



EUROPEAN COMMISSION

Brussels, 22.11.2012
C(2012) 8719

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/2012/1378: Dispute settlements concerning voice call termination on individual mobile networks in Poland**
Comments pursuant to Article 7(3) of Directive 2002/21/EC

I. PROCEDURE

On 22 October 2012, the Commission registered a notification from the Polish national regulatory authority, Prezes Urzędu Komunikacji Elektronicznej ("UKE")¹, concerning dispute settlements related to the "framework clause" in interconnection agreements, which requires affected operators to implement, in an immediate and automatic manner, MTRs resulting from UKE's regulatory decisions.

The national consultation² ran from 24 August to 24 September 2012.

On 26 October 2012, a request for information³ was sent to UKE and a response was received on 31 October 2012.

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.

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 In accordance with Article 6 of the Framework Directive.

³ In accordance with Article 5(2) of the Framework Directive.

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. UKE has conducted its first full review of the mobile call termination markets in 2006 and a second round in 2009⁴.

The current regulation of mobile termination rates, imposed on the four operators affected by this notification, was consulted at EU level in May 2011 (PL/2011/1204). At that time UKE consulted its new draft measure concerning voluntary commitments by four⁵ 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 out⁶ 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.⁷ Moreover, the Commission pointed out that the proposed measure does not take into account the Termination Rates Recommendation⁸, 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 four operators (Polkomtel, PTC, PTK and P4).⁹ However, following the opening of an in-depth investigation by the Commission on the basis of Article 7a of the Framework Directive UKE withdrew its notifications¹⁰. The withdrawal was followed by the Common Statement of UKE, BEREC and the Commission¹¹ according to which UKE undertook to implement pure bottom-up long run incremental cost (BU-LRIC) based, symmetric MTRs by 1 January 2013 by way of legally binding measures.

On 2 October 2012 UKE re-notified its 3rd review of the market, this time covering all MNOs active in Poland. In its comments letter¹² the Commission criticised UKE for deviating from the Common Statement and urged UKE to introduce pure BU-LRIC rates already in January 2013. In addition, the Commission urged UKE to undertake all measures to ensure effective implementation of the cost oriented MTRs by the desired

⁴ PL/2009/0904, C(2009) 4017.

⁵ Polkomtel, PTC, PTK, and P4.

⁶ Those measures were notified under the "old" Framework where the Commission's powers with regard to remedies were limited to comments.

⁷ 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.

⁸ 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.

⁹ PL/2011/1255-1258, C(2011) 8073.

¹⁰ 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).

¹¹ 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.

¹² PL/2012/1368, C(2012) 8023.

date and ensure compliance with UKE's price setting decisions (for example by way of dissuasive penalties in case of non-compliance), which could avoid having to resolve individual disputes between MNOs.

II.2. The notified draft measures

The notified draft measures concern three dispute settlements between P4 and Polkomtel, PTC, and PTK respectively. In its draft decisions, resolving the above-mentioned dispute settlements, UKE proposes to introduce the so called "framework clause" into interconnection agreements between (i) P4 and Polkomtel, (ii) P4 and PTC, (iii) P4 and PTK. According to this clause, the affected operators would be required to implement, automatically and immediately, MTRs previously imposed on them by UKE in regulatory decisions.

UKE explains that both regulatory decisions adopted by UKE (SMP designation, imposition of remedies) as well as dispute settlements are immediately enforceable. Hence, such decisions should be implemented by affected operators immediately after their delivery. However, operators often refuse to comply instantly with regulatory decisions pointing, in particular, to the following problems: (i) no possibility to agree on annexes to interconnection contracts; (ii) long negotiation processes; (iii) irregularities of UKE's decisions.

UKE acknowledges that it is in a position to control the implementation of regulatory measures imposed on operators¹³. According to UKE the level of financial sanction for lack of implementation of regulatory obligations is however disproportionately low vis-à-vis benefits resulting from a delayed implementation of remedies. Against this background UKE considers that it is much more efficient to focus on the implementation of regulatory obligations into interconnection agreements (by way of resolution of individual disputes) instead of imposing a large number of fines.

III. COMMENTS

The Commission has examined the notification and the additional information provided by UKE and has the following comment:¹⁴

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

The Commission notes that in the currently notified draft measures UKE intends to confirm the validity of MTRs which were already imposed in immediately enforceable regulatory measures.

The Commission would like to reiterate¹⁵ its concerns that the present disputes, and hence the need for frequent regulatory intervention, are the result of inefficient regulation of MTRs in Poland.

The Commission takes note of UKE's argument that fines for lack of compliance

¹³ Since 2009 UKE controlled (the lack of) implementation of regulatory obligations six times. It did not impose any fines, but in two cases it adopted specific recommendations for operators.

¹⁴ In accordance with Article 7(3) of the Framework Directive.

¹⁵ See Commission's comments in case PL/2011/1206-1216, C(2011) 3558.

with regulatory obligations would potentially be much lower than the benefits derived by MNOs from high MTRs and therefore would not immediately bring the desired effect. Nevertheless the Commission considers that UKE should not accept a situation in which MNOs do not respect regulatory decisions and can therefore considerably delay compliance with obligations imposed on them.

The Commission would like to emphasise that UKE has never in the past imposed a penalty for non-compliance with its MTR decisions and has in fact encouraged operators to engage in individual disputes, where no agreement could be reached over terms of interconnection.

In that regard the Commission highlights the changes brought about by the amended Framework Directive, in particular its Article 21a according to which UKE should be able to impose appropriate, effective, proportionate and dissuasive penalties.

The Commission considers it therefore inappropriate to continue settling individual disputes rather than eliminating such disputes by means of strict enforcement of UKE's price setting decisions. UKE's current approach requires unnecessarily frequent regulatory interventions, is overly bureaucratic and leads to excessive regulatory costs in Poland.

The proposed regulatory approach requiring the resolution of numerous disputes is moreover in opposition to the Common Statement¹⁶ by UKE, the Commission and BEREC, according to which, "[...] regulatory obligations, including the level of MTRs, are 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 bilateral interconnection agreements on the set level of MTRs."

Furthermore, the Commission points out that, in light of Article 8(5) a) and b) of the Framework Directive, UKE should ensure a consistent regulatory approach and that there is no discrimination in the treatment of undertakings providing electronic telecommunication networks and services. Against this background, UKE's approach to amend interconnection agreements of only three pairs of operators, at the request of one of them, might create heterogeneous, discriminatory competitive conditions in Poland.

The Commission notes that beside the three pairs of interconnection contracts subject of the notified dispute settlement decisions, there are numerous (potentially hundreds, including those between the largest MNOs, with fixed and international operators) interconnection agreements, which are not affected by UKE's proposed measures. This could potentially lead to a de facto asymmetry of MTRs in Poland as the MNOs will be in a position to delay the implementation of UKE's regulatory measures depending on the state of individual dispute resolutions.

Consequently, the Commission urges UKE to enforce its regulatory decisions and to impose dissuasive penalties in case of non-compliance instead of engaging in

¹⁶ 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.

individual dispute settlements (separately for specific pairs of operators).

Pursuant to Article 7(7) of the Framework Directive, UKE shall take the utmost account of the comments of other NRAs, BEREC 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.

Pursuant to Point 15 of Recommendation 2008/850/EC¹⁷ 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 Commission¹⁸ 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.¹⁹ You should give reasons for any such request.

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

¹⁷ 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.

¹⁸ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

¹⁹ The Commission may inform the public of the result of its assessment before the end of this three-day period.