
Comments pursuant to Article 7(3) of Directive 2002/21/EC¹

I. Procedure

Between 14 and 29 April 2011 the Commission registered a set of notifications² by the Polish National Regulatory Authority, Prezes Urzędu Komunikacji Elektronicznej (UKE). The draft measures concern in each case a dispute settlement related to the level of fees which the new mobile entrants are allowed to charge for termination on their

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² The following disputes have been registered under the respective case numbers: PL/2011/1206 (dispute between Mobyland and Polkomtel); PL/2011/1208 (dispute between Mobyland and PTK); PL/2011/1209 (dispute between Mobyland and PTC); PL/2011/1212 (dispute between CenterNet and PTC); PL/2011/1215 (dispute settlements between Cyfrowy Polsat and Telekomunikacja Polska, Cyfrowy Polsat and Polkomtel, Cyfrowy Polsat and PTC, Cyfrowy Polsat and PTK); PL/2011/1216 (dispute settlements between CenterNet and Polkomtel, CenterNet and PTK).
mobile networks of calls and SMS messages.\(^3\)

The national consultations\(^4\) run in parallel with the EU consultations under Article 7 of the Framework Directive and the deadlines for the latter fall between 16 May 2011 and 30 May 2011\(^5\).

A request for information was sent to UKE\(^6\) on 29 April 2011 and the response was received on 5 May 2011. On 6 May the Commission services held a telephone conference with UKE.

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

Under case PL/2010/1162 UKE concluded that four new entrants (CenterNet, Cyfrowy Polsat, Mobyland and Sferia) have SMP in the markets for call termination in their mobile networks and imposed regulatory remedies, including an access obligation, non-discrimination, transparency and price control, in the form of a prohibition of excessive pricing. Furthermore, in its decision UKE stated that it will consider as non-excessive those mobile termination rates (MTRs) which would not exceed levels indicated on UKE's website in the form of a non-binding 'position'. This position was published by UKE on 10 November 2010, and was last amended on 29 November 2010. UKE's position, which was however not part of its notified draft measures, provides a detailed analysis, including the actual level of charges (which are asymmetric and significantly above the regulated MTRs of the established mobile operators) and the glide path towards symmetric MTRs. During the EU consultation, UKE confirmed in its reply to the request for information that it intends to adopt another set of decisions which will set out in detail the MTRs of the four operators concerned, and that UKE will consult such decisions at both national and EU level. The Commission issued a "comments" letter asking UKE to impose cost oriented MTRs on the operators and to phase out asymmetries as soon as possible.

So far UKE has not adopted any regulatory decision which would set the exact level of

\(^3\) SMS termination rates (in addition to the regulation of MTRs) are proposed to be set by UKE in the following disputes: PL/2011/1206 (Mobyland and Polkomtel); PL/2011/1208 (Mobyland and PTK) and PL/2011/1209 (Mobyland and PTC).

\(^4\) In accordance with Article 6 of the Framework Directive.

\(^5\) Case Date of notification Phase I deadline

<table>
<thead>
<tr>
<th>Case</th>
<th>Date of notification</th>
<th>Phase I deadline</th>
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<tbody>
<tr>
<td>PL/2011/1206</td>
<td>14/04/2011</td>
<td>16/05/2011</td>
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<tr>
<td>PL/2011/1208</td>
<td>18/04/2011</td>
<td>18/05/2011</td>
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<tr>
<td>PL/2011/1209</td>
<td>18/04/2011</td>
<td>18/05/2011</td>
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<tr>
<td>PL/2011/1215</td>
<td>28/04/2011</td>
<td>30/05/2011</td>
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<tr>
<td>PL/2011/1216</td>
<td>29/04/2011</td>
<td>30/05/2011</td>
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\(^6\) Pursuant to Article 5(2) of the Framework Directive.
MTRs of the operators concerned, based on the latters` SMP designation. The price control in form of "non-excessive" pricing is ambiguous, and the operators do not seem to be legally obliged to follow UKE's non-binding explanations of what "non-excessive" means. Instead of setting the prices of the operators in a generally applicable decision, and in line with Article 16 of the Framework Directive ("Market analysis procedure"), UKE prefers to set such prices by way of the settlement of bilateral disputes.

II.2. Notified decision

The notified draft measures concern the dispute settlements between the Polish mobile operators Mobyland, CenterNet and Cyfrowy Polsat on the one hand, and the established mobile operators (i.e. Polkomtel S.A. (Polkomtel), Polska Telefonia Cyfrowa Sp. z o.o. (PTC) and Polska Telefonia Komórkowa Sp. z o.o. (PTK)) as well as the fixed incumbent Telekomunikacja Polska on the other hand. In each of the ten decisions, UKE imposes the exact prices which the concerned mobile operator shall be allowed to charge one of its counterparts for the termination of mobile calls on its network. Each decision covers only a specific pair of operators. With regard to the level of prices set in the decisions, UKE refers to its position of 10 November 2010, published on UKE's website, in which the Polish regulator presented its new approach to the levels of MTRs for new entrants' networks. The proposed levels of MTRs are the following:

<table>
<thead>
<tr>
<th>1 July 2011 r.</th>
<th>1 January 2012 r.</th>
<th>1 July 2012 r.</th>
<th>1 January 2013 r.</th>
<th>1 July 2013 r.</th>
</tr>
</thead>
<tbody>
<tr>
<td>0.280 PLN/min</td>
<td>0.180 PLN/min</td>
<td>0.140 PLN/min</td>
<td>0.137 PLN/min</td>
<td>Symmetry vis-à-vis the established operators</td>
</tr>
</tbody>
</table>

With regard to operators acting as full mobile virtual network operators (MVNOs, without own mobile network elements), UKE proposes to set their mobile termination rates symmetric to the rate of their host operator.

With regard to Mobyland, the decisions also set out the price for SMS termination in the respective network. The proposed prices are the following:

<table>
<thead>
<tr>
<th>until 30 June 2011</th>
<th>1 July 2011 r.</th>
<th>1 January 2012 r.</th>
<th>1 July 2012 r.</th>
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<tbody>
<tr>
<td>0.08 PLN/SMS;</td>
<td>0.07 PLN/SMS;</td>
<td>0.06 PLN/SMS;</td>
<td>0.05 PLN/SMS</td>
</tr>
</tbody>
</table>

The dispute settlements concern also details of other elements on which the parties could

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7 In this position, UKE published its recommended MTRs.
8 The dispute resolutions neither define the market for SMS termination in Mobyland's network nor assess the latter's potential SMP position in such market. In August 2010, UKE notified the Commission of its assessment of the wholesale market for mobile SMS termination, where it designated 3 established mobile operators and 2 new entrants as having SMP (PL/2010/1125). In a response to the request for information in this case, UKE confirmed that it will assess the markets for SMS termination for the other networks at a later date. In the reply to the request for information in the present notification, UKE maintains that it cannot assess the SMP position of Mobyland on the market for SMS termination, as Mobyland is not yet providing such services (due to lack of interconnection).
not reach an agreement, such as the type of interconnection, traffic routing and billing, number portability, etc.

Furthermore in the notified dispute settlement decisions, UKE sets the MTRs also for the three larger mobile operators (Polkomtel, PTK Centertel and PTC), despite the fact that it had already imposed relevant SMP obligations. In its reply to the request for information, UKE does not explain how it will ensure consistency between the MTRs set in the individual dispute resolution decisions and the general SMP obligations. UKE merely states that the dispute settlements have to take into account currently binding MTR levels (but not foreseen amendments). UKE further explains that in the event of final adoption of the recently notified amendments to the SMP decisions (PL/2011/1195 and PL/2011/1204) all the individual dispute settlement decisions will be subject to yet another amendment (in order to bring the levels of the MTRs set in the dispute resolutions in line with then amended SMP decisions).

III. COMMENTS

On the basis of the present notification, and the additional information provided by UKE, the Commission has the following comments:

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 set the mobile termination rates only on a bilateral basis, i.e. for a pair of operators, instead of adopting regulatory decisions based on market analysis procedures in line with Article 16 of the Framework Directive. The latter decisions would address the identified competition problem and set generally applicable termination rates.

The Commission is concerned that the present disputes, and hence the need for frequent regulatory intervention, are the result of ineffective and therefore inefficient regulation of MTRs in Poland. The Commission has on several occasions urged UKE to impose without delay legally binding regulatory measures setting out the details of mobile termination rates for the operators concerned, effective vis-à-vis all other operators, and to notify such measures under Article 7 of the Framework Directive. In a response to a formal Commission request for information, UKE had indeed committed to adopt and consult such decisions.

The Commission considers therefore, that by continuing to set mobile termination rates by means of settling individual disputes, UKE does not take utmost account of the Commission’s comments. Moreover, UKE’s approach is not only inefficient but also likely to create disputes rather than avoiding them. It further requires unnecessarily frequent regulatory interventions and is, therefore, overly bureaucratic and leading to unjustified regulatory costs in Poland.

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9 The proposed MTRs for the three larger MNOs are set at the same level as in the currently binding SMP decisions.

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

Consequently, the Commission urges UKE to impose MTRs by way of regulatory decisions based on market analysis procedures instead of relying on non-binding statements and dispute settlements (separately for specific pairs of operators).

**Need for cost-oriented, symmetric termination rates**

The Commission would like to reiterate the Commission's comment on UKE's previous notification of MTRs of new entrants. The Commission urges UKE to take full account of the Termination Rates Recommendation and to set cost-oriented termination rates also for new entrant mobile operators. In this respect, UKE should demonstrate that the proposed level (and duration) of asymmetry of MTRs correspond to any higher costs incurred by such operators. UKE should further endeavour to set symmetrical MTRs, oriented towards the cost of an efficient operator, as soon as possible.

**Regulation of SMS termination services without a proper market analysis**

The Commission considers that Article 5 of the Access Directive must be used with caution, taking into account the general principle of the electronic communications regulatory framework that regulation should only be imposed when necessary and must in any event be proportionate to the competition problem identified.

The Commission points out that the obligations proposed by UKE fall within the scope of the wholesale market for SMS termination which is considered in Poland as a market susceptible to ex-ante regulation. Contrary to its previous commitments, UKE, instead of analyzing the relevant market in question for all operators, only draws certain preliminary conclusions with regard to the market for SMS termination in the network of Mobyland. The Commission stresses that any preliminary finding which forms part of the current draft measures should not prejudge the outcome of the market analysis and SMP assessment in the market for SMS termination in Mobyland's network, which is to be carried out and notified to the Commission and other NRAs in accordance with Articles 15 and 16 of the Framework Directive. Moreover, the fact that an operator is currently not providing the services of SMS termination (due to an alleged lack of agreement on interconnection and the level of prices), should not prevent UKE from assessing its market power (in a relevant market which is very similar to numerous markets already assessed before). The Commission reminds UKE to complete its market analysis for all other operators terminating SMS in Poland, under Articles 15 and 16 of the Framework Directive, as soon as possible.

Pursuant to Article 7(7) 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.

Pursuant to Point 15 of Recommendation 2008/850/EC the Commission will publish this

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12 See case PL/2010/1162
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Yours sincerely,
For the Commission,
Robert Madelin
Director-General

\textsuperscript{14} Your request should be sent either by email: INFSO-COMP-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

\textsuperscript{15} The Commission may inform the public of the result of its assessment before the end of this three-day period.