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Ryšių reguliavimo tarnyba (RRT)
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03219 Vilnius
Lithuania

For the attention of
Mr. Feliksas Dobrovolskis
Director

Fax: +370 5 216 156 4

Dear Mr Dobrovolskis,

Subject: Commission Decision concerning Case LT/2015/1784: Wholesale call termination on individual public telephone networks provided at a fixed location in Lithuania

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

1. PROCEDURE

On 6 November 2015, the Commission registered a notification from the Lithuanian national regulatory authority, Ryšių reguliavimo tarnyba (RRT)¹, concerning the wholesale markets for call termination on individual public telephone networks provided at a fixed location² in Lithuania.

The national consultation³ ran from 3 September until 22 September 2015.

On 16 October 2015, a request for information (RFI)⁴ was sent to RRT and a response was received on 21 October 2015.

¹ Under Article 7 of 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, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

² Corresponding to Market 1 in Commission Recommendation 2014/710/EU of 9 October 2014 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 (Recommendation on Relevant Markets), OJ L 295, 11.10.2014, p. 79.

³ In accordance with Article 6 of the Framework Directive.

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

2. DESCRIPTION OF THE DRAFT MEASURE

2.1. Background

The market for call termination on individual public telephone networks provided at a fixed location in Lithuania was previously notified to and assessed by the Commission under case LT/2014/1622⁵. RRT found ten operators to hold SMP on their respective termination markets and imposed on the incumbent - TEO LT - access, non-discrimination, transparency, price control and cost accounting obligations, while the alternative network operators (ANOs) were subject to access and price control obligations only. RRT proposed not to calculate Fixed Termination Rates (FTRs) on the basis of a pure BU-LRIC model, as set out in the Commission's Termination Rates Recommendation⁶, but to base them on the historic ratio between the Mobile Termination Rates (MTRs) and the FTRs. This approach resulted in FTR price caps of 0.61 €cents/min, which was the same FTR which was being applied at the time of the notification. The Commission opened a Phase II investigation questioning whether the methodology adopted by RRT to set FTRs fulfilled the objectives pursued by the regulatory framework and led to the creation of barriers to the internal market and higher prices for consumers. Following the opening of the Phase II investigation, RRT withdrew its notification.

Subsequently, RRT notified a new proposal under case LT/2015/1731⁷. The price cap for termination services related to calls originated within the European Economic Area (EEA), calculated via a bottom-up model, was set at 0.26 €cents/min for the nine operators with SMP. The price cap was not applicable to calls originated outside the EEA, which meant that all operators could set higher rates for this type of termination service. The Commission opened a Phase II investigation following its serious doubts on the appropriateness of both RRT's market definition and proposed remedies. As regards the market definition, the Commission criticised the lack of a clear delineation between the transit market, a market outside the scope of the Commission's Recommendation on Relevant Markets, and the relevant termination markets. It also expressed serious doubts on the inclusion of non-geographic numbers in the market definition, without sufficient arguments justifying this choice. The Commission also considered that RRT's proposed costing methodology did not seem to reflect the Commission's recommended pure BU-LRIC model, as i) it appeared to be based on the incumbent's

⁴ In accordance with Article 5(2) of the Framework Directive.

⁵ C(2014) 5103

⁶ Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU, OJ L124, p. 67 (the "Termination Rates Recommendation").

⁷ C(2015) 3608

network and services, rather than on a hypothetical efficient operator, ii) the applicable price cap was calculated using demand levels from 2010, rather than forward-looking volumes, and iii) the wholesale commercial costs were calculated outside the model and added to the model's output, rather than being derived directly from the costing model itself. Following the opening of the Phase II investigation, RRT withdrew its notification.

2.2. Market definition

RRT defines the market for call termination on individual public telephone networks provided at a fixed location as the *"transmission of a call from the exchange of a Network (including the exchange) where network interconnection is implemented or could be implemented, to the point identified by a telephone number, installed in the exchange of the same Network, where the call is terminated."*

The market includes the termination of all types of calls irrespective of where the call originates (nationally, internationally, from fixed or mobile numbers) when provided on fixed PSTN and VoIP networks⁸.

Call termination of a particular type of non-geographic telephone numbers, so called 'personal numbers' (number range 7XXXXXXX) are included in the market because the provision of calls to/from these numbers works in the same way as calls to/from geographic numbers. RRT explains in the answer to the RFI that these numbers are used, with very few exceptions, to provide managed VoIP retail fixed telephone services. These services are usually provided to new customers who do not have a geographic number⁹, or who would like to have a personal number rather than a geographic number.

RRT defines nine individual markets corresponding to the networks of the following operators: TEO LT, Lietuvos geležinkeliai, Lietuvos radijo ir televizijos centras, CSC TELECOM, LINKOTELUS, MEDIAFON, Nacionalinis telekomunikacijų tinklas, Telekomunikacijų grupė, and ECOFON.

The relevant geographic scope of these markets is national.

2.3. Finding of significant market power

On the basis of its market analysis, RRT intends to designate the nine above-mentioned network operators as having SMP in their respective markets for fixed call termination.

The main criteria considered by RRT include: i) market shares (each operator has 100% share on the relevant market), ii) barriers to entry, iii) absence of potential competition, iv) absence of countervailing buying power and v) the opinion provided by operators to RRT through a questionnaire.

⁸ The market includes call termination services related to telephone numbers from the number ranges 3XXXXXXX, 4XXXXXXX, 5XXXXXXX, 7XXXXXXX.

⁹ A "scarce resource" in Lithuania, according to RRT.

2.4. Regulatory remedies

Remedies imposed on TEO LT

As regards TEO LT, RRT proposes to maintain the access obligation and to withdraw the accounting separation obligation, considered to be excessively burdensome for the incumbent. Moreover, the regulator proposes to amend the non-discrimination, price control and transparency obligations in the following way:

- Non-discrimination obligation: under the newly proposed remedies, TEO LT would no longer be required to apply the same termination rates to calls originated within and outside the European Economic Area (EEA). TEO LT, however, would continue to be required to charge the same termination rate to all calls originated within the EEA (see price control obligation below). It would also be required to charge the same termination rate to operators buying the same service (no discrimination between operators in "equal circumstances").¹⁰
- Price control obligation: RRT proposes to set the FTR for calls originated within the EEA at 0.13 € cents/min. (excl. VAT). TEO LT will be free to set any rate that it considers appropriate for the termination of calls originated outside of the EEA (while complying with the non-discrimination obligation mentioned above).
- Transparency obligation: RRT proposes a minor change in the wording of the obligation. The content and impact of the remedy will remain the same.

Remedies imposed on the ANOs

As regards the other eight SMP operators, RRT proposes to maintain the access obligation and to amend the price control obligation by requesting them to charge FTRs that are not higher than the FTRs applied by TEO LT¹¹. As in the case of the incumbent, the regulation of prices of call termination services for ANOs is limited to calls originated within the EEA. The non-discrimination and the transparency obligations are not imposed on the ANOs.

Details of the cost model

RRT explains that the FTR of 0.13 €cents/min was calculated using a "BU-LRAIC model", which was developed in 2015. However, the regulator clarified that the model only accounts for avoidable or incremental network

¹⁰ For example, TEO LT should charge the same rate to a call directly originated from a non-EEA operator and to a national transit operator delivering a call originated in the same non-EEA country.

¹¹ RRT explained in case LT/2015/1731 that such a price control remedy would in practice reduce the number of administrative procedures when a change to the regulated rates will occur, given that all the alternative operators' FTRs would be changed by amending only the incumbent's FTR.

costs - used for the provision of fixed call termination services - and that no joint or common costs are included in the regulated tariff.¹²

RRT runs the model¹³ to estimate the forward-looking incremental network costs for the provision of fixed termination services over the upcoming regulatory period (2016 to 2018). RRT then calculates the arithmetic average of the model's output over the three years, which results in network costs of 0.1092 €cents/min.

As in its previous notification, on top of the cost generated within the model, RRT proposes to add incremental wholesale commercial costs (revenue management, payment administration, administration of services sold and others)¹⁴. The wholesale commercial costs were derived from TEO LT's most recent (2014) regulatory accounting data and amount to 0.0171 €cents/minute - which when added to the BU-LRAIC cost output (0.1092 €cents/minute) result in the final value of the applicable FTR (0.13 €cents/minute ex. VAT).

The entry into force of the proposed measures is foreseen for 1 January 2016¹⁵. The new measures would be valid at least until the next market analysis, which is expected in 2018.

3. COMMENTS

The Commission has examined the notification and the additional information provided by the RRT and has the following comment:¹⁶

The treatment of additional commercial costs

The Commission notes that the cost model used for calculating the FTRs is considered by RRT to be in line with the recommended pure BU-LRIC model, and that the proposed price cap for FTRs has been set at 0.13 €cents/min. This level corresponds to the sum of the result of the costing model (0.1092 €/min) and a mark-up for wholesale commercial costs (0.0171 €cents/min). The Commission

¹² Indeed, RRT explains in the response to the RFI that they use the terms "BU-LRAIC" and "BU-LRIC" interchangeably. It should be noted that, generally, the BU-LRAIC model does include a share of joint or common costs, but, as mentioned above, RRT clarified that this is not the case in its draft decision.

¹³ The BU-LRAIC network costs were calculated by RRT on the basis of a NGN single-layer (national) IP core network, built on the basis of the incumbent's forecasted demand for wholesale fixed call termination services. RRT uses a 'scorched nodes' approach, applying current cost accounting (CCA) principles and an indexed annuity depreciation method. The prices of the estimated network elements were set according to the latest information provided by TEO LT. The model was used to calculate incremental (avoidable) costs of the provision of wholesale call termination services by a hypothetical efficient operator, as required by the Termination Rates Recommendation.

¹⁴ In the response to the RFI, RRT explains that the model is unable to calculate the wholesale commercial costs, so these need to be added separately.

¹⁵ RRT believes that operators will continue to apply the interim rate of 0.61 €cents/min (which entered into effect on 1st January 2013 and was supposed to be replaced as of October 2013) until the new rates are implemented.

¹⁶ In accordance with Article 7(3) of the Framework Directive.

notes that wholesale commercial costs have been derived from TEO LT's data, and have not been adjusted for efficiency.

In this respect, the Commission considers that wholesale commercial costs should be derived from the costing model itself, rather than being calculated outside the model and added to the model's cost result, as RRT's proposed approach suggests. The Commission highlights that, in the absence of a BU-LRIC evaluation of wholesale commercial costs, it is difficult to assess to what extent figures provided by the incumbent reflect efficient operational costs.

The Commission is aware, however, that in this particular case the wholesale commercial costs account for only around 13% of the total costs of an efficient operator providing the relevant termination service in Lithuania.

The Commission therefore invites RRT to derive wholesale commercial costs directly from its costing model in the context of its next update and/or review, and to amend its pure BU-LRIC model accordingly.

Pursuant to Article 7(7) of the Framework Directive, RRT shall take the utmost account of the comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measure; where it does so, shall communicate it 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/EC¹⁷ 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 Commission¹⁸ 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.¹⁹ You should give reasons for any such request.

Yours sincerely,

For the Commission,
Roberto Viola
Director-General

¹⁷ 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.

¹⁸ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

¹⁹ The Commission may inform the public of the result of its assessment before the end of this three-day period.