



Brussels, 28.4.2014
C(2014) 2950 final

Český telekomunikační úřad (ČTÚ)

Sokolovská 219
P. O. Box 02
CZ 22502 Praha 025
Czech Republic

For the attention of:
Mr Jaromír Novák
Chairman of the Council

Fax: +420 224 004 811

Dear Mr Novák,

Subject: Commission Decision concerning Case CZ/2014/1581: Wholesale market for call termination on individual public telephone networks provided at a fixed location in the Czech Republic - remedies

Comments pursuant to Article 7 of Directive 2002/21/EC as amended by Directive 2009/140/EC

I. PROCEDURE

On 27 March 2014, the Commission registered a notification from the Czech national regulatory authority, *Český telekomunikační úřad* (ČTÚ)¹, concerning the wholesale market for call termination on individual public telephone networks provided at a fixed location² in the Czech Republic.

The national consultation³ ran from 6 February 2014 to 17 February 2014.

On 11 April 2014 a request for information (RFI)⁴ was sent to ČTÚ and a response was received on 16 April 2014.

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 3 in 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.

³ In accordance with Article 6 of the Framework Directive.

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

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), the 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 second review⁵ of the markets for wholesale call termination on individual public telephone networks provided at a fixed location, notified to and assessed by the Commission in August 2009, ČTÚ designated 24 operators as having significant market power (SMP) in their respective fixed networks. A full set of remedies was imposed on Telefónica O2 Czech Republic a.s. (Telefónica O2). With regard to the other SMP operators, ČTÚ proposed to impose only transparency and non-discrimination obligations. In its comments, the Commission invited the Czech regulator to impose cost orientation as well as an access obligation on all SMP operators.

The third market review, which included the identification and scope of remedies to be imposed, was notified to and assessed by the Commission in August 2013. ČTÚ did not propose to impose an access obligation on 27 alternative fixed networks operators present in the market. The Commission issued a serious doubts letter in this respect⁶ following which ČTÚ withdrew its notified draft measure.

A modified third market review - including remedies - was again notified to and assessed by the Commission in November 2013⁷. ČTÚ proposed to impose the access obligation on all SMP operators active in the market. The Commission issued a "no comments" letter.

II.2. Regulatory remedies

ČTÚ notified two draft measures: one imposing a detailed set of remedies and the other providing details of the price control obligation.

As outlined in its previously notified measure (CZ/2013/1530), ČTÚ proposes to impose the following obligations on each SMP operator: (i) access to specific network elements and associated facilities; (ii) non-discrimination; (iii) transparency; and (iv) price control. ČTÚ furthermore intends to impose only on the incumbent operator, Telefónica O2, an obligation of accounting separation.

With regard to the price control obligation, ČTÚ proposes to introduce a symmetric price control obligation on all SMP operators. The fixed termination rate proposed by ČTÚ is 0.03 CZK/min (approximately 0.11 €-cent/min) without VAT. ČTÚ sets a single maximum price, which results from a 'pure' BU-LRIC model on the basis of an NGN topology for all SMP operators.

In line with the previously notified market analysis, containing also a framework of remedies, the price control remedy applies only to those wholesale fixed termination services which are related to calls originated in countries belonging to the European Economic Area (EEA). Nonetheless, ČTÚ clarifies that should an operator find that the differentiation of FTRs vis-à-vis non EEA countries imposes an administrative cost

⁵ Case CZ/2009/0964.

⁶ Case CZ/2013/1497.

⁷ Case CZ/2013/1530.

which outweighs the benefits in terms of additional revenues, this operator is free to charge a uniform pure BU-LRIC rate vis-à-vis all originating operators.

ČTÚ motivates its regulatory approach by a high asymmetry of prices charged by operators active in the Czech Republic compared to those active outside the EEA, which results in the fact that Czech consumers calling outside the EEA are paying high retail price (reflecting higher FTRs) while consumers from outside the EEA calling Czech numbers would only be subject to pure-BU-LRIC termination charges. ČTÚ also considers that its regulatory approach is based on the same logic as used to regulate roaming within the Union.

ČTÚ intends to impose the regulated FTRs at the latest from the first day of the third month following the month in which the final decision enters into effect. ČTÚ states that this timing is necessary to amend provisions and administrative processes related to changes to existing contracts.

III. ASSESSMENT

The Commission has examined the notification and the additional information provided by ČTÚ and has the following comments:⁸

Exclusion of calls originated outside the EEA and terminated in the Czech Republic from the price control obligation

The Commission notes that the price control remedy applies, in principle⁹, only to those wholesale fixed termination services, which are related to calls originated in countries belonging to the European Economic Area (EEA).

As outlined above, ČTÚ motivates its regulatory approach by a high asymmetry of prices charged by operators active in the Czech Republic compared to those active outside the EEA, as well as a reference to the regulation of roaming within the Union.

In accordance with Articles 15(3) and 16(1) of the Framework Directive, the NRAs shall define and analyse relevant markets in accordance with the principles of competition law, taking utmost account of the Recommendation on Relevant Markets and the Commission's Guidelines on Market Analysis¹⁰. In the context of the previously notified draft measure the Commission did not object to ČTÚ's market definition.

The Commission notes that Article 8(2)(a) of the Framework Directive requires NRAs to promote competition by ensuring that users derive maximum benefit in terms of choice, price and quality. Article 8(4) of the Access Directive¹¹ requires NRAs to impose remedies, which are based on the nature of the problem

⁸ In accordance with Article 7(3) of the Framework Directive.

⁹ An operator may charge the regulated pure BU-LRIC rate also for the termination of non-EEA calls where the administrative costs of FTR differentiation outweigh the benefits.

¹⁰ Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications and services (OJ C 165, 11.07.2002).

¹¹ Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection, of electronic communications networks and associated facilities, OJ L 108, 24.4.2002, p. 7 (of the Access Directive).

identified, proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive. Moreover, in line with Article 13 of the Access Directive, which deals with price control and cost accounting obligations, a price control remedy may only be imposed in situations where the market analysis indicates, *inter alia*, that the lack of effective competition means that operator(s) may sustain prices at an excessively high level to the detriment of the end user.

In the present case, the Commission calls on the ČTÚ to further substantiate a different regulatory treatment of calls originated from outside the EEA in view of the requirements laid down in the Regulatory Framework. In particular, ČTÚ would need to further elaborate how higher termination rates charged to non-EEA operators would translate into a different competition problem with different foreseeable effects on EEA end-users, and whether or not the risk of excessive prices (as a ground for the imposition or not of a price control remedy) is different for these two categories of calls, account taken of the underlying competition problem identified at the corresponding retail market.

In view of the above, the Commission hence asks ČTÚ to further substantiate its regulatory approach in its final decision in line with the EU Regulatory Framework.

Moreover, the Commission calls upon ČTÚ to closely cooperate with other NRAs, the Commission, and BEREC (including the relevant expert working group that is currently considering the regulatory treatment of calls originating from outside the EU) with a view to developing a consistent regulatory practice in the internal market with regard to calls originated from outside the EU and to ensure a consistent application of the Regulatory Framework within the EU.

Implementation of the Termination Rates Recommendation

ČTÚ intends to impose the regulated FTRs at the latest from the first day of the third month following the month in which the final decision enters into effect.

In this regard, the Commission points out that according to the Termination Rates Recommendation¹², NRAs should have ensured that termination rates are implemented at a cost-efficient (pure BU-LRIC) level by 31 December 2012. In this respect, the Commission considers that the pure BULRIC methodology best promotes competition by, *inter alia*, ensuring that all users derive maximum benefit in terms of choice, price and quality, in line with Article 8(2) of the Framework Directive. Moreover, the Commission observes that termination rates, which are based on a pure BULRIC model, contribute to a level playing field among operators, by eliminating competitive distortions in the termination markets.

This being said, the Commission takes note of the explanations for the implementation delay given by ČTÚ. In particular, the Commission notes that ČTÚ finds this timing necessary to amend provisions and administrative processes relating to existing contracts. Nevertheless, the Commission considers that the proposed implementation date further delays the implementation of cost efficient FTRs for the benefit of consumers.

¹² 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), OJL 124, 20.5.2009, p. 67.

However, in the specific circumstances of this case, the Commission considers that if it were to proceed with the opening of a Phase II investigation on the currently notified draft measure, ČTÚ would not be in a position to adopt the proposed measure for a minimum of an additional three months, which appears to be the same timeframe as the proposed implementation delay. Hence, the Commission calls on ČTÚ to adopt its final measure without any undue delay and further specify in its final measure detailed reasons for the proposed delay in the implementation of the FTRs.

Pursuant to Article 7(7) of the Framework Directive, ČTÚ 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 publication.¹⁵ 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: 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.