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Urząd Komunikacji Elektronicznej  
(UKE)

18-20 Kasprzaka Street  
01-211 Warsaw  
Poland

For the attention of:  
Ms. Anna Streżyńska  
President

Fax: +48 22 53 49 253

Dear Ms Streżyńska,

**Subject: Commission decision concerning case PL/2011/1222: Wholesale call termination on the public telephone network of PTC provided at a fixed location in Poland**

**Comments pursuant to Article 7(3) of Directive 2002/21/EC<sup>1</sup>**

## **I. PROCEDURE**

On 18 May 2011, the Commission registered a notification from Urząd Komunikacji Elektronicznej (UKE) concerning the review of the wholesale market for call termination on the public telephone network of Polska Telefonia Cyfrowa Sp. z o.o. (PTC) provided at a fixed location.

The national consultation<sup>2</sup> runs in parallel with the EU consultation under Article 7 of the Framework Directive. The deadline for the EU consultation is 20 June 2011.

On 26 May 2011 a request for information<sup>3</sup> (RFI) was sent to UKE and a response was received on 31 May 2011.

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<sup>1</sup> 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.

<sup>2</sup> In accordance with Article 6 of the Framework Directive.

<sup>3</sup> Pursuant to Article 5(2) of the Framework Directive.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs) and the Commission may make comments on notified draft measures to the NRA concerned.

## **II. DESCRIPTION OF THE DRAFT MEASURE**

### **II.1. Background**

The draft measure follows the measures already notified to the Commission regarding the fixed call termination markets, relating to the incumbent operator TP (case PL/2006/0381 and PL/2009/0903) and alternative operators (cases PL/2006/0502, PL/2007/0633, PL/2007/0641, PL/2007/0685, PL/2008/0760 – 0762, PL/2008/0776, PL/2009/0814, PL/2010/1092-1093).<sup>4</sup>

The first market review concerning the wholesale market for call termination on the public telephone network of PTC was notified to the Commission under case number PL/2008/0762. In its response to the RFI in the current notification UKE stated that its previous decision (adopted on 18 November 2008) was annulled by the courts of first and second instances in Poland.

### **II.2. Market definition**

The notified draft measure concerns the wholesale market for call termination on the public telephone network of PTC, which corresponds to market 3 of the Commission Recommendation on relevant markets (the “Recommendation”)<sup>5</sup>.

Call termination is defined as a wholesale service supplied by operators which ensures the routing of traffic incoming from a point of interconnection with another operator to the fixed network termination point.

UKE explains that PTC is a mobile network operator, which also provides voice services at a fixed location, *i.e.* in an area around a given base station (a radius of about 500m, “home zone”). If the customer leaves this area, the call is disconnected. Customers using this service receive a telephone number from the fixed numbering plan, containing the area code of the location where the service is provided. Retail prices for this service are similar to retail offers of fixed operators.

UKE indicates that the relevant product market does not include call termination to numbers of information networks (NDSI), non-geographic numbers and numbers for special subscriber services (AUS)<sup>6</sup>. This is in line with the Commission's position in case

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<sup>4</sup> In these notifications relating to call termination on alternative operators’ (ANOs) networks, the Commission commented on the non-imposition of price regulation on the ANOs and invited UKE to closely monitor the development of their termination rates. The Commission noted that if there would be a material change of the contractual terms, the expected trend of further price decreases would not materialise or if the level of asymmetry with Telekomunikacja Polska (TP) termination rates increased, UKE should intervene and impose effective price regulation also on the alternative operators.

<sup>5</sup> The Commission Recommendation 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, OJ L 344, 28.12.2007, p. 65.

<sup>6</sup> Apart from termination of calls to emergency numbers (99X, 98X and 112 - allocated to services officially required to provide assistance).

PL/2006/0381<sup>7</sup> and UKE's subsequent notifications of the wholesale fixed termination markets.

According to UKE, the relevant geographic market corresponds to the geographic coverage of the operator's network.

### II.3. Finding of significant market power

On the basis of its market analysis, UKE concludes that PTC possesses SMP.

UKE bases its conclusion mainly on the following criteria: PTC has a monopoly position for call termination in its own network. UKE also considers that the buying power of other operators is not sufficient to countervail the position of the terminating operator. UKE also analyses other criteria, *i.e.* lack of potential competition, economies of scale and scope, easy or privileged access to capital markets or financial resources, the existence of technological advantage and vertical integration of the operator.

### II.4. Regulatory Remedies

UKE proposes to impose on the SMP operator the following obligations:

- (i) to meet reasonable requests for access to, and use of, network elements and associated facilities, as regards the provision of call termination in the public fixed telephone network of the SMP operator;
- (ii) non-discrimination, consisting in equal treatment of electronic communications operators in respect of access concerning the provision of call termination in the public fixed telephone network of the SMP operator, and in offering services and access information on conditions not worse than applied internally;
- (iii) transparency, consisting in the publication of information, including technical network specifications and charges, necessary for the preparation by an interested operator of an application for access concerning the provision of call termination in the public fixed telephone network of the SMP operator.
- (iv) price control (prohibition to set excessive prices).

With regard to the price control, UKE considers as non-excessive charges not higher than those set out in its draft measure, *i.e.*:

	From the date of the delivery of this draft measure	From 01/01/2012 to 30/06/2012	From 01/07/2012 to 31/12/2012
Maximum level of asymmetry vis-à-vis TP's <sup>8</sup> FTRs	46%	37%	27%

In the response to the RFI, UKE stated that it has not yet decided on the introduction of symmetry with TP's fixed termination rates after 31 December 2012. Prior to that date, UKE will once again assess the market for fixed call termination in PTC's network.

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<sup>7</sup> The initial inclusion of call termination to such numbers caused the Commission to raise serious doubts. The Commission issued a withdrawal of serious doubts letter after UKE amended its market definition in the course of the second phase procedure.

<sup>8</sup> Telekomunikacja Polska SA, the fixed incumbent operator.

### III. COMMENTS

On the basis of the present notification and the additional information provided by UKE, the Commission has the following comment<sup>9</sup>:

#### **Need to apply the Termination Rates Recommendation**

The Commission notes that UKE's glide path does not specify access prices but sets a ratio between PTC's termination rates and TP's termination rate, whereby TP is not obliged to follow any glide path<sup>10</sup> as its prices are based on costs incurred as approved by UKE. The Commission would like to recall that TP's termination rates are currently not set in line with the Termination Rates Recommendation, that is at the level of costs which are faced by an efficient operator providing the relevant service.<sup>11</sup> Therefore, the inefficiencies allowed for in the termination rate set for TP will also be reflected in the rates of PTC.

Furthermore, a distinction must be made between mobile termination rates (MTRs) and FTRs. As stated in the Termination Rates Recommendation, new entrants on the mobile telephony markets may be subject to higher unit cost for a transitional period, before having reached the minimum efficient scale. New entrants in fixed markets, however, can achieve low unit costs for example by focusing their networks on high-density routes in particular geographic areas and/or by renting relevant network inputs from other operators. Therefore, the transitional period of price asymmetry (in justified cases up to four years) that is foreseen by the Termination Rates Recommendation only applies to MTRs, but not FTRs.

The Commission notes that the proposed glide path does not lead to symmetrical rates and determines the levels of FTRs in PTC's network for a relatively short period of time (1.5 years), while leaving the determination of future rates to yet another market review. The Commission considers that the lack of determination of the FTRs at symmetric levels beyond 31 December 2012 is not in line with Commission's Termination Rates Recommendation, creates the need for unnecessarily frequent and overly bureaucratic regulatory interventions, and does not bring about the appropriate transparency, predictability for the market participants and expected benefits to final customers. Therefore, the Commission urges UKE to take full account of the Termination Rates Recommendation and reconsider on this basis its approach in order to set FTRs for PTC at cost efficient level and symmetric with other operators' rates as soon as possible.

Pursuant to Article 7(5) of the Framework Directive, UKE shall take the utmost account of comments of other NRAs and the Commission and may adopt the resulting draft measures and, where it does so, shall communicate them 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.

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<sup>9</sup> In accordance with Article 7(3) of the Framework Directive.

<sup>10</sup> See PL/2009/0903 and PL/2011/1173.

<sup>11</sup> See PL/2009/0903.

Pursuant to Point 15 of Recommendation 2008/850/EC<sup>12</sup> 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 Commission<sup>13</sup> 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<sup>14</sup>. You should give reasons for any such request.

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

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<sup>12</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 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.

<sup>13</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.

<sup>14</sup> The Commission may inform the public of the result of its assessment before the end of this three-day period.