



Brussels, 31.10.2012
C(2012) 8023

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/2012/1368: Voice call termination on individual mobile networks in Poland

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

I. PROCEDURE

On 2 October 2012, the Commission registered a notification from the Polish national regulatory authority, Prezes Urzędu Komunikacji Elektronicznej ("UKE")¹, concerning the markets for voice call termination² in the networks of 7 mobile network operators in Poland.

The national consultation³ ran from 3 August to 3 September 2012.

On 8 October 2012, a request for information⁴ was sent to UKE and a response was received on 12 October 2012.

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 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. Previous notifications

The regulation of voice call termination in individual mobile networks in Poland has been subject of frequent regulatory activity by UKE.⁵ UKE has conducted its first full review of the mobile call termination markets in 2006 and a second round in 2009⁶.

In March 2011 UKE notified a draft measure concerning the details of the price control remedy imposed on the three largest MNOs (Polkomtel, PTC, and PTK). UKE proposed to set symmetrical termination rates of 0.966 PLN/min (around 0.025 EUR). This decision was, however, never adopted. Instead, in May 2011 (PL/2011/1204) UKE consulted a new draft measure concerning voluntary commitments by four⁷ MNOs to invest in areas with no or limited coverage ("white spots") in exchange for less steep glide paths (i.e. higher MTRs). In its comments the Commission pointed out⁸ 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.⁹ Moreover, the Commission pointed out that the proposed measure does not take into account the Termination Rates Recommendation¹⁰, 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.

In October 2011 UKE notified its 3rd review of the market for voice call termination of 4 operators (Polkomtel, PTC, PTK and P4).¹¹ In its draft measure UKE proposed to designate all four MNOs as having SMP and to impose a full set of obligations on all of them. With regard to price control UKE proposed to impose a pure BU LRIC (bottom up long run incremental costs) model applicable as of 1 January 2013. However, in its notified draft measure UKE did not plan to formally impose the MTRs resulting from the model by way of a regulatory decision; instead these rates would only be published

⁵ The Commission has registered in total 27 notifications concerning various aspects of MTR regulation in Poland. The majority of the draft decisions concerned the setting or amending of MTR levels by means of dispute resolutions; other decisions concerned the amendments of glide paths set in the regulatory decisions.

⁶ PL/2009/0904, C(2009) 4017.

⁷ Polkomtel, PTC, PTK, and P4.

⁸ Those measures were notified under the "old" Framework where the Commission's powers with regard to remedies were limited to comments.

⁹ 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.

¹⁰ Commission's Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (Termination Rates Recommendation), 2009/396/EC, OJ L 124, 20.5.2009, p. 67.

¹¹ PL/2011/1255-1258, C(2011) 8073.

on UKE's website in a form of a non-binding announcement (as such, those rates could not be formally challenged by the MNOs). UKE expected that the operators would voluntarily apply those (non-binding, recommended) rates. If not, UKE would then impose such MTRs by means of dispute resolutions.

The Commission opened an in-depth investigation on the basis of Article 7a of the Framework Directive. The Commission was concerned by the fact that UKE was not imposing MTRs by way of a formally binding decision, and that this would seriously undermine UKE's ability to enforce its proposed rates in a timely manner.

During the second phase of the investigation UKE withdrew its notifications¹². The withdrawal was followed by the Common Statement of UKE, BEREC and the Commission¹³ according to which UKE undertook to implement pure BU LRIC, symmetric MTRs by 1 January 2013 by way of legally binding measures. Furthermore, UKE committed to consult at national and EU level well in time so that the new symmetric, BU LRIC based MTRs could be applied by all operators as of 1 January 2013.

II.2. The notified draft measure

II.2.1. Market definition

The notified draft measures concern the third review of wholesale markets for voice call termination on individual mobile networks. UKE analyses the provision of wholesale voice call termination by all MNOs (3 incumbents and 4 new entrants)¹⁴ and, accordingly, identifies seven relevant markets of voice call termination provided in the network of:

- (1) Polkomtel S.A.,
- (2) Polska Telefonia Cyfrowa Sp. z o.o.,
- (3) Polska Telefonia Komórkowa Sp. z o.o.
- (4) P4 sp. z o.o.
- (5) Mobyland sp. z o.o.
- (6) CenterNet S.A.
- (7) Aero2 sp. z o.o.

Regarding the geographic scope of the markets, UKE considers that the area covered by each mobile network individually constitutes a separate relevant market.

II.2.2. Finding of significant market power

UKE concludes that each of the seven MNOs should be designated as having SMP in its respective market for voice call termination.

The criteria considered by UKE when reaching its conclusion are market shares (decisive criterion)¹⁵, absence of technical and economic justification for building an alternative

¹² UKE withdrew its notification concerning the 3rd review of the voice call termination markets (PL/2011/1255-58) as well as dispute settlement decisions concerning new entrants (PL/2011/1260 and PL/2011/1273).

¹³ Common Statement of the Commission, BEREC and UKE published on 20 January 2012, http://www.uke.gov.pl/_gAllery/50/39/50398/Common_statement__KE_BEREC_UKE.pdf.

¹⁴ In Poland there is also one MVNO operator but, as explained by UKE, its mobile termination rates should be always symmetric to the rate of the host operator.

¹⁵ Each operator has 100% market share in the defined relevant market.

telecommunications infrastructure, easy or privileged access to capital markets or financial resources, vertical integration of business, absence of potential competition, existence of barriers to further expansion of the undertakings and the relevant market, and the existence of barriers to entry in the relevant market.

II.2.3. Regulatory Remedies

UKE proposes to impose on all seven SMP operators the following obligations: (i) network access, (ii) non-discrimination, (iii) transparency and (iv) price control.

With regard to the price control remedy UKE is proposing to set the MTRs on the basis of a pure bottom-up long-run incremental costs model (BU LRIC), which amounts to 4.29 groszy per minute (i.e. 1.04 eurocent/min). However, UKE proposes that such rates should be implemented only as of 1 July 2013; in the meantime as of 1 January 2013 an interim rate (8.26 groszy/min) should be applicable which is calculated as an arithmetical average between the currently applicable rate (12.23 groszy/min) and the final modelled rate.

When justifying the six months delay from the deadline for the introduction of pure BU LRIC rates foreseen in the Termination Rates Recommendation, UKE uses two separate arguments.

Firstly, UKE points to the established EU regulatory practice, citing the examples of Spanish, Italian and UK regulators who are not fully compliant with the Termination Rates Recommendation. UKE underlines that the introduction of pure BU LRIC in Poland ahead of other Member States would put Polish MNOs at a disadvantage in their bilateral relations with foreign MNOs established in those Member States which allow higher than cost oriented MTRs¹⁶.

Secondly, UKE argues that the delayed introduction of pure BU LRIC rates would protect Polish MNOs against a sudden and disruptive “price shock” and decrease of revenues generated by the MTRs¹⁷. The delay is considered necessary and proportionate in order to adjust MNOs' investment and business plans.

III. COMMENTS

The Commission has examined the notification and the additional information provided by UKE and has the following comment:¹⁸

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

The Commission welcomes UKE's commitment to set regulated mobile termination rates (MTRs) on the basis of a pure BU LRIC cost model, at a level

¹⁶ In particular, due to a significant number of Polish citizens being present in the UK, Spain, and Italy, and resulting from the large volume of incoming/outgoing mobile calls from those three Member States, Polish SMP operators, if forced to apply pure BU LRIC rates as of 1 January 2013, would be exposed to higher mobile termination rates charged by operators located in the three above-mentioned countries.

¹⁷ UKE estimates that, in case of imposition of the recommended pure BU LRIC rates as of 1 January 2013 (i.e. without any interim price) Polish operators would incur a decrease of revenues of ca. 440 million PLN (ca. 110 million EUR) over the period of 6 months.

¹⁸ In accordance with Article 7(3) of the Framework Directive.

of 1.04 €ct/min. However, the Commission notes that the proposed glide-path for the introduction of fully cost-oriented MTRs in Poland will result in reaching the LRIC target level only by 1 July 2013, which is not in line with the Commission's Termination Rates Recommendation, according to which NRAs should ensure that termination rates are implemented at a cost-efficient (LRIC) level by the end of 2012.

Moreover, the Commission regrets that despite significant joint efforts of UKE, BERECA and the Commission to ensure that mobile termination rates in Poland are set at a single, cost-efficient level as of 1 January 2013, UKE now intends to deviate from the Common Statement of January 2012. By way of the Common Statement UKE had informed all stakeholders in a transparent manner and well in advance about its regulatory intentions to introduce symmetric pure BU LRIC rates by way of binding decisions by 1 January 2013, in line with the Termination Rates Recommendation.

In view of UKE's January 2012 announcement of its regulatory intentions and the envisaged date for the introduction of truly cost oriented MTRs in Poland (by 1 January 2013), the Commission considers it appropriate to act in accordance with the Common Statement. The Commission therefore urges UKE to implement pure BU LRIC rates already as of 1 January 2013.

The Commission takes note of UKE's argument that any earlier introduction of MTRs based on pure LRIC would result in a disruptive impact on Polish mobile operators. The Commission recognizes that UKE must strike a balance between protecting consumer welfare and ensuring undistorted competition on the one hand, and avoiding a disruptive impact on the mobile operators on the other hand. Against this background the Commission considers that a short delay in the implementation of the cost-oriented rates which in no circumstances should last beyond 1 July 2013, may exceptionally be acceptable in this case.

In any event, UKE should undertake all measures to ensure that the MTRs reflecting the efficient, cost oriented levels are applied in practice by the desired date. For that reason UKE should impose dissuasive penalties in case of non-compliance, which could avoid having to resolve individual disputes between operators as happened in the past.¹⁹ In any event, given the track record of implementing MTR decisions in the past, the Commission will carefully monitor whether the MTRs as notified are applied by the operators in Poland by the desired date and consider intervening in case of UKE's delay in implementation of its decisions.

Pursuant to Article 7(7) of the Framework Directive, UKE shall take the utmost account of the comments of other NRAs, BERECA and the Commission and may adopt the resulting draft measure; 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.

¹⁹ See the Commission comments expressed in cases PL/2011/1206, PL/2011/1208, PL/2011/1209, PL/2011/1212, PL/2011/1215, PL/2011/1216.

Pursuant to Point 15 of Recommendation 2008/850/EC²⁰ 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 Commission²¹ 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.²² You should give reasons for any such request.

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

²⁰ 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.

²¹ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

²² The Commission may inform the public of the result of its assessment before the end of this three-day period.