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BEREC Opinion on
Phase II investigation
pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC:

Case PL/2019/2156

Market for wholesale call termination on individual public telephone networks provided at a fixed location (Market 1) in Poland - Remedies

10 June 2019

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1. Executive summary

On 28 March 2019, the Commission registered a notification by the Polish Regulatory Authority, Urząd Komunikacji Elektronicznej (UKE), concerning the market for wholesale call termination on individual public telephone networks provided at a fixed location in Poland (case PL/2019/2156).

In its draft measure, UKE notifies the market definition, including call termination services in each operator's fixed network, as well as termination services to emergency numbers[1], the identification of operators with significant market power (SMP) - namely Orange Polska S.A., the incumbent, (OPL, thereafter) and 203 alternative operators – and, respectively, the regulatory remedies. UKE proposes to impose the obligations of providing access to and the use of certain network elements and associated infrastructure, non-discrimination, transparency[2] and price control, on all SMP operators. A cost accounting obligation is proposed to be imposed only on OPL.

With regard to the imposition of the price control obligation, UKE proposes to issue a partial administrative decision[3] according to which the future rates are to be calculated and imposed at a later stage in line with the recommended BU-LRIC methodology. In other words, UKE aims at maintaining the currently applied fixed termination rates (hereafter, referred to as FTRs) for now. They are either established based on the Fully Distributed Costs (FDC) methodology, for the price regulated operators, or on the interconnection agreements for the rest of the operators identified with SMP. However, UKE does not envisage a timeframe for the application of FTRs calculated according to the BU-LRIC methodology, nor does it propose that intermediary FTRs could be established through one of the exceptionally accepted methods mentioned in the Commission's Recommendation 2009/396/EC on the Regulatory Treatment of Fixed and Mobile Termination Rates (Termination Rates Recommendation or TRR, thereafter), for example, benchmarking.

On 26 April 2019, the Commission sent a serious doubts letter opening a phase II investigation pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC. The Commission's doubts concern UKE's proposed measures with respect to the price control remedies for the concerned market. To this effect, the Commission specifically outlines that, pending the partial decision setting FTRs based on the BU-LRIC methodology, the operators in Poland will continue applying, for an undetermined period of time[4], the current FTRs[5] which include the recuperation of inefficiently incurred costs, as well as a proportion of joint and common costs, in instances when they are regulated. For the other operators, the current FTRs bear no relation to costs. The Commission considers that UKE's proposed notification

[1] The ranges used for emergency services are 99x, 98x and 112.

[2] The incumbent will have the obligation to publish the standard reference offer for interconnection. The other SMP operators will need to publish minimum conditions for interconnection.

[3] The partial administrative decision refers to the fact that UKE proposes to issue immediately a decision establishing the mentioned regulatory remedies on the operators designated with SMP, but not set the BU-LRIC FTRs by the same decision. The BU-LRIC FTRs will be set later on, by another partial administrative decision. The two decisions will complement each other.

[4] As UKE provided no timeline for the implementation of the rates, neither in the draft decisions, nor in its answers to the requests for information.

[5] Based on the FDC methodology for two of the operators (OPL and T-Mobile Polska S.A.) and on the commercially negotiated interconnection agreements for the rest of 202 operators.

maintains considerable asymmetries to the detriment of competition and the internal market, as such.

Based on the analysis set out in this Opinion, BEREC considers that the Commission's serious doubts are justified.

In light of the argumentation provided herewith, BEREC suggests that, for the intermediary period, UKE is to notify a draft measure setting the regulated FTRs in Poland on the basis of a benchmark of European FTRs determined according to the pure BU-LRIC methodology. This will ensure, on one hand, the setting of regulated FTRs at an efficient level and, on another hand, address the current asymmetric regime of regulated FTRs. Additionally, UKE should outline and present to the market, without undue delay, a schedule setting timelines[6] for the adoption of the BU-LRIC-based FTRs in Poland.

2. Introduction

On 28 March 2019, the Commission registered a notification by the Polish National Regulatory Authority, UKE, concerning the market for wholesale call termination on individual public telephone networks provided at a fixed location in Poland. On 4 April 2019, the Commission sent a first request for information (RFI) to UKE and a response was received on 9 April 2019. A second RFI was sent on 16 April 2019 and a response was received on 17 April 2019.

The Commission initiated a phase II investigation, pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC, with a serious doubts letter on 26 April 2019. In accordance with the BEREC rules of procedure, on 6 May 2019 the Expert Working Group (EWG) was established with the mandate to prepare an independent BEREC opinion concerning the justification of the Commission's serious doubts in the aforementioned case.

Based on the reading of the information provided, on 10 May 2019 the EWG sent a list of questions to UKE. On 13 May 2019, the EWG held its initial meeting in Riga. During the meeting, an audition with UKE was held via videoconference, in order to gather further information and seek clarification on the questions previously sent, and to make additional questions. UKE submitted its written answers to the EWG on 15 May 2019. The objective of the EWG was to reach a clear conclusion on whether the Commission's serious doubts are justified. No call was held between the EWG and the Commission on this occasion.

The EWG finalised its draft opinion on 6 June 2019 and a final opinion was presented and adopted by a majority of the BEREC Board of Regulators on 7 June 2019. This opinion is now issued by BEREC in accordance with Article 7a(3) of the Framework Directive.

[6] Additional to the proposal addressed to UKE to notify without delay a decision setting FTRs in Poland by benchmarking, the EWG proposes that a schedule for the adoption of the BU-LRIC FTRs based on the model developed by the Polish Regulator is made publicly available.

3. Background

Previous notifications

The previous full review of the market for wholesale call termination on the public telephone networks provided at a fixed location in Poland was notified and assessed by the Commission under case PL/2009/0903. At the time, UKE defined the relevant market as comprising of the wholesale services ensuring the routing of calls from an interconnection point with another operator's network to the fixed network termination point. The geographic scope of the market was determined by the incumbent's (OPL's) network coverage. OPL was identified with SMP and the full set of remedies was imposed on this operator, including the price control obligation. The Commission commented on the proposed price control methodology and invited UKE to apply the BU-LRIC methodology in setting FTRs and to notify the decision concerning the rates under the procedure set in Article 7 of the Framework Directive.

Subsequently, in 2010 and 2011[7], UKE notified the Commission with draft measures identifying several other operators that were designated with SMP in the market under investigation. Concerning the proposed measures to address the identified competition problems with respect to the provision of wholesale fixed call termination services in the networks of alternative operators, the Commission commented on the non-imposition of price regulation and invited UKE to closely monitor the market and to intervene timely by imposing adequate FTRs on alternative operators, should such a measure be needed. In these decisions, the Commission's comment relating to the need to apply the BU-LRIC model was not addressed by UKE.

Current notification and the Commission's serious doubts

Current notification

UKE's current notification, registered as case PL/2019/2156, concerns the full review of the market for wholesale call termination on individual public telephone networks provided at a fixed location in Poland, including the relevant market definition, the identification of SMP operators and the imposition of the appropriate remedies on the operators designated with SMP. UKE defines the relevant product market as comprising of call termination services in each operator's fixed network, as well as termination to emergency numbers[8]. The scope of the relevant geographic market is determined by the coverage of any particular operator's network. Based mainly on the assessment of market shares and the lack of countervailing buying power, UKE identifies all the operators providing fixed termination services in Poland as being dominant for termination in their own networks. Accordingly, UKE proposes to designate OPL and other 203 fixed network operators with SMP. In view of these findings, UKE proposes to impose the full set of remedies on all the operators – (i) the provision of

[7] Cases PL/2010/1092, PL/2010/1093, PL/2011/1173, and PL/2011/1222.
[8] The ranges used for emergency services are 99x, 98x and 112.

access to and the use of certain network elements and associated infrastructure; (ii) non-discrimination; (iii) transparency[9]; (iv) cost accounting, only on OPL; and (v) price control.

With respect to the price control obligation, UKE explains that the BU-LRIC methodology is the most appropriate to be used for setting the FTRs, stressing that it provides the right regulatory tools to effectively address the identified competition failures. However, UKE proposes that the appropriate FTRs are to be established at a future date, by partial regulatory decisions of the President of UKE.

Commission's serious doubts

The Commission expresses serious doubts regarding the compatibility of UKE's current draft measure with the European Union (EU) law, concerning the proposed price control remedies for the market for call termination on individual public telephone networks provided at a fixed location in Poland, in particular with the requirements referred to in Articles 8(4) and 13(2) of the Access Directive in conjunction with Article 8 of the Framework Directive and Article 16(4) of the Framework Directive. Furthermore, the Commission considers that the relevant draft measure may create barriers to the internal market. Specifically, the Commission has serious doubts that FTRs as proposed by UKE would promote competition and would enable customers to derive maximum benefits in terms of efficient cost-based termination rates.

The Commission points to the fact that UKE intends to implement price caps for the FTRs of the identified SMP operators using currently applied rates. The current FTRs in Poland are calculated using the FDC methodology, which does not comply with the regulatory principles and objectives set out in the Regulatory Framework. This is because such a methodology allocates all the costs actually incurred by operator, even the inefficient ones, as well as a proportion of joint and common costs to the provision of the fixed termination service. For the other operators on which the price control obligations have not been previously imposed, the FTRs bear no relationship to the underlying costs. In these conditions, the FTRs applied by the operators are not, in principle, symmetric to the regulated rate. Moreover, the Polish FTRs currently benchmark significantly above the average of the pure BU-LRIC termination rates applied by NRAs in the EU[10].

The Commission mentions that methods other than the application of the recommended pure BU-LRIC model (such as benchmarking) may, in exceptional circumstances, be used as a valid alternative methodology, in particular if the development of an appropriate cost model is demonstrated to be disproportionate. It is worth stressing that the Commission notes that, although referring to the complexity of collecting all the necessary data for the BU-LRIC model, UKE did not invoke arguments and did not propose to apply the benchmarking method instead.

Overall, the Commission is of the view that UKE does not provide sufficient justification as to why it chose not to follow the Termination Rates Recommendation and, in particular, why the chosen currently applied FTRs would best meet the objective of consistent regulatory practice

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[9] The incumbent will have the obligation to publish the standard reference offer for interconnection. The other SMP operators will need to publish minimum conditions for interconnection.

[10] According to the BEREC report on termination rates at European level: https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/8306-termination-rates-at-european-level-july-2018

and the consistent application of the Regulatory Framework as set out in Article 8(3)(d) of the Framework Directive.

4. Assessment of the serious doubts

On 26 April 2019, the Commission sent a serious doubts letter opening a phase II investigation pursuant to Article 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC. The Commission's doubts concern compliance with Articles 8(4) and 13(2) of the Access Directive in conjunction with Article 8 and Article 16(4) of the Framework Directive, in particular the need to ensure that customers derive maximum benefits in terms of efficient cost-based termination rates and that the fixed termination rate does not create barriers to the internal market.

Concerns of the Commission

In its draft measure, UKE proposes to maintain the current FTRs in Poland, which have been set either by the interconnection agreements in place or by regulatory decisions. The current FTRs in Poland are calculated according to the FDC methodology and UKE envisages that these rates shall remain in force for an intermediary period until FTRs based on a BU-LRIC model are calculated and implemented following notification. The Polish Regulator did not foresee/propose a duration of this intermediary period.

Taking into account that the Polish FTRs are already significantly higher than the average of pure BU-LRIC termination rates calculated by NRAs in the EU[11], the Commission notes that benchmarking could have been used as an intermediary solution. Nevertheless, UKE does not propose to follow such an approach.

Additionally, the Commission says that UKE did not provide sufficient justification as to why FDC FTRs would reflect efficient costs of fixed termination services and, as such, "represent a valid approximation of the true "as-if-competition" price for fixed termination in Poland"[12].

Views of UKE

UKE explains that the proposed arrangement is only temporary since the future rates will be established by a partial decision of UKE's President according to the recommended BU-LRIC methodology. The Authority is not currently in a position to apply the BU-LRIC FTRs pending the necessary collection, verification and processing of the relevant data to set such FTRs. In this respect, UKE acknowledges the availability of 2017 data regarding traffic volumes and corresponding revenues, but explains that significantly more data is required as input to the model. UKE adds that such a process is time-consuming and cumbersome given the large number of operators and their heterogeneity in terms of operational costs.

Concerning potentially adequate methods according to which FTRs could be established in the intermediary period, UKE outlines the following options: (i) price cap; (ii) retail minus; (iii)

[11] The currently regulated rate in Poland is 0.4810 eurocents/minute, compared to 0.086 eurocents/minute, the average of all BU-LRIC rates set by NRAs in EU Member States as of July 2018 (https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/8306-termination-rates-at-european-level-july-2018).

[12] Commission's serious doubts letter, pg. 7-8.

benchmarking; and/or (iv) cost orientation. However, UKE clarifies that, due to specific provisions in the Polish national law, the level of the regulated FTRs are generally established through a verification process of the rates applied by the SMP, which are based on incurred costs. UKE however notes that it can only price regulate operators after the verification process is completed and the cost data of the regulated operator is in hand.

In terms of timing, UKE argues that setting an intermediate regulated FTR (on the basis of Article 39 of the Polish Telecommunications Act[13]) is disproportionate as the determination, auditing and verification of the necessary data would take approximatively 18 months. UKE adds that such an approach would generate additional and unnecessary costs for both the operator and the regulator.

BEREC's Assessment

BEREC is of the opinion that UKE's position of not applying the BU-LRIC methodology in setting the regulated FTRs is not aligned with the objectives and proposals underlying the 2009 Termination Rates Recommendation. BEREC notes that the Commission's serious doubts raised in most Phase II investigations regarding termination markets outline the significant benefits in harmonizing cost methodologies and, in particular, in adopting a pure BU-LRIC methodology to set symmetric termination rates for all operators. Diverging regulatory treatment for termination rates has been perceived as creating fundamental competitive distortions by both NRAs and the Commission. Therefore, the harmonization of NRAs' approaches when setting termination rates is considered of utmost importance in order to provide greater legal certainty, the right incentives for (potential) investors, as well as reducing the regulatory burden on existing operators and assuring a level playing field for all electronic communication operators in the European Union.

As it is widely acknowledged, the Commission recommends that NRAs set symmetric termination rates between operators in a *Calling Party Network Pays* charging system at the most cost-efficient level, which is, in the context of wholesale voice call termination markets, and given their competitive and distributional characteristics, defined as the one resulting from a bottom-up modelling approach using a pure long-run incremental costs methodology (pure BU-LRIC). Moreover, given that voice call termination services are traffic-related services, setting the efficient cost for the provision of the services implies that FTRs should allow only for the recovery of those costs which vary with the level of termination traffic and which could be avoided if a wholesale voice call termination service were no longer provided to third parties.

Also, a lack of harmonisation in the application of cost-accounting principles to termination markets may also create a barrier to the internal market. Specifically, given significant price differences for termination services determined by the usage of various underlying cost methodologies, operators from those Member States where termination rates are pure BU-LRIC-based would have to pay higher termination charges to other operators, which may translate into higher retail prices and/or may make it difficult for them to include cross-border calls in national plans, with negative impact on the development of pan-European offers.

In addition, wholesale charges above pure BU-LRIC-level and the asymmetry between different Member States would create undue financial flows between operators and can have a negative impact at national level on competition, innovative services and/or pricing

[13] Article 39 provides for price regulation based on the justified costs by the SMP operator.

structures. Therefore, not implementing the TRR reduces the benefits that could be achieved in terms of retail prices, quality and choice of services in the respective Member State(s).

In this respect, despite the fact that UKE proposes to set the FTRs according to the recommended BU-LRIC methodology, the rates will *de facto* stay at the current levels for an undetermined period. As mentioned before, the currently regulated rates are based on a costing methodology that allocates all the costs actually incurred by the operators (FDC), including the inefficient ones, as well as a proportion of joint and common costs to the provision of the fixed termination service. Therefore, BEREC considers that UKE's current proposal is effectively setting out circumstances under which Polish operators are permitted to set their FTRs based on a non-efficient cost methodology. Moreover, BEREC stresses that the currently applied FTRs are well above the efficient price level, as determined by UKE in its draft decision published in May 2018[14], as well as the average of pure BU-LRIC FTRs applied across other Member States. In light of the above, BEREC considers that the Polish FTRs do not comply with the principles and objectives of the TRR, as described above.

BEREC also notes that, according to the TRR, NRAs should have ensured that as of 31 December 2012 termination rates were implemented, amongst other things, at a symmetric cost-efficient level (i.e. in line with a pure BU-LRIC methodology). Therefore, UKE had more than six years since the deadline to apply the TRR, but did not effectively do so. Furthermore, although Article 19(2) of the Framework Directive provides for the possibility for NRAs not to follow a Recommendation, NRAs would have to provide reasons/justification for such deviations, and, in BEREC's view, UKE was not able to present valid reasons for deviating.

Moreover, having regard to UKE's acknowledgement of the appropriateness and proportionality of the BU-LRIC methodology in setting the FTRs, on the one hand, and to the significant period elapsed since the previous full market review, on the other hand, BEREC fails to understand UKE's delay in amending the previously imposed price control obligation.

Notwithstanding the analysis presented above, for the intermediary period, BEREC finds that UKE should reconsider the proposed maintenance of the current FTRs. As said, in accordance with point 12 of the TRR, in exceptional circumstances, NRAs can consider using alternative methodologies to BU-LRIC for the purposes of setting the regulated termination rates. However, the resulting prices should not exceed the average of the termination rates set by NRAs implementing the BU-LRIC model. Therefore, BEREC considers that prices based on a benchmark of BU-LRIC rates set by NRAs could be a suitable solution for the intermediary period. This rate is available from the biannual BEREC termination rates benchmarking report and, if used uniformly in Poland, would secure the setting of symmetrical rates that are in line with the TRR.

Concerning the forward-looking schedule, BEREC considers that UKE's notified draft measure does not duly take into account the timing aspect related to the implementation of the results of its BU-LRIC model. BEREC is of the opinion that the setting of clear timelines for the implementation of BU-LRIC based FTRs would provide greater legal certainty of a level playing field to existing operators, and for all electronic communication operators in the EU. In BEREC's view, such an approach would also send the right signals to the Polish fixed

[14] In May 2018, UKE has publicly consulted the FTR decisions, including the rates resulting from its pure BU-LRIC model which was 0.0032 PLN/min, over 8 times lower than the FTRs currently prevailing in Poland.

telephony market, considering that regulatory certainty and predictability are principles of utmost importance to be taken into account by NRAs when applying the adequate regulatory remedies to address competition shortcomings in the underlying electronic communications markets.

Finally, in terms of functioning of the internal market, as mentioned before, considerable asymmetries in FTRs within the EU would be kept in place for an undetermined period, to the detriment of competition, the internal market and consumers. BEREC therefore endorses the Commission's standpoint, as presented in its serious doubts letter. Furthermore, BEREC notes that UKE's intended approach would also imply no decline in fixed termination charges in the foreseeable future and, thus, no possibility for such a decline being reflected in lower fixed calling rates to the end-user.

At the same time, any alternative regulatory approach chosen by the NRA other than the one recommended by the Commission, according to Article 19 of the Framework Directive, has to comply with the other provisions of this Directive and, in particular, with Articles 8(4) and 13(2) of the Access Directive in conjunction with Article 8 and 16(4) of the Framework Directive. BEREC is of the view that UKE's proposed approach for the intermediary period does not comply with the stated provisions.

Given the above, BEREC concurs with the Commission that, at this stage, UKE's notified draft measure would create barriers to the internal market.

5. Conclusions

On the basis of the analysis set out in section 4 above, BEREC considers that the Commission's serious doubts regarding the draft decision of the Polish Regulatory Authority, UKE, on the need to ensure that customers derive maximum benefits in terms of efficient cost-based termination rates and that fixed termination rates promote competition - as expressed in the Commission's letter dated 26 April 2019 concerning case PL/2019/2156 – are justified.

BEREC is of the opinion that UKE should comply with the provisions in the TRR as soon as possible, by setting the appropriate FTRs at a symmetric, cost-efficient level. Moreover, in light of the Commission's serious doubts and the argumentation above, BEREC considers that, for the intermediate period, UKE should set the FTRs by using a European benchmark of the FTRs determined based on pure BU-LRIC methodology.

Although the lack of a timeline for the introduction of rates determined on the basis of a pure BU-LRIC model is not explicitly stated by the Commission in its serious doubt letter, in order to comply with the prudential principle of legal certainty and to create a level playing field for the operators providing fixed telephony services in Poland, BEREC recommends that the Polish NRA should make publicly available, without undue delay, a schedule of timelines on the adoption of the BU-LRIC-based regulated FTRs.