

BEREC Opinion

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

**Case PL/2011/1255-1258 – Voice call termination on individual
mobile networks of Polska Telefonia Cyfrowa Sp. z o.o., P4 Sp. z
o.o., Polkomtel S.A. and Polska Telefonia Komórkowa Sp. z o.o. in
Poland**

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1 Introduction

On 4 October 2011, the European Commission (the Commission) registered notifications from the Polish National Regulatory Authority, Prezes Urząd Komunikacji Elektronicznej (UKE), concerning the wholesale markets for voice call termination on individual mobile networks of Polska Telefonia Cyfrowa Sp. z o.o., P4 Sp. z o.o., Polkomtel S.A. and Polska Telefonia Komórkowa Sp. z o.o. (in this report referred to as “operators” or “SMP operators”), under the case numbers PL/2011/1255, PL/2011/1256, PL/2011/1257 and PL/2011/1258 respectively.

The Commission initiated a phase II investigation with a serious doubts letter¹ on 4 November 2011. In accordance with the BEREC rules of procedure² the Expert Working Group was established immediately after that date with the mandate to prepare an independent BEREC opinion on the justification of the Commission’s serious doubts on the case.

On 10 November 2011 BEREC sent a list of questions for clarification to UKE. Answers were received from UKE on 11 November 2011. BEREC met on 14 November 2011 in Stockholm. During that meeting BEREC held a telephone conference with UKE where the NRA had the opportunity to explain the case to BEREC and provide further information and clarification in response to questions. The objective of BEREC was to reach clear conclusions on whether or not the Commission’s serious doubts are justified. On 28 November a second meeting with BEREC were held in Brussels, and a meeting with UKE also took place during the day. Some further clarifications were received from UKE the day after, the 29th. On 5 December, a telephone conference was held with BEREC, UKE and the Commission.

A draft report by BEREC was finalized on 6 December 2011 and a final report was presented to the BoR on 8 December 2011.

¹ https://circabc.europa.eu/d/d/workspace/SpacesStore/2f495d27-c3d1-48aa-be7e-dea50a10b5bd/PL-2011-1255-1258%20Acte%289%29_EN%2Bdate%20et%20nr.pdf

² Procedures for the elaboration of the BEREC Opinion in article 7 and 7a Phase II, BoR (10) 61 rev1, dated 110214.

2 Background

2.1 Previous notifications

UKE proposed in its previous market reviews (case number PL/2009/0904) to designate three mobile network operators (MNO) Polkomtel SA (Polkomtel), Polska Telefonia Cyfrowa Sp. z o.o. (PTC) and Polska Telefonia Komórkowa Sp. z o.o. (PTK) as having significant market power on their respective networks. For all three operators UKE proposed to impose obligations of transparency, non-discrimination, access, and price control (based on costs incurred).

The first review of the market for voice call termination on P4 Sp. z o.o.'s (P4) mobile network was notified to the Commission under case number PL/2008/0794. In this case UKE proposed to impose on P4 the obligations of access, non-discrimination, transparency, and non-excessive pricing.

Under the case PL/2011/1195, UKE notified a draft measure concerning the details of the price control obligation imposed on Polkomtel, PTC, and PTK that set symmetrical termination rates of 0.966 PLN/min (around 0.025 EUR) for the three SMP operators. The decision was however not adopted and instead a new draft measure, under the case PL/2011/1204, concerning voluntary commitments by four MNOs to invest in areas with no or limited coverage (white spots) in exchange for less steep glide paths for mobile termination rates (MTRs), was proposed. In its comments the Commission pointed out that the proposed measures are not in line with Article 8(4) of the Access directive, namely that they are neither based on the nature of the problem identified nor proportionate and justified. Moreover, the Commission pointed out that the proposed measure does not take into account the Termination Rates Recommendation³, which states that MTRs should be oriented towards the cost of an efficient operator. The latter decision was despite negative comments from the Commission, however adopted.

2.2 The notified draft measure

The notified draft measure concerns wholesale markets for voice call termination on individual mobile networks in Poland. This product market is listed in the Commission's Recommendation on relevant markets (Recommendation 2007/879/EC of 17 December 2007). UKE considers that the provision of wholesale voice call termination by MNOs, regardless of the origination of the call (fixed or mobile), belongs to the relevant product market. Furthermore, UKE identifies four relevant markets for wholesale voice call termination provided respectively by each of the four operators. Regarding the geographic scope of the markets, UKE considers that the area covered by each mobile network constitutes a separate relevant market.

³ Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (2009/396/EC).

UKE concludes that each of the MNOs should be designated as having SMP in its respective market.

UKE proposes to maintain obligations previously imposed on the three largest SMP operators concerning non-discrimination, transparency and price control (based on costs incurred until 31 December 2012). As far as P4 is concerned, UKE maintains the previously imposed obligations of non-discrimination and price control (i.e. prohibition to charge excessive prices) which would be valid until the end of 2012.

With regard to the termination rates after 31 December 2012, UKE proposes to impose on all four operators an obligation to set and apply prices resulting from a BU LRIC model built for an efficient operator. In addition, the SMP operators are required to submit to UKE, by 30 April 2012, data in electronic form that is needed to create a profile of an efficient operator. According to UKE, no further consultations are intended concerning the rates resulting from the application of the BU LRIC model, since the operators were informed about the new regulatory approach during dedicated workshops and the proposals were formally consulted during national consultations.

UKE will publish the updated and relevant MTRs in the form of a statement on its website and will leave the implementation of such prices to the operators in order for them to be able to negotiate the level of MTRs in their individual interconnection agreements. Only if there is no agreement, then UKE intends to impose prices by way of individual dispute settlement decisions, but only after a 90 days period (prescribed by law for negotiations) has expired. UKE intends to consult such dispute settlement decisions at both national and EU levels prior to their adoption.

2.3 Summary of the serious doubts

The Commission is, according to its serious doubts letter, concerned that UKE will publish non-binding (recommended) MTRs instead of legally binding decisions. If the MTRs are not legally binding or immediately enforceable, this creates significant barriers to the development of a single market. The Commission also believes that the lack of transparency may increase costs and would unnecessarily enlarge the intervention of public administration when individual disputes between operators should be solved. Furthermore, the Commission states that UKE's approach not to formally impose MTRs and not taking full account of the Termination Rates Recommendation leads to a lack of predictability in accordance with the EU regulatory framework.

3 Assessment of the justification of the serious doubts

3.1 The task of BEREC

According to the Articles 2(a) and 3(a) BEREC Regulation⁴, BEREC shall develop and disseminate among NRAs regulatory best practice, such as common approaches, methodologies or guidelines on the implementation of the EU regulatory framework. The task of BEREC is to deliver opinions on draft measures of NRAs concerning market definition, the designation of undertakings with significant market power and the imposition of remedies, in accordance with Articles 7 and 7a of the Framework Directive (FD), and to cooperate with the NRAs in accordance with Articles 7 and 7a of the FD.

The procedures for the elaboration of the BEREC Opinion in article 7 and 7a Phase II states the task of the BEREC EWG.⁵ The opinion of BEREC shall contain a summary of the notification and the serious doubts, the analysis, clear conclusions on whether the draft regulatory measure is compatible with the EU Regulatory Framework and possible alternative proposals from BEREC, pursuant to article 7a provisions. The opinion of BEREC will be outlined in this chapter while recommendations are provided in chapter four.

3.2 General observations

The serious doubts expressed by the Commission relate to issues regarding UKE, as a result of the market analysis, not adopting legally binding decisions for MTRs on the market for voice call termination on individual mobile networks as well as consultation of further regulatory actions.

UKE has applied binding MTRs before, however the proposed draft measure raises concerns regarding the status of the future MTRs in Poland. BEREC is concerned about the possible lack of binding MTRs in the Polish mobile termination markets given the general understanding regarding the competition problems and history of disputes on the concerned markets. Polish law does not lie within the competence of BEREC and hence the question concerning whether or not the MTRs will be binding remains somewhat unclear to BEREC, as does the reasons for UKE choosing the proposed measure.

Having said that, the understanding of BEREC is that, based on its national legislation, UKE:

- i) imposes the obligation of determination and application of fees for voice call termination on individual mobile networks (article VI of each SMP decision);

⁴REGULATION (EC) No 1211/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 November 2009, establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office.

⁵ Procedures for the elaboration of the BEREC Opinion in article 7 and 7a Phase II, BoR (10) 61 rev1, dated 110214.

- ii) considers it not being possible to impose MTRs based on a BU LRIC methodology as standard remedy under Article 40 of the Polish Telecommunication Act (TA);
- iii) considers it to be ineffective and complicated to impose MTRs based on a BU LRIC methodology as a standard remedy under Article 39 TA or as an exceptional remedy under Article 44 TA;
- iv) will publish the MTRs via a statement, resulting from the BU LRIC model, that the SMP operators should set in their interconnection agreements;
- v) has the power to solve dispute settlements or to intervene *ex officio* by modifying bilateral agreements if the above-mentioned MTRs are not properly implemented (articles 28 to 30 of the TA).

3.3 Creation of barriers to the single market

3.3.1 Concerns of the Commission

In its serious doubts letter the Commission considered that the fact that UKE does not adopt legally binding and immediately enforceable measures creates significant barriers to the development of a single market. The Commission believes that the lack of transparency may increase costs and reduce the possibility for other operators and service providers to provide services. The Commission also believes that the lack of legally binding MTRs would unnecessarily enlarge the intervention of public administration when individual disputes between operators should be solved. Moreover all negotiations would be time consuming for the operators.

3.3.2 BEREC opinion

Creation of barriers to the single market

The view of BEREC is that, in the light of the information presented by UKE, the Commission's serious doubts are justified.

In this regard, on the basis of the information provided by UKE, it seems that the NRA – in consideration of its national legislation – considers inappropriate to impose or approve MTRs based on a LRIC methodology through a regulatory measure, thus through a decision defining the remedies to be applied by the SMP operator. Instead UKE deems it more appropriate to impose MTRs by modifying bilateral agreement, frequently within dispute settlements. In the view of BEREC, remedies should be justified according to the competition concerns identified in the relevant markets. In addition, the understanding of BEREC is that UKE does not share the Commission's remark on the lack of transparency in the market, as the NRA considers that the recommended tariffs will be in any case implemented in the interconnection agreements, voluntarily or by means of UKE's decisions modifying bilateral agreements.

In the view of BEREC, it should also be taken into account that, according to the recital (49) of the Directive 2009/140, there is a need to adapt regulation rapidly in a coordinated and harmonised way at Community level, as experience has shown that unjustified divergence among the national regulatory authorities in the

implementation of the EU regulatory framework may create barriers to the development of the internal market.

This is one of the reasons why Articles 7.2 and 7.bis.2 Directive 2009/140, set up the need for cooperation between the Commission, BEREC and the NRA in order to “identify the most appropriate and effective measure in the light of the objectives laid down in Article 8, whilst taking due account of the views of market participants and the need to ensure the development of consistent regulatory practice”.

The Commission guidelines on market analysis and the assessment of significant market power states in paragraph 121:

“The Commission will assist NRAs to ensure that as far as possible they adopt consistent approaches in their choice of remedies where similar situations exist in different Member States. Moreover, as noted in Article 7(2) of the Framework Directive, NRAs shall seek to agree on the types of remedies best suited to address particular situations in the marketplace”.

BEREC notes that in this case, the remedies proposed by UKE are not in line with the solutions adopted in the rest of the EU.

Unnecessary enlargement of public intervention

The proposed measure, by BEREC understood as giving the operators room to negotiate and implement the MTRs in their interconnection agreements, risk resulting in several dispute settlements and possibly ex officio interventions by UKE. The consequence is heavily public intervention by UKE, and BEREC therefore shares the concerns put forward by the Commission regarding unnecessary enlargement of public intervention. BEREC appreciates that UKE consider that the NRA in the past has been forced to resort to dispute settlement although having imposed legally binding MTRs. Still, in the view of BEREC, not enforcing legally binding MTRs is not expected to remedy this.

Considerations on the application of Article 40 TA

According to UKE, Article 40 TA, that implements Article 13 of the Access Directive (AD), would allow to impose on the SMP operators only the obligation to set prices based on the costs incurred calculated by means of an FDC methodology. Therefore, under Article 40 TA, UKE considers that it is not possible to impose binding MTRs on the basis of an LRIC Model as recommended by the Commission in its 2009 Recommendation⁶ on termination rates.

BEREC considers that, if this understanding is correct, the Polish implementation and interpretation of Article 13 AD may be too restrictive. Cost orientation is usually intended as a principle which may refer to costs incurred either by a real or an efficient operator. Therefore, it seems that it could be linked to a FDC methodology but also alternatively to a BU LRIC methodology on the basis of a hypothetical

⁶ Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (2009/396/EC).

efficient operator (as recommended by the 31 December 2012 at the latest⁷) and any other pricing methodology that serves to promote efficiency and sustainable competition and maximise consumer benefits. Member States are entitled by Article 13 AD, as transposed into their own national law; to impose prices on the basis of cost incurred both by real or efficient operators by fixing them in a market analysis decision.

Considerations on the application of Article 39 TA

The understanding of BEREC is that UKE believes that it could impose MTRs based on the LRIC methodology as a standard remedy under Article 39 TA but in practice this is not possible because the required audit would be time consuming and lead to results not being finalized before the 1st of January 2013. Furthermore, UKE is not convinced that Article 39 TA allows for an effective operator approach but rather the costs of a particular SMP-operator.

Considerations on Article 44 TA

According to UKE, on the basis of article 44 of TA, which allows UKE to impose further obligations than those referred to in Articles 34-40 TA, it is not possible to set the MTRs resulting from the BU LRIC model in a new decision. Furthermore, UKE states that it cannot set MTRs resulting from the BU LRIC already in the proposed decision since the NRA does not have the relevant cost data yet. Once UKE has the data, the NRA considers that it would need to conduct a new market analysis in which the corresponding operators are once again designated with SMP on their individual mobile network for call termination in order to be able to include the MTRs in the decision.

With reference to the above described articles of the TA, BEREC wishes to underline that it is not in the position to draw conclusions on how Polish national law should be interpreted and therefore cannot judge whether the interpretations put forward by UKE are justified or not.

BEREC is however in the position to interpret the articles in the European directives on which the national law is based and make recommendations on that basis. These recommendations will be described in paragraph 4 of this opinion.

UKE has pointed out that in the past; SMP operators on voice call termination in their individual mobile networks did not respect UKE's decisions which imposed the MTRs in question. This resulted in that the tariffs were established via dispute settlements anyway. UKE therefore concludes that there will be a need for dispute settlements regardless of whether the MTR statement is recommended or binding. This is another argument used by UKE for proposing in its draft measure to only publish on its website a statement including the MTRs on the basis of a LRIC model. To BERECs understanding, this measure appears to be only indirectly enforceable due

⁷ Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (2009/396/EC).

to the fact that, if the SMP operators do not apply the recommended rates, UKE can modify the bilateral agreements ex officio or within dispute settlements.

According to BEREC, the lack of consideration by the Polish MNOs of the past binding decisions seems not to be a justification for adopting non-binding decisions.

Lack of transparency

The Commission states that the lack of transparency of MTRs would damage the mobile market conditions. According to UKE, recommended tariffs published on UKE's website, will in any case be implemented in the interconnection agreements (voluntarily or by means of UKE decisions modifying bilateral agreements).

BEREC considers that even if recommended tariffs in the end will be applied, it cannot be considered a transparent procedure. This due to that the only way for undertakings, and not only Polish ones, to revise the level of MTRs set between two operators is the resolution of a dispute settlement which will be notified to the EC and other NRAs. Moreover, BEREC cannot be sure that the MTRs set will be the ones previously recommended by UKE if one of the undertakings, involved in the dispute settlement, brings new data to calculate its estimated level of MTR. In the event of the lack of dispute settlements or ex officio intervention there would be even less transparency.

3.4 Infringement of Article 8(5) (a) of the Framework Directive; regulatory predictability

3.4.1 Concerns of the Commission

In its serious doubts letter the Commission states that UKE's approach not to formally impose MTRs does not create predictability in accordance with Article 8(5) (a) FD. The reason for this being that it is not inconceivable that there will be operators who will agree to higher prices than UKE has recommended. Beyond that, the Commission does not consider UKE to take full account of the Termination Rates Recommendation which also leads to a lack of predictability. Since operators are likely to charge higher prices and/or asymmetric rates the main objectives of the recommendation will not be achieved.

3.4.2 BEREC opinion

The view of BEREC is that, in the light of the information presented by UKE, the Commission's serious doubts are justified. The Commission criticized UKE's approach to not formally impose MTRs, but to publish them on its website in the sense that it does not create regulatory predictability. Indeed, in absence of binding tariffs, there is a risk that the negotiations result in MTRs higher than those recommended by the NRA.

BEREC considers, as well as the previous doubts of the Commission, that this can be avoided by imposing binding proportionate price regulation on all operators including small ones (as SMP on their network).

BEREC's understanding is that the results of the cost model will be ready during 2012. This since UKE imposes MTRs on the basis of a BU model of an effective operator from 1 January 2013 and according to the draft measure, the operators should provide the data needed for creating the profile of an effective operator by 30 April 2012. In the view of BEREC, this should allow UKE enough time to consult the results nationally and on an EU level.

3.5 Infringement of Article 16(4) of the Framework Directive; appropriateness of specific regulatory obligations

3.5.1 Concerns of the Commission

In its serious doubts letter the Commission did not regard the proposed price control by publishing MTRs on UKE's website in the form of non-binding statements to be in accordance with the Article 16(4) of the FD, which requires the NRAs to impose appropriate specific regulatory obligations on the SMP operators. The Commission raised doubts concerning UKE's method to not force the SMP operators to comply with the "recommended" prices in their interconnection agreements and instead enable the operators to negotiate the prices. In the view of the Commission this could lead to even higher prices than the recommended and in addition to that create disputes instead of avoiding them.

The Commission also regarded UKE's methods of imposing MTRs by means of resolving individual disputes to create the following delays:

- i) 90 days required by the law for negotiations between operators;
- ii) up to 4 months for resolving the dispute by UKE;
- iii) a reasonable period for national consultation;
- iv) one month for the consultation at EU level.

3.5.2 **BEREC opinion**

The view of BEREC is that, in the light of the information presented by UKE, the Commission's serious doubts are justified. In order to be appropriate an obligation shall address the competition problems that are identified in the market analysis. UKE identified the following two competition problems:

- i) the possibility of anti-competitive overpricing for call termination in the network of the respective operators' networks,
- ii) the possibility of impeding operators from accessing the operators' networks.

The first competition problem refers to excessive prices. Excessive MTRs are not only a wholesale problem. They, in turn, may lead to distorted price structures and excessive prices for calls to mobile phones at the retail level to the detriment of fixed and mobile subscribers in Poland and in other Member States. Furthermore, excessive MTRs could also be a mean to raise rival's costs in order to put other operators on a competitive disadvantage.

Article 16(4) FD specifies that NRAs should impose appropriate specific regulatory obligations. In this case, BEREC regards that as a price control obligation. According to the Recommendation on Termination Rates, the most appropriate measure in order to address this type of competition problem is to impose a price regulation that ensures that MTRs are at the efficient level (within an appropriate and clearly defined time horizon).

BEREC considers that in order for such a price regulation to be effective, this generally implies that it should:

- have a clearly defined price ceiling,
- have a well specified and appropriate time path when the target level shall be reached and
- be directly enforceable (which means that under no circumstances shall the SMP operator be allowed to deviate from the regulated price).

In the view of BEREC, the majority of Member States impose such a regulation (in accordance with Article 13 AD) on operators that are designated of having SMP on their mobile termination market. After having examined the market analysis of UKE, BEREC believes that this is not effectively the case in Poland. The proposed measure raises concerns about the time frame until the MTRs of all mobile operators are symmetric at

an efficient level. At which point the MTRs reaches the Pure LRIC cost level seems to depend merely on the outcome of future dispute settlements which is to a certain extent indeterminate. Therefore, apart from efficiency concerns due to procedural delays (7 months for each dispute⁸) the SMP operator could have the incentive to take advantage of this regulation (e.g. delaying tactics).

Under the given circumstances BEREC does not identify any benefits by allowing operators to negotiate MTRs. Due to the nature of the competition problems that have been identified it cannot be expected that the outcome of such negotiations will be at an efficient level. To the contrary, according to information BEREC received from UKE, such negotiations in the past have regularly failed to produce cost oriented MTRs.

To conclude, BEREC shares the doubts of the Commission. In the view of BEREC it would be more appropriate under the given circumstances, if possible due to the national Polish legislation, to impose a price cap based on the Termination Rates Recommendation as an outcome of the market analysis as this would give all relevant stake holders legal certainty and predictability and contribute to the harmonization of European markets.

3.6 Infringement of Article 16(6) in conjunction with Article 6 and 7 of the Framework Directive; imposition and consultation of specific regulatory obligations

3.6.1 Concerns of the Commission

In its serious doubts letter the Commission considered that the publication of MTRs in non-binding statements are not in accordance with the procedural requirements of Article 16(6) FD in conjunction with Articles 6 and 7 FD. According to Article 16(4) FD there is a clear requirement to impose appropriate specific regulatory obligations in the market determined as not effectively competitive, and where individual or joint SMP was identified. According to the articles the imposition of appropriate specific regulatory obligations, e.g. detailed price remedies such as MTRs, should only be imposed after consultations at national and EU level if they have significant impact on the relevant market and affects trade between Member States.

The Commission expressed serious doubts concerning the lack of notification from UKE's behalf since the only notification on the level of MTRs would be the results of dispute settlements, i.e. if disputes arise. If MNOs would follow the non-binding recommendations or agree on different price levels there would be no consultations.

3.6.2 BEREC opinion

The view of BEREC is that, in the light of the information presented by UKE, the Commission's serious doubts are justified. Furthermore, BEREC shares the Commission's point of view that UKE's proposed draft measures may create barriers to

⁸ In the serious doubt letter the delays sum up to a longer period of time. To the contrary of what is stated in the serious doubt letter, BEREC understands that the consultation is included in the 4 month period for settling the dispute.

the single market as well as serious doubts as to the compatibility of these draft measures with the EU law for the following reasons.

According to information available to the EC, in its draft measure and response to the request for information UKE confirmed that it does not intend to further consult the rates resulting from the application of the BU LRIC model (i.e. the actual levels of MTRs). This understanding of the issue was also confirmed to BEREC, at least to the extent that there is no dispute settlement decision or ex officio intervention by UKE, which then would be notified including the MTRs.

Pursuant to Article 16(6) FD measures taken in accordance with the provisions of paragraphs 3 and 4 of the same Article shall be subject to the procedures referred to in Articles 6 and 7 FD. The Article 16(4) FD provides that where NRAs determine that a relevant market is not effectively competitive, they shall identify undertakings which individually or jointly have a significant market power on that market in accordance with Article 14 FD and the NRA shall on such undertakings impose appropriate specific regulatory obligations referred to in paragraph 2 of this Article or maintain or amend such obligations where they already exist.

Article 16(2) FD provides that where an NRA is required under paragraphs 3 or 4 FD, Article 17 of Directive 2002/22/EC (Universal Service Directive), or Article 8 AD to determine whether to impose, maintain, amend or withdraw obligations on undertakings, it shall determine on the basis of its market analysis whether a relevant market is effectively competitive.

Pursuant to Article 7 FD and specifically paragraph 3 thereof, where a national regulatory authority intends to take a measure which falls within the scope of Articles 15 or 16 FD, or Articles 5 or 8 AD and would affect trade between Member States it shall make the draft measure accessible to the Commission, BEREC, and the national regulatory authorities in other Member States, at the same time, together with the reasoning on which the measure is based, in accordance with Article 5(3) AD, and inform the Commission, BEREC and other NRAs.

UKE also explained that operators were informed about the new regulatory approach and recommendatory not actual character of the BU LRIC basis for MTR levels during dedicated workshops. BEREC understands that in this case, the Commission, operators outside Poland, BEREC and other NRAs would not have the opportunity to provide comments, if any, on the applicable level of MTRs, as provided for by the EU regulatory framework. Hence, BEREC shares the views of the Commission that the lack of national and EU consultation represents an infringement of the procedural requirements of Article 16(6) in conjunction with Articles 6 and 7 FD.

3.7 Infringement of Article 4 of the Framework Directive; appeals

3.7.1 Concerns of the Commission

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 FD. The only possibility for operators to question the results of a BU LRIC in court will be at the stage of adoption of the currently notified draft measure or when, UKE adopts any possible future individual dispute decisions.

3.7.2 **BEREC opinion**

BEREC, in the light of the information presented, does not completely share the Commission's serious doubts regarding the lack of possibility to effectively challenge the MTRs in national courts. To elaborate, BEREC finds the information provided to be somewhat unclear concerning whether the actual MTRs will be recommended or binding. In this regard, BEREC also wishes to stress that in evaluating whether the Commission's doubts are justified or not, BEREC should only take into account such information that has been available to the Commission.

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.

It is only the NRA decisions resulting in binding effects on users or operators that are subject to the before mentioned appeal mechanism. Thus, the scope of Article 4 FD is to allow any user or operator to appeal a decision which damages it in order to cancel its effects. In the case under examination, BEREC understands that the statement detailing the actual level of MTRs is in itself not binding, and these tariffs cannot be appealed. Recommended prices are not enforceable so operators may also not follow them on the basis of motivated reasons.

In order to comply with Article 4 FD, all decisions of UKE imposing binding rates should be possible to appeal. Thus, in BEREC's understanding, in Poland all decisions imposing binding tariffs may be appealed, in particular:

- i) decisions solving disputes (or decision of modifying ex officio bilateral agreements) may be appealed before the Court of Competition, and
- ii) SMP decisions may be appealed before national courts.

Nevertheless, according to UKE the statements of the NRA cannot be appealed. In this regard, it has to be noted that if the statement of UKE concerns binding tariffs (i.e. not recommended tariffs), it would represent an infringement of Article 4 FD as these statements are not able to be appealed.

To conclude, BEREC shares the Commission's view that in order to comply with Article 4 FD, binding obligations must be possible to appeal. To BEREC's understanding though, the statement published on the website is not *in itself* legally binding, and hence Article 4 FD does not apply. Still, UKE stresses that the MTRs are binding, and should the statement also be binding (and not only the SMP decision and administrative decisions resulting from dispute settlements or ex officio intervention), BEREC would fully share the Commission's view that the concerned parties lack the possibility of

effectively challenging the decision.

4 Possible alternative proposals from BEREC, pursuant to Article 7a provisions

First of all, BEREC recommends UKE to re-evaluate if the NRA is able to set binding MTRs calculated with the BU LRIC model decisions on the basis of articles 39, 40 or 44 TA. BEREC wishes to underline that in general, the MTRs could be set either within the market analysis decision (SMP decision) or in preceding decisions which act as an extension of the market analysis and details the price regulation obligation by stating the actual calculated MTRs.

In any event, UKE should use all efforts to make sure that the MTRs will be consulted, notified and implemented based on calculations made with the BU LRIC model. When needed, UKE should also be active in efficiently solving individual dispute settlements and use the instrument of imposing fines when appropriate.

In particular BEREC would like to provide the following recommendations:

- i) In order to comply with Article 8(5) (a) FD, UKE should reassess whether it might be possible, according to Articles 39 or 40 of the TA, to impose binding and directly enforceable MTRs calculated by means of a BU LRIC model, in order to avoid the problems connected to the recommended tariffs indicated by the Commission.
- ii) In order to comply with Article 8(5) (a) FD, UKE should also reassess the applicability of Article 44 TA which allows UKE to impose further obligations than those referred in Articles 34-40 TA. BEREC encourages UKE to explore whether the NRA may use this power to impose binding and directly enforceable MTRs avoiding the problems connected to the recommended tariffs indicated by the Commission.
- iii) In any case, UKE should use all efforts to notify under Article 6 and 7 FD, the MTRs based on the BU LRIC model in order to remedy the lack of transparency and give interested parties, BEREC, the Commission and other NRAs the chance to comment.
- iv) In case neither i) nor ii) are possible and the tariff is not directly binding, UKE must avoid that the SMP operators can use their market power to impose transitory or permanent higher MTRs than those published by UKE, or delay the application of the published MTR in time. In this sense, BEREC understands that UKE has the necessary decision powers such as the powers to intervene ex officio without delay even if there is no request for intervention or the power to set MTRs on a retrospective basis in case the decision is taken after 1 January 2013. This to effectively enforce the obligation stated in the

SMP decision. Given the preceding conflicts and delays, UKE should use all its powers in order to ascertain that MTRs are in accordance with the calculated BU LRIC by 1 January 2013 at the latest, instead of waiting for a possible failure of negotiation among market participants. By acting quickly and by setting MTRs on a retrospective basis, all operators under equal conditions will be treated in the same way. In this way UKE creates legal certainty according to Article 8 (5) (b) Directive 2009/140.

- v) UKE should evaluate the possibility to combine the separate dispute settlements instead of having a separate dispute settlement for every bilateral agreement. Or, if possible act ex officio and take separate administrative decisions when the NRA observes that there is a potential risk for having to deal with several dispute settlements. Combining the dispute settlements should be especially beneficial, as the price applied by the MNO should be, in principle, the same in every bilateral agreement unless there are justified differences in the costs. In the view of BEREC, this would ease the burden of public intervention, which the Commission comments on and considers being an obstacle to the single market.
- vi) UKE should, subsequent to consultation, publish the results of the BU LRIC model by a reasonable time following the date fixed for the sending of information (30 April 2012) in order to avoid the lack of predictability and to comply with Article 8(5) (a) FD. According to Article 5 FD, an NRA may at any time request information from operators without the need to impose the submission of data as a remedy (which seems to be done in the notified draft decision).