks, the coverage of alternative operator Si.mobil is 97.4% of the national territory and 99.9% of the population, and that of Tušmobil is 87.7% of the national territory and 99.2% of the population. The coverage of Si.mobil, Tušmobil and T-2 (which does not have its own 2G infrastructure) is also growing on 3G platforms⁹.

Moreover, even though economies of scope and economies of scale still represent a certain barrier to entry, APEK points out that both are present on the majority of electronic communication markets, and they do not therefore represent a particularity of this relevant market neither when compared to other Slovenian markets nor when compared to similarly defined markets across the EU. Finally, APEK concludes that the level of vertical integration does not represent a barrier to entry either, since wholesale services are provided by more than one operator and a potential new entrant or existing operators are able to gain access to

⁷ 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 (Recommendation on Relevant Markets), OJ L 344, 28.12.2007, p. 65.

⁸ In accordance with Point 2 in conjunction with Recital 5 of the Recommendation on Relevant Markets, when identifying markets other than those mentioned in the Annex, national regulatory authorities should ensure that the following three criteria are cumulatively met: (1) there must be high and non-transitory entry barriers, (2) the structure of the market must not tend towards effective competition within the relevant time horizon and (3) the application of competition law alone would not adequately address the market failure(s) concerned.

⁹ See below a table comparing area coverage of operators' UMTS network in 2009 and 2012:

| | UMTS area coverage 2009 | UMTS area coverage 2012 | UMTS population coverage 2009 | UMTS population coverage 2012 |
|-------------------|-------------------------|-------------------------|-------------------------------|-------------------------------|
| Telekom Slovenije | 30.9% | 53.7% | 73.6% | 90.6% |
| Si.mobil | 17.0% | 68.8% | 55.0% | 93.7% |
| Tušmobil | - | 35.3% | - | 79.2% |
| T-2 | 7.4% | 20.0% | 35% | 35% |

one of the existing networks. APEK believes that the operators perceive the provision of wholesale access services as an opportunity for additional wholesale revenues, rather than a threat to their retail market shares.

The second criterion: no tendency towards effective competition

APEK analyses market shares, trends in prices, existence of potential competition, possibility of infrastructure duplication, diversity of services and products, and barriers for expansion. It concludes that the second criterion is not met as the market tends towards effective competition.

In its market shares analysis, APEK observes a trend according to which Telekom Slovenije's market shares, although currently at 51.8% at retail and 57.4% at wholesale level¹⁰, have been steadily declining, whereas the market shares of alternative operators are on the rise (both at the retail and wholesale level)¹¹. APEK notes that Slovenia is a mature mobile market with 105.5% mobile penetration at the end of the current market review period.

With regards to prices and pricing policies, on the basis of the fact that since April 2012 Telekom Slovenije is no longer the sole provider of wholesale access services, as T-2 switched to Si.mobil and in June 2012 Tušmobil successfully concluded negotiations with Telemach, APEK concludes that Telekom Slovenije, Si.mobil and Tušmobil are capable of offering access at competitive prices. Although APEK does not have specific information on the wholesale prices offered by Si.mobil and Tušmobil, it explains that as Telekom Slovenije is under the regulatory obligation to make sure its wholesale prices do not lead to margin squeeze, the prices charged by Si.mobil and Tušmobil therefore must be competitive as well, otherwise operators would not turn to them when seeking access.

As to potential competition, APEK mentions recent developments in the market. First of all, it observes that Tušmobil's network has now reached a level of development which allows Tušmobil to offer competitive services, even in the absence of *ex ante* regulation. APEK's finding is supported by the fact that Tušmobil recently entered into a commercial contract with Telemach regarding the provision of its wholesale access services. Moreover, Si.mobil's network is also capable of providing access to other operators, and T-2 has been using its national roaming services since April 2012 on a commercial basis. APEK believes that the fact that T-2 preferred to use services of an unregulated operator rather than a regulated one can also be regarded as evidence of competition in the market.

The third criterion: insufficiency of competition law alone

APEK concludes that the third criterion is not met either, since, first of all, currently there is no evidence of uncompetitive behaviour which would cause irreversible damage to the market, and secondly, potential competition problems would be effectively remedied *ex post* by the implementation of competition law provisions.

¹⁰ Wholesale voice traffic, including service providers, self-supply and national roaming.

¹¹ Overview of wholesale voice traffic market shares in percentages, including self-supply, service providers and national roaming:

| | 2008/1 | 2008/2 | 2009/1 | 2009/2 | 2010/1 | 2010/2 | 2011/1 | 2011/2 |
|-------------------|--------|--------|--------|--------|--------|--------|--------|--------|
| Telekom Slovenije | 70.7 | 66.7 | 63.3 | 63.0 | 62.4 | 62.0 | 59.4 | 57.4 |
| Si.mobil | 26.1 | 26.0 | 27.4 | 27.2 | 28.3 | 29.5 | 32.1 | 33.0 |
| Tušmobil | 3.2 | 7.1 | 8.7 | 8.8 | 8.1 | 7.3 | 7.5 | 8.6 |
| T-2 | 0.0 | 0.2 | 0.7 | 1.0 | 1.1 | 1.1 | 1.1 | 1.0 |
| WWI | | | | | | | | |
| Total | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

In summary, APEK believes that principally because of the following developments that took place since the last market analysis the market no longer fulfils the three-criteria test and therefore does no longer warrant *ex ante* regulation:

- (i) the market shares of the incumbent are steadily declining (both at the retail and wholesale level), whereas the market shares of alternative operators are on the rise,
- (ii) at least two alternative operators have managed to build more extensive networks and now achieve considerably higher coverage,
- (iii) Tušmobile started offering wholesale access services to Telemach and
- (iv) T-2 no longer uses access services from Telekom Slovenije, but has concluded a commercial national roaming agreement with Si.mobil.

III. NO COMMENTS

The Commission has examined the notification and the additional information provided by APEK and has no comments.¹²

Pursuant to Article 7(7) of the Framework Directive, APEK may adopt the resulting 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 publication.¹⁵ You should give reasons for any such request.

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

¹² In accordance with Article 7(3) of the Framework Directive.

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: CNECT-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.