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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/2012/1281: Dispute settlement between Polkomtel S.A. and E-Telko Sp. z o.o. in Poland

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

I. PROCEDURE

On 9 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 mobile operator Polkomtel S.A. (Polkomtel) and fixed line operator E-Telko Sp. z o.o. (E-Telko) relating to non-traffic issues (guarantees for performance of contract, fraud prevention), traffic directioning and management, but also the level of Mobile Termination Rates (MTRs) in the network of Polkomtel.

The national consultations² ran from 20 September 2011 to 20 October 2011. The deadline for the EU consultation is 9 February 2012.

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.

A request for information was sent to UKE³ on 18 January 2012 and the response was received on 23 January 2012.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), 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 number PL/2011/1204 UKE consulted a draft measure concerning voluntary commitments by four mobile network operators (MNOs), including Polkomtel, to invest in areas with no or limited coverage ("white spots") in exchange for less steep glide paths for MTRs. That notification related to an amendment of remedies, following a previous decision determining the relevant market and designating Polkomtel with SMP in the market for mobile voice call termination.

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 resolves details of the interconnection agreement between Polkomtel and E-Telko. Those details include provisions concerning traffic management (fraud prevention), contractual penalties, retroactive settlement of accounts (in the event of MTR decisions being successfully appealed by Polkomtel), form of guarantees for contract performance, and traffic forwarding towards ported numbers.

With regard to the MTRs in Polkomtel's network, the decision re-imposes the same rates as in the previously notified decision (PL/2011/1204). In the reply to Commission's request for information UKE explained that Polkomtel refused to apply MTRs set by UKE in 2009, the time the dispute was launched. However, as UKE further explains, Polkomtel is not contesting the latest MTR decision (PL/2011/1204) and is implementing the set rates into interconnection agreements on a voluntary basis.

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

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.

III. COMMENTS

The Commission has examined the notification and the additional information provided by UKE and has the following comments:⁶

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

In the context of recent Phase II investigations⁷ and UKE's subsequent withdrawal of draft measures, the Commission, BEREC, and UKE jointly reiterated 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 agreements⁸.

The Commission welcomes UKE's commitment 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, which takes full account of the Termination Rates Recommendation. To this end UKE should be able to effectively enforce its decisions, and apply dissuasive penalties in case its decisions are not implemented duly and in time.

Need for cost-oriented, symmetric termination rates

The Commission reiterates its previous comments⁹ and urges UKE to take full account of the Termination Rates Recommendation and to set symmetric, cost-oriented termination rates for all mobile operators in Poland. In the presently notified draft measure UKE maintains MTRs in Polkomtel's network which are significantly above the cost oriented levels as calculated by UKE. As already underlined in previous Commission comments, UKE failed to calculate the MTRs for Polkomtel (as well as for other large MNOs in Poland) on the basis of costs of an efficient operator. The use of actual costs incurred, as well as the recovery of costs which are not incremental to the provision of the wholesale termination services can lead to distorted investment signals and higher prices for the originating operators and, consequently, their consumers.

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

⁶ In accordance with Article 7(3) of the Framework Directive.

⁷ PL/2011/1255-1258, PL/2011/1260 and PL/2011/1273

⁸ 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.

⁹ See case PL/2011/1204.

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/EC¹⁰ 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 Commission¹¹ 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 publication¹². You should give reasons for any such request.

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

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 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.

¹¹ Your request should be sent either by email: INFSO-COMP-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

¹² The Commission may inform the public of the result of its assessment before the end of this three-day period.