

Report on the outcome of the voting of the BEREC Board of Regulators on the BEREC Opinions on the Phase II cases under the Article 7a of the revised Framework Directive

In the Plenary meeting on 9 December 2011 BEREC adopted the formal opinions on the first Phase II cases under the revised framework for electronic communications: the combined Polish cases PL/2011/1255-1256-1257-1258 and the Polish case PL/2011/1260. The first case was opened on 4 November 2011 and the second case was opened on 17 November 2011, when the Commission sent the Serious Doubts Letters to the Polish National Regulatory Authority, UKE.

According to Article 7a(3) of the Framework Directive, BEREC shall issue an Opinion on the Commission's notification of its serious doubts indicating whether it considers that the draft measure should be amended or withdrawn and, where appropriate, provide specific proposals to that end.

BEREC Opinion on Cases PL/2011/1255-1256-1257-1258

In the combined four cases PL/2011/1255-1256-1257-1258 the notified draft measures concern the third review of the wholesale markets for voice call termination on individual mobile networks in Poland.

The serious doubts expressed by the Commission relate to the proposal of the Polish National Regulatory Authority, UKE, not to adopt legally binding and immediately feasible measures for mobile termination rates on the market for voice call termination on individual mobile networks. The Commission considered that this creates significant barriers to the development of a single market. The Commission also stated that UKE's approach not to formally impose mobile termination rates does not create predictability in accordance with Article 8 (5) (a) of the Framework Directive. Furthermore, the Commission raised concerns about the lack of possibility for the concerned parties to effectively challenge the level of MTRs in national courts, which is required under Article 4 of the Framework Directive.

The view of BEREC is that, in the light of the information presented by UKE, the Commission's serious doubts concerning the lack of legal predictability in accordance with Article 8(5) (a) of the Framework Directive are justified.

BEREC agreed with the Commission's concerns concerning the infringement of Article 16(4) of the Framework Directive on the appropriateness of specific regulatory obligations. BEREC considers that, apart from efficiency concerns due to procedural delays, the SMP operator could have the incentive to take advantage of the proposed regulation e.g. by delaying tactics.

BEREC also shares the Commission's point of view that UKE's proposed draft measures may create barriers to the single market as well serious doubts as to the compatibility of these draft measures with the EU provisions on imposition and consultation of specific regulatory obligations.

BEREC shares the Commission's view that in order to comply with Article 4 Framework Directive, binding obligations must be possible to appeal. BEREC, however, does not completely share the Commission's serious doubts regarding the lack of possibility to effectively challenge the mobile termination rates in national courts. It is not evident that recommended tariffs are within the scope of Article 4 FD. Moreover, BEREC understands that the legally binding decisions such as the market analysis imposing the price regulation and the dispute settlement decisions can be appealed.

BEREC Opinion on Case PL/2011/1260

In the second Phase II case under the revised framework (Polish case PL/2011/1260), the Commission's serious doubts are related to the fact that UKE plans to impose obligation without having first defined and analysed a market for mobile call termination in the network of the relevant mobile operator, and without designating the operator as having significant market power (SMP). In this case UKE notified to the European Commission the draft measures concerning the dispute settlements between a new entrant on the mobile market, Aero2 sp. z o.o, and the fixed incumbent operator Telekomunikacja Polska S.A, as well as the mobile network operators (MNOs) Polska Telefonía Komorkowa Sp. z o.o, Polkomtel S.A. and Polska Telefonía Cyfrowa Sp. z o.o.

In case PL/2011/1260 BEREC notes that since Aero2 has not started providing voice services yet, it does not enjoy any competitive advantage that should be corrected with urgency by the regulator.

BEREC concludes, in line with the Commission's serious doubts, that as long as UKE fails to clearly justify the reasons why it modifies the MTRs imposed on Aero2 in a long term perspective without defining and analysing the market for voice call termination on its individual mobile network nor designating Aero2 as having SMP, UKE's draft measures are not in line with Articles 15 and 16 of the Framework Directive and Article 8(3) of the Access Directive. BEREC also shared the Commission's serious doubts on the regulatory predictability and agreed with the Commission that UKE does not adequately justify objective cost differences that might justify asymmetry of mobile termination rates.

BEREC considers that provided that the amendment of the MTRs established in 2010 would aim to accommodate these MTRs to the changes in the market situation in the medium/long term, the appropriate procedure to assess those long-term market conditions is defined in Articles 15 and 16 of the Framework Directive. This is especially the case considering the non-transitory character of the draft decision.