

26 June 2008

IRG Expert Group Report

Opening of Phase II investigation pursuant to Article 7(4) of Directive 2002/21 EC:

Case PL/ 2008/ 0766- Transit services in the fixed public telephone network in Poland

Executive summary

On 18 April 2008 the Commission registered a notification by the Polish National Regulatory Authority, "UKE", concerning the transit services in the fixed public telephone network under case number PL/ 2008/ 0766. The national consultation was held in parallel with the Community consultation, the deadline being 20 May.

Transit is defined as a service offered by electronic communications operators processing their own infrastructure which can be used by other operators for the purpose of provision of telephone calls and covers by the conveyance of calls from the local exchange of the calling party to the local exchange of the called party if these two local exchanges are not directly interconnected. This market was listed in the previous version of the Commission Recommendation on relevant markets. However, in the new Commission Recommendation on relevant markets the market was removed from the list of markets susceptible for ex ante regulation. UKE decided to include captive sales in the market definition. The relevant market is defined as national.

UKE finds that the first and second criteria are fulfilled in this market due to the existence of high entry barriers in the market and that the market does not tend towards effective competition. Concerning the third criterion, UKE lists a number of potential problems which it believes cannot be properly addressed by ex-post regulation: refusal to access, excessive prices, vertical leveraging, etc..

UKE intends to designate TP as an operator having SMP in the relevant market and intends to impose on TP the following obligations: (i) obligation to provide access, (ii) non-discrimination, (iii) transparency, (iv) accounting separation, (v) price control, (vi) publication for an access reference offer.

On 20 May 2008, the Commission initiated a Phase II with serious doubts as to the compatibility of the draft measure with Community law. The Commission has doubts about if UKE has presented evidence to substantiate the conclusion that the market for transit services is susceptible to ex ante regulation in Poland and whether, in the event if such a market can be identified, TP has SMP in that market. In particular, the Commission holds that:

- there is not sufficient evidence to conclude that the market for transit services in the fixed telephone network in Poland fulfils the three criteria test and is therefore susceptible to ex ante regulation.

- TP has no SMP, given the low and decreasing market shares of TP which would not create a presumption of dominance. With regard to the inclusion of captive sales into the market definition, the Commission considers that UKE did not provide sufficient justification for the inclusion of these sales in the market.

The IRG Expert Group has analysed the serious doubts of the Commission and presents the following conclusions:

- UKE has not proved so far that the three criteria test is fulfilled in the market for transit services provided at a fixed location in Poland, considering the national market as a whole. Accordingly, the SMP of TP is not proved. The serious doubts of the Commission seem justified in this sense.
- There may be particular problems in certain areas of the territory and/or for certain specific routes, defined geographically or in terms of operators where traffic would be terminated. In all these cases, the lack of an alternative to TP would show that the three criteria test would be fulfilled and would most probably be also followed by SMP proved by very high market shares (in the cases commented, typically of 100%, as are based on non feasibility for duplication of TP infrastructure). In such a case, ex ante regulation and the finding of SMP would be justified and even needed in order to avoid distortions of competition by leveraging in these particular non-competitive areas. In case alternative suppliers do not exist for certain areas or routes the Expert group suggest that UKE identifies separate markets or sub-markets, for instance for national and international transit. This would ensure that where TP holds a privileged position regulatory obligations are maintained.
- The Expert Groups points out certain areas where problems may be identified by UKE, such as transit to ported numbers and international transit, and includes different recommendations also regarding both issues.
- The inclusion of captive sales for all operators could be justified in this particular case, given the data shown by UKE which points out to the competing services being able to exert pressure even on internal transit traffic. The Expert group has also provided some recommendations for UKE regarding this point.