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Český telekomunikační úřad (ČTÚ)

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Czech Republic

For the attention of:  
Mr. Pavel Dvořák  
Chairman of the Council

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Dear Mr Dvořák,

**Subject: Commission decision concerning Case CZ/2012/1392: Price related remedies on the market for call termination on individual public telephone networks provided at a fixed location in the Czech Republic**

**Opening of Phase II investigation pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC**

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

**Commission decision concerning Case CZ/2012/1393: Price related remedies on the markets for voice call termination on individual mobile networks in the Czech Republic**

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

## **I. PROCEDURE**

On 8 November 2012, the Commission registered the notifications from the Czech national regulatory authority, *Český telekomunikační úřad* (ČTÚ)<sup>1</sup>, concerning price control remedies on the wholesale market for call termination on individual public telephone networks provided at a fixed location and on the wholesale markets for voice

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<sup>1</sup> 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.

call termination on individual mobile networks in the Czech Republic<sup>2</sup>.

The national consultations<sup>3</sup> concerning such price control remedies ran from 14 September 2012 to 14 October 2012 and from 14 September 2012 to 15 October 2012, respectively.

On 14 November 2012, a request for information (RFI)<sup>4</sup> was sent to ČTÚ, and a response was received on 19 November 2012. On 21 November 2012 a supplementary RFI was sent to ČTÚ, and a response was received on 26 November 2012.

Pursuant to Article 7a(1) of the Framework Directive, the Commission may notify national regulatory authority (NRA) concerned and the 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.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), 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**

#### *Fixed termination markets*

In its second review<sup>5</sup> of the markets for wholesale call termination on individual public telephone networks provided at a fixed location ČTÚ designated 24 operators as having significant market power (SMP) in their respective markets. A full set of remedies (including price control based on a LRIC cost model) was imposed on Telefónica O2. With regard to the other SMP operators, ČTÚ proposed to impose only transparency and non-discrimination obligations. The Commission in its "comments" letter invited the Czech regulator to impose a cost orientation as well as an access obligation on all SMP market players.

ČTÚ notified<sup>6</sup> price related remedies applicable to fixed termination rates<sup>7</sup> applied by Telefónica O2 separately. These fixed termination rates were not yet based on a "pure" BU-LRIC methodology, but on an LRIC methodology. The Commission had no comments.

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<sup>2</sup> Corresponding respectively to markets 3 and 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.

<sup>3</sup> In accordance with Article 6 of the Framework Directive.

<sup>4</sup> In accordance with Article 5(2) of the Framework Directive.

<sup>5</sup> Case CZ/2009/0964.

<sup>6</sup> Case CZ/2010/1060.

<sup>7</sup> These rates were: 0,30 CZK (approximately 1,18 EUR-cents) at local level in peak hours, 0,15 CZK (approximately 0,59 EUR-cents) at local level in off-peak hours, 0,34 CZK (approximately 1,34 EUR-cents) at last transit exchange level in peak hours and 0,17 CZK (approximately 0,67 EUR-cents ) at last transit exchange level in off-peak hours (these prices do not include VAT).

### *Mobile termination markets*

In its second review<sup>8</sup> of the markets for wholesale voice call termination on individual mobile networks ČTÚ designated the four mobile network operators (MNOs) as having SMP in their respective mobile networks. A full set of remedies was imposed on the three larger operators, T-Mobile Czech Republic a.s., Vodafone Czech Republic a.s., and Telefónica 02 Czech Republic a.s, while the fourth operator, MobilKom a.s, which entered the market in 2008, was only subject to obligations of transparency and non-discrimination.

According to the price control obligation, a new price cap was set as from 1 July 2010<sup>9</sup>. This new price cap was calculated on the basis of a fully allocated historic cost (FAC) model. The costs of SIM cards, retail costs, spectrum costs and common costs were excluded from the relevant cost base.

In its comments, the Commission invited ČTÚ to impose on MobilKom a price control obligation and effective access obligations underlining that an asymmetry of termination rates between the three price regulated operators and MobilKom may arise with the implementation of the proposed glide path. Moreover, in line with the Commission's comments made in the previous cases, the Commission reminded ČTÚ that NRAs should ensure that termination rates are effectively set at a cost-efficient and symmetric level, hence the recommended BU-LRIC model should be implemented.

ČTÚ notified<sup>10</sup> price related remedies applicable to mobile termination rates<sup>11</sup> applied by the three larger operators<sup>12</sup>, T-Mobile Czech Republic a.s., Vodafone Czech Republic a.s., and Telefónica 02 Czech Republic a.s, separately. These mobile termination rates were not yet based on a "pure" BU-LRIC methodology, but on a FAC cost methodology.

In its comments, the Commission urged ČTÚ to accelerate the process of implementation of the BU-LRIC model in a way that it would lead to cost efficient mobile termination rates already as from 1 January 2013, in line with the Termination Rates Recommendation. The Commission reminded ČTÚ that if it were to propose a new price remedy, which would deviate from EU law and the principles of the Termination Rates Recommendation, the Commission could proceed to opening a phase II investigation pursuant to Article 7a of the Framework Directive.

The Commission also stressed that even if Mobilkom's termination rates have so far followed the three larger operators' regulated prices and that there are currently no asymmetries between operators, an asymmetry of termination rates may still arise. Therefore, the Commission invited ČTÚ to impose a price regulation in line with that imposed on the other three operators and the Termination Rates Recommendation also on MobilKom.

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<sup>8</sup> Case CZ/2009/0959.

<sup>9</sup> The case was notified and assessed by the Commission under case CZ/2010/1057.

<sup>10</sup> Case CZ/2012/1327.

<sup>11</sup> These rates were set in a glide path with the following price caps: from 1 July 2011 to 30 June 2012 1.08 CZK (approximately 4.25 EUR-cents), from 1 July 2012 to 31 December 2012 0.72 CZK (approximately 2.83 EUR-cents) and from 1 January 2013 0.55 CZK (approximately 2.17 EUR-cents). These prices do not include VAT.

<sup>12</sup> ČTÚ thus continued not imposing a price control obligation on the fourth mobile operator Mobilkom, which was however applying termination rates that are symmetrical to the regulated rates applied by other mobile operators.

## II.2. The notified draft measure

In the draft measure regarding call termination on individual public telephone network provided at a fixed location ČTÚ proposes to impose on Telefónica Czech Republic a.s., a two staged glide path to be applied from 1 January 2013 and from 1 July 2013, respectively. ČTÚ intends to impose fixed termination rates ("FTRs") that under ČTÚ's view correspond to the target pure BU-LRIC rates from 1 July 2013 at the following levels:

(i) FTRs proposed from 1 January 2013:

Termination with interconnection at	Traffic time	Price cap [CZK/min] ex. VAT
a) local exchange (HOST)	peak	0.19 (0.75 €-cents)
	off-peak	0.10 (0.39 €-cents)
b) last transit exchange	peak	0.21 (0.83 €-cents)
	off-peak	0.11 (0.43 €-cents)

ii) FTRs proposed from 1 July 2013:

Termination with interconnection at	Traffic time	Price cap [CZK/min] ex. VAT
a) local exchange (HOST)	peak	0.07 (0.28 €-cents)
	off-peak	0.04 (0.16 €-cents)
b) last transit exchange	peak	0.08 (0.31 €-cents)
	off-peak	0.04 (0.16 €-cents)

Similarly, in the draft measures regarding voice call termination on individual mobile networks ČTÚ proposes to apply to the three larger mobile operators T-Mobile Czech Republic a.s., Vodafone Czech Republic a.s., and Telefónica Czech Republic a.s., a two staged glide path to be applied respectively: from 1 January 2013 maximum of 0.41 CZK/min excluding VAT (1.61 €-cents) and from 1 July 2013 maximum of 0.27 CZK/min excluding VAT (1.06 €-cents). ČTÚ explains that if a glide-path was not implemented, the rates would drop by 75% in less than 6 months. ČTÚ intends to impose mobile termination rates ("MTRs") that seem to correspond to the target pure BU-LRIC rates from 1 July 2013..

ČTÚ is of the view that at the current stage the extent of regulation is strictly limited by the results of the last market analyses where the price control obligation was not imposed on all SMP market players on fixed and mobile termination markets.

ČTÚ does not consult at the EU level the cost model used for the calculation of the fixed and mobile termination rates which ČTÚ intends to effectively impose from 1 July 2013. ČTÚ informed the Commission that the corresponding methodology is available at the ČTÚ's website. ČTÚ's is of the view that the model which is applicable to calculation of wholesale charges for voice call termination does not have to be consulted at the EU level. The ČTÚ thus rejects to notify the relevant methodology to the Commission under Article 7 of the Framework Directive<sup>13</sup>.

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<sup>13</sup> ČTÚ is of the view that its methodology does not differ from the methodology recommended in the Termination Rates Recommendation. Moreover, ČTÚ is of the view that the methodology itself would not affect trade between Member States.

However, ČTÚ explains that the specific levels of termination rates to be applied from 1 January 2013 represent an arithmetical average of the termination rates which are currently in place in the Czech Republic and those rates which are intended to be applied from 1 July 2013. Moreover, ČTÚ used a WACC level of 8.26% for the purposes of its calculations.

ČTÚ intends to reassess on a yearly basis the costs of an efficient operator and in case that newly calculated termination rates would differ significantly from the currently proposed rates ČTÚ would propose new price measures.

### III. ASSESSMENT

The Commission has examined the notification and the additional information provided by ČTÚ and has the following comments:<sup>14</sup>

#### **Non-imposition of effective remedies on all SMP market players and the need to carry out new analyses of the markets for termination on fixed and mobile networks**

The Commission disagrees with the approach taken by ČTÚ whereby the proposed regulation concerns only one fixed network operator operating in the Czech Republic, and ČTÚ does not intend to impose a price control obligation on other fixed network operators designated with SMP. Similarly on mobile markets, the Commission disagrees with the approach taken by ČTÚ whereby the proposed regulation concerns only three mobile operators operating in the Czech Republic, and ČTÚ does not intend to impose a price control obligation on Mobilkom, the fourth operator designated with SMP. The Commission notes that the approach taken by ČTÚ has the ultimate effect of continued asymmetry in price regulation of SMP operators.

However, since the scope of the current notification concerns only the amendment of price-related remedies which ČTÚ has already imposed in its previous decisions, the Commission cannot at this stage proceed with the opening of a phase II investigation pursuant to Article 7a of the Framework Directive, which would be based on the non-imposition of effective remedies on all SMP market players on the markets for termination on fixed and mobile networks.

Moreover, the Commission notes that the last market review of the markets for termination on fixed and mobile networks in the Czech Republic were carried out by ČTÚ in 2009. Having in mind that Article 16(6)(a) of the Framework Directive requires NRAs to carry out a new market review within three years from the adoption of a previous measure relating to that market, the Commission therefore urges ČTÚ to carry out and notify in accordance with Article 7 of the Framework Directive new market analysis of the markets for termination on fixed and mobile networks without undue delay and to impose an appropriate set of remedies on all market players. In this respect the Commission points out that competition problems in termination markets should normally be addressed with the imposition of price control based on the cost of a hypothetically efficient operator and in line with the provisions of the Termination Rates Recommendation.

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<sup>14</sup> In accordance with Article 7(3) of the Framework Directive.

## **Implementation of the Termination Rates Recommendation**

The Commission takes note that the proposed measures are not fully in line with the Commission's Termination Rates Recommendation according to which NRAs should ensure that symmetric termination rates are set at the cost efficient (pure LRIC) level by the 31 December 2012. The Commission further notes that according to the information provided by ČTÚ the introduction of fixed and mobile termination rates based on the recommended pure BU-LRIC model already by 1 January 2013 would result in a steep drop of termination rates and would put Czech operators at a competitive disadvantage vis-à-vis other European operators, which benefit from a delayed introduction of cost-efficient termination rates in their respective Member States.

The Commission recognizes that regulators need to strike a balance between protecting consumer welfare and avoiding a disproportionate negative impact on the operators and that to that end NRAs have a certain margin of discretion, which could allow them to delay to a certain degree the introduction of fully cost-oriented rates.

Against this background the Commission considers that the proposed delay in the implementation of symmetric cost-oriented rates for fixed and mobile termination rates, which in no circumstances should last beyond 1 July 2013, may exceptionally be acceptable in this case.

Nevertheless, the Commission invites ČTÚ to take full account of the Termination Rates Recommendation and to consider setting cost-efficient fixed and mobile termination rates for all operators already as of 1 January 2013 in order to bring more quickly to Czech and EU end-users the full benefits of low FTRs and MTRs in the Czech Republic.

### **Need to notify the cost model used for the calculation of the fixed and mobile termination rates to the Commission**

The Commission notes that ČTÚ does not intend to notify details of the cost model used for the calculation of both fixed and mobile termination rates arguing that the methodology itself does not affect trade between the Member States.

The Commission points out that the cost model is the basis for calculating price levels which falls under Article 8 of the Access Directive<sup>15</sup> and which has a direct effect on cross-border trade and that therefore knowledge of the details of the cost model is indispensable for the assessment of the Commission whether the draft measure complies with EU law and whether or not it creates a barrier to the single market.

Further to that ČTÚ's claim that the cost model complies with the Termination Rates Recommendation can only be verified if the cost model is notified with all its details.

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<sup>15</sup> Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, OJ L 108, 24.04.2002, p.7, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p.37.

The Commission therefore requests ČTÚ to notify the cost model used for the calculation of the fixed and mobile termination rates to the Commission without undue delay in accordance with Article 7 of the Framework Directive.

In case ČTÚ fails to notify the cost model that it has used for the calculation of the fixed and mobile termination rates, the Commission would like to point out already at this stage that it could take appropriate legal action against the Czech Republic, and thus open infringement proceedings, pursuant to Article 258 TFEU.

Furthermore, following the examination of the notification and the additional information provided by ČTÚ, the Commission considers that ČTÚ's draft measures concerning price related remedies on the market for call termination on individual public telephone networks provided at a fixed location fall within Article 7a (1) of the Framework Directive and would affect trade between Member States, because the conditions for the access to the abovementioned markets determine the costs and the ability of other operators and service providers (including those established in other Member States) to provide electronic communication services.

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, as the notified measure aims at imposing obligations on operators in conjunction with Articles 9 to 13 of the Access Directive.

Draft measures imposing regulatory obligations on undertakings with SMP in the Czech Republic 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. Consequently, such draft measures may affect the pattern of trade between Member States<sup>16</sup> and would create a barrier to the internal market.

The Commission expresses serious doubts in this regard for the following principal reason:

### **The non-imposition of appropriate fixed termination rates**

Regarding the proposed FTRs, the Commission observes that ČTÚ proposes to impose price caps applicable to termination segmented for interconnection at (i) local exchange (host) and for interconnection at (ii) last transit exchange. Secondly, the Commission would also like to stress that, even though ČTÚ explains that FTRs were calculated on the basis of a pure BU-LRIC cost model which ČTÚ failed to notify to the Commission, the proposed rates between 0.16 €-cents and 0.31 €-cents per minute are approximately two times higher than in other EU Member States where a pure BU-LRIC methodology is used<sup>17</sup>.

The Commission highlights that pursuant to one of the core regulatory principles enshrined in Article 8(5)(d) of the Framework Directive, NRAs are required to promote efficient investment and innovation in new and enhanced infrastructures. It is on that basis that any cost model imposed should be based on

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<sup>16</sup> See Recital 38 of the Framework Directive.

<sup>17</sup> In France such rate is 0.080 €-cents/min, in Ireland such rate is 0.098 €-cents/min, in Malta such rate is 0.044 €-cents/min and in Denmark such rate is 0.060 €-cents/min in peak time and 0.032 €-cents/min in off-peak time.

efficient technologies available in the time frame considered by the model. Therefore the core part considered for fixed networks should in principle be next-generation-network based.

The Commission has serious doubts that ČTÚ conforms to the mandatory principles under Article 8(5)(d) of the Framework Directive by imposing such price caps to termination markets which are segmented for interconnection at (i) local exchange (host) and for interconnection at (ii) last transit exchange. The Commission stresses that, according to ČTÚ's explanation, it decided to amend the cost model, which ČTÚ failed to notify to the Commission, during a national public consultation by introducing several changes to the definition of the input data, so that the model can, in ČTÚ's words, better reflect the reality, which is the fact that the SMP operator has not introduced the NGN technology to full extent. Thus, ČTÚ failed to impose price caps that would consider next-generation-network based efficient technologies in its entirety, necessary to model the costs of an efficient operator as required by a BU-LRIC methodology.

Moreover, the Commission has serious doubts that the proposed FTRs conform with Article 13(2) of the Access Directive, which requires NRAs to ensure that any cost recovery mechanism or pricing methodology that is mandated serves to promote efficiency and sustainable competition and maximise consumer benefits while NRAs may also take account of prices available in comparable competitive markets, and would not be in line with Article 8(2) of the Framework Directive, which requires that NRAs should ensure that users derive maximum benefits in terms of price, choice and quality, and that there is no distortion or restriction of competition.

In this respect, the Commission points out that the model used by ČTÚ, which ČTÚ failed to notify to the Commission, does not ensure that rates are set on the basis of the costs of an efficient operator and therefore does not ensure that it will serve to promote efficiency and sustainable competition and maximise consumer benefits.

#### *Creation of barriers to the internal market*

The Commission considers that excessive prices for FTRs in the Czech Republic can negatively impact the ability of operators to offer pan-European connectivity to their retail (business) customers.

The Commission stresses the need to bring all termination rates towards an efficient level in a transparent and predictable manner.

In light of the above considerations, the Commission considers, at this stage, that the draft measure would create barriers to the internal market.

#### *Conclusion*

The Commission observes that ČTÚ's notification does not meet the policy objectives and regulatory principles enshrined in Article 8 of the Framework Directive, and cannot be considered to be in line with Articles 8(5)(d) of the Framework Directive and 13(2) of the Access Directive. Hence, the Commission has serious doubts that ČTÚ's proposal on FTRs can be justified in light of the objectives laid down in Article 8 of the Framework Directive, and in particular the objectives of promoting competition and user benefits and ensuring that there is no distortion or restriction of competition in the electronic communications



sector, pursuant to Article 8(2) of the Framework Directive and believe, at this stage, that the draft measures would create barriers to the internal market.

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 measure regarding the remedies on the market for call termination on individual public telephone networks provided at a fixed location in the Czech Republic shall not be adopted for a further three months.

Pursuant to Article 7(7) of the Framework Directive, ČTÚ shall take the utmost account of the comments of other NRAs, BEREC and the Commission and may adopt the draft measure regarding the remedies on the markets for voice call termination on individual mobile networks in the Czech Republic; where it does so, shall communicate it to the Commission.

Pursuant to Recital 17 of Recommendation 2008/850/EC<sup>18</sup>, 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 Commission<sup>19</sup> within three working days following receipt whether you consider that, in accordance with European Union 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,  
Neelie KROES  
Vice-President of the Commission

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<sup>18</sup> 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.

<sup>19</sup> Your request should be sent either by email: [INFSO-COMP-ARTICLE7@ec.europa.eu](mailto:INFSO-COMP-ARTICLE7@ec.europa.eu) or by fax: +32.2.298.87.82.