EFTA SURVEILLANCE AUTHORITY

Brussels, 26 May 2011
Case No: 63627
Event No: 598899

Amt für Kommunikation
9490 Vaduz
Principality of Liechtenstein

For the attention of:
Mr. Kurt Bühler
Director
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Dear Sir,

Subject: Wholesale market for voice call termination in individual mobile phone networks (market 7) in Liechtenstein

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

1 Procedure

On 26 April 2011, the EFTA Surveillance Authority (the "Authority") received a notification of draft national measures in the field of electronic communications pursuant to Article 7 of the Framework Directive[1] from the Liechtenstein national regulatory authority, *Amt für Kommunikation* (AK). The notification became effective on the same day. The draft measure concerns the first round review of the wholesale market for voice call termination on individual mobile networks[2] in Liechtenstein.

National consultation pursuant to Article 6 of the Framework Directive was carried out in the period from 28 September 2010 to 3 November 2010[3]. The deadline for the

[1] 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, OJ L 108, 24.4.2002, p. 33 (as amended by Regulation (EC) No 717/2007, OJ L 171, 29.6.2007, p. 32 and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12), as referred to at point 5cl of Annex XI to the EEA Agreement and as adapted to the Agreement by Protocol 1 (the "Framework Directive").

[2] Corresponding to market 7 of EFTA Surveillance Authority Recommendation of 5 November 2008 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with the Act referred to at point 5cl of Annex XI to the EEA Agreement (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); adopted by Decision No. 688/08/COL; OJ C 156, 9.7.2009, p.18.

[3] AK has previously conducted two other national consultations with regard to the termination markets: between 23 November 2007 and 25 January 2008 and between 26 August 2008 and 12 September 2008.

consultation with the Authority under Article 7 of the Framework Directive expires on 26 May 2011.

On 3 May 2011, the Authority sent a request for information to AK. The reply was received on 11 May 2011[4].

2 Description of the draft measure

2.1 Market definition

As regards the product market definition, the network of each individual operator constitutes a distinct product market, regardless of the technology used (both 2G and 3G networks are included).

According to AK, the relevant geographic market corresponds to the geographic coverage of each operator's network and is national in scope, i.e., limited to Liechtenstein.

2.2 Finding of significant market power (SMP)

AK proposes to designate all active mobile network operators (MNOs) providing mobile termination as having SMP on their respective markets. The main criteria considered by AK when reaching its conclusion on the SMP designation are: market shares (each operator has 100% market share on its own network), entry barriers, lack of countervailing buyer power and lack of potential competition. AK lists four MNOs[5]: Mobilkom Liechtenstein AG; Orange (Liechtenstein) AG, Swisscom FL[6] and Alpcom AG[7].

2.3 Regulatory remedies

AK proposes to impose the following remedies on all SMP operators:

(i) access obligation;

(ii) transparency obligation (publication of a reference offer);

(iii) non-discrimination (internal and external with regard to the interconnection quality and external with regard to the termination price); and

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[4] The deadline for submitting the reply to the request for information was extended due to technical problems of the Authority's eCOM Online Notification Registry.

[5] In addition to the four MNOs, there are currently 3 licensed mobile virtual network providers (MVNOs) which – according to AK – do not provide termination services and operate only as Service Providers (SPs). These are: First Mobile AG, Telecom Liechtenstein AG and Coast Media GmbH. A further 9 operators are registered as MVNOs, out of which five are operating as SPs (MTtel AG, IP Communications GmbH, Mach Connectivity GmbH, CUBIC AG and Datamobile AG). The remaining four operators are – according to AK - not operating as yet (White Label Mobile AG, A.T.C. Avant Telecom Consulting AG, EUinternetworking B.V. and Top Connect OÖ/CSC Telecom).

[6] The current GSM network of Swisscom (Schweiz) AG in Liechtenstein based on their Liechtenstein license (Swisscom FL) is not operated as an independent network. Rather, it represents an extension of the Swiss network onto the territory of Liechtenstein utilizing the Liechtenstein Mobile Country Code (MCC) 295 at the air interface on domestic base transceiver stations as well as the usage of Liechtenstein mobile telephone numbers. Liechtenstein customers with Liechtenstein telephone numbers are allocated a subscriber identity module (SIM) with a subscriber identification on the basis of the Liechtenstein MCC 295.

[7] Mobilkom FL, Orange FL and Alpcom (formerly Tele2) have been commercially active since 2000. Swisscom FL had provided mobile communications services in Liechtenstein already before the liberalization of the market in 1999/2000, i.e., under the 1978 PTT Treaty between Liechtenstein and Switzerland, and GSM mobile communications services from about 1993 in Liechtenstein.

(iv) price control.

With regard to the price control, AK proposes the introduction of a glide-path towards a target maximum termination rate of 7.65 centimes/min. (5.45 eurocents/min.[8]) corresponding to a weighted average of the MTRs (applicable on 1 January 2011) of three Swiss MNOs[9]. The current weighted average of MTRs in Liechtenstein amounts to 28 centimes/min. (19.88 eurocents/min.). The following evolution of price caps is foreseen:

	01 July 2011	01 January 2012	01 July 2012	01 January 2013
Mobilkom FL	20 (14.2 eurocents/min[10])	12 (8.52 eurocents/min.)	10 (7.1 eurocents/min.)	7.65 (5.45 eurocents/min.)
Orange FL	20	12	10	7.65
Swisscom FL	20	12	10	7.65
Alpcom	20	12	10	7.65

Table: MTRs price caps in centimes per minute.

Starting with the first step on 1 July 2011, AK proposes to introduce symmetric caps for termination rates for all MNOs through setting the maximum level of MTRs at 20 centimes/min. (14.2 eurocents/min.). The next three steps are intended to be introduced every six months at the above rates. According to AK, these steps are designed to give the operators enough time to adjust their business accordingly[11], with the last value representing the weighted average Swiss MTR on 1 January 2011[12]. Whereas the first step of the proposed glide-path leads to a decrease of the MTRs for Mobilkom FL and Alpcom, they remain at the same level for Orange FL. As for Swisscom FL, the first maximum allowed termination rate of the glide-path is almost three times higher than the current

[8] The calculations in eurocents referred to throughout this document are based on the exchange rate used by AK in the notified draft measure, (1€=CHF 1.4086, see footnote 185 of the notified draft measure). However, according to the information available to the Authority, the exchange rate was last set at this level in June 2010. The exchange rate as of the date of the current notification, i.e., 26 April 2011, was 1€ = CHF 1.2830 (see: http://www.ecb.int/stats/exchange/eurofxref/html/eurofxref-graph-chf.en.html).

[9] According to the information provided by AK in its reply to the request for information, the Swiss operators autonomously agree among themselves to lower their MTRs. There is no cost methodology employed. Also, according to AK, further reductions are envisaged by the Swiss operators in the near future.

[10] According to the exchange rate of 26 April 2011, see footnote 9 above, the MTRs values of the glide-path would be as follows: 15.59 eurocents/min., 9.35 eurocents/min., 7.79 eurocents/min. and 5.96 eurocents/min.

[11] In this regard, AK explains in the draft measure that the period for allowing high MTRs has been long enough in Liechtenstein.

[12] AK explains that the currently proposed price regulation for mobile termination would be applicable until 1 January 2013 but that it will be revised in line with the corresponding reductions in MTRs in Switzerland. AK informs the Authority that it intends to monitor the development of the Swiss MTRs and that it will initiate a new market analysis and/or an adjustment of the regulated termination rates in case of significant reductions. AK further states that, in any event, such a revision will be conducted in 2012 at the latest.

MTR of this operator[13]. However, as this operator has autonomously been lowering its MTRs since 2005, a sudden increase should, in AK's view, not be expected, even after AK's currently notified draft decision enters into force[14].

With regard to the chosen benchmark, AK deems it appropriate to set the termination rates of operators active in Liechtenstein based on the MTRs in Switzerland, due to the competitive situation on the retail market, where the Swiss MNOs directly compete for customers with the Liechtenstein operators. Moreover, the subscriber growth in Liechtenstein has been modest in the past years; at the same time, the direct competitors based in Switzerland have a much bigger subscriber growth in Liechtenstein than the Liechtenstein operators. Given the saturation rate of 100% and the small number of residents in Liechtenstein, AK argues that the domestic market potential is very limited. As a result of this and also of the migration to Swiss providers, the cost structures continue to develop to the disadvantage of the domestic operators[15].

With regard to the development of a costing methodology under the Termination Rates Recommendation[16] (BU-LRIC), AK is of the opinion that the resources required for the introduction of such a cost model are not available to the very small Liechtenstein NRA at present, nor in the foreseeable future and thus the application of the recommended method would not be proportionate. Therefore, according to AK, point 12 of the Termination Rates Recommendation should be applicable[17].

3 Comments

On the basis of the present notification and the additional information provided by AK, the Authority has the following comments:

3.1 Appropriateness of the proposed price control mechanism

The Authority recalls that although the Regulatory Framework does not exclude a

[13] The unregulated termination rates on 1 January 2011 in Liechtenstein were as follows: Mobilkom FL: 35 centimes/min. (24.85 eurocents/min.); Orange FL: 20 centimes/min. (14.2 eurocents/min.); Swisscom FL: 7 centimes/min. (4.97 eurocents/min.); Alpcom: 35 centimes/min. (24.85 eurocents/min.).

[14] AK further informs the Authority that Swisscom FL has been lowering its MTRs in Liechtenstein at the same pace as Swisscom CH in Switzerland, the main reason being easier and less costly administration of its very high number of international interconnection agreements.

[15] Therefore, AK classifies the market as fragile. According to AK, the majority of the domestic mobile communications users are currently customers of Swiss providers, accounting for approximately 65% of all Liechtenstein mobile communications subscriptions. The high amount of the subscribers with Swiss telephone numbers is explained by the fact that up to the introduction of an independent country code and national numbering plan in 1999, Liechtenstein was part of the Swiss numbering space. Afterwards, the existing customers could choose to remain a customer of Swisscom AG (on the basis of its Swiss mobile communications license, Swisscom CH), and the majority of them decided to do so.

[16] EFTA Surveillance Authority Recommendation of 13 April 2011 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EFTA States (the "Termination Rates Recommendation"), not published in the OJ as yet, available on the Authority's website http://www.eftasurv.int/media/internal-market/ESAs-Recommendation-on-termination-rates.pdf.

[17] At the same time, AK signals its intention to achieve cost-efficient levels over time while making all reasonable endeavours to apply the provisions of the Termination Rates Recommendation by not exceeding the average of the MTRs set by NRAs implementing the recommended cost methodology when choosing the appropriate benchmark.

price control mechanism based on comparison with other countries, such a mechanism should serve to promote efficiency and sustainable competition and maximize consumer benefits.

In this regard, the Authority reminds AK that according to the principle of forward-looking economic efficiency, termination rates should be set at a symmetric level corresponding to the costs of an efficient operator employing efficient technology. In line with the Authority's practice, the practice of the European Commission and the European Regulators' Group[18] (now the Body of European Regulators for Electronic Communications (BEREC)), these termination rates should be based on costs calculated on the basis of a long-run incremental costing (LRIC) model, using current costs of an efficient operator and not historical costs, which risk considerably overestimating the appropriate costs. Operators who are compensated through the regulated wholesale charge for actual costs incurred may have fewer incentives to increase efficiency and any resulting inefficiencies may be passed on to final consumers. High termination rates tend to lead to high retail prices for originating calls and correspondingly lower usage rates, thus decreasing consumer welfare.

As indicated in the notified draft measure, AK intends to implement a price control obligation based on international benchmarking and proposes to this end a symmetric glide-path for all four SMP operators as of 1 July 2011. The final step of the glide-path, entering into force on 1 January 2013, is set at the level of 7.65 centimes/min. (5.45 eurocents/min.) which corresponds to the weighted average of the MTRs of three Swiss MNOs on 1 January 2011. The preceding steps in the glide-path are set at the level of 20 centimes/min. (14.2 eurocents/min.) as of 1 July 2011, 12 centimes/min. (8.52 eurocents/min.) as of 1 January 2012 and 10 centimes/min. (7.1 eurocents/min.) as of 1 July 2012.

The Authority highlights the fact that the level of termination rates in a number of EEA States, where these rates are regulated on the basis of cost accounting methodologies leading to MTR levels which progressively approach efficient costs, is well below the suggested starting level of 14.2 eurocents/min. and the intermediate steps referred to by AK[19].

In this respect, the Authority recalls the need to reduce termination rates to a cost-oriented level reflecting the cost of an efficient operator as soon as possible. Inappropriate benchmarks that do not represent efficient cost-based estimates will imply that the competitive distortions resulting from inconsistent and above-cost termination rates persist.

Against this background, the Authority invites AK to revise, in its final measure, the proposed price control mechanism and to apply the benchmarking approach in such a way that it takes account of the above and, consequently, results in steeper reductions in termination rates already this year.

This could be achieved if, instead of benchmarking against the weighted average

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[18] See, for example, the Authority's comments letters of 04/05/2007, 03/11/2008 and 22/09/2010 pursuant to Article 7(3) of the Framework Directive on the Norwegian wholesale markets for voice call termination services on individual mobile networks.

[19] See, for example, the glide-paths imposed on incumbents in France (going from 6.5 to 3 eurocents/min. in December 2010) and Italy (going from 7.7 to 5.3 eurocents/min. in July 2011) in the respective cases FR/2008/0812 and IT/2008/0802 as well as the glide-path in Norway (Authority's comments letter of 22/09/2010), whereby the MTR in July 2011 is set between 4-10 eurocents/min. and should reach 1.9 eurocents/min. as of January 2013.

of the Swiss MTRs (that the Authority understands are lowered on the basis of autonomous agreement among the Swiss operators and not based on any particular cost-oriented methodology), AK already used a benchmark based on the average termination rates in those EEA States that apply cost accounting methodologies designed to set efficient MTRs.

The Authority considers that this kind of price control mechanism would also facilitate future compliance with the Termination Rates Recommendation, which provides that by 31 December 2012 MTRs should be set at the level of efficient costs. It would also help to avoid the need for sudden drops in the glide-paths at the end of the transition period provided for in the Termination Rates Recommendation.

3.2 Need for a coherent EEA approach to regulating wholesale fixed termination rates

Given the importance of regulating termination rates effectively and in a consistent manner across the EEA, the Authority reminds AK of the Authority's Termination Rates Recommendation which was adopted on 13 April 2011 in order to give guidance to the EFTA States on how to arrive at a coherent cost accounting method for calculating mobile termination rates.

The Recommendation foresees that in exceptional circumstances, whereby an NRA is not in a position, in particular due to limited resources, to finalise the recommended cost model under the Termination Rates Recommendation in a timely manner, and where it is able to demonstrate that a methodology other than a bottom-up LRIC model based on current costs results in outcomes in line with the Termination Rates Recommendation and generates efficient outcomes consistent with those in a competitive market, it could consider setting interim prices based on an alternative approach until 1 July 2014. Where it would still be objectively disproportionate for those NRAs with limited resources to apply the recommended cost methodology after this date, such NRAs may continue to apply an alternative methodology up to the date for revision of the Termination Rates Recommendation. Any such outcome resulting from alternative methodologies should not exceed the average of the termination rates set by NRAs implementing the recommended cost methodology.

In this context, the Authority welcomes AK's intention to achieve cost efficient levels over time (based on the application of benchmarking) and AK's endeavours to apply the provisions of the Termination Rates Recommendation in order not to exceed the average of the MTRs set by NRAs implementing the recommended cost methodology.

The Authority invites AK to take utmost account of the Termination Rates Recommendation in its next review of the termination markets in 2012, as envisaged by AK, in order to reduce termination rates to a cost-oriented level reflecting the cost of an efficient operator as soon as possible.

3.3 Need to monitor the termination markets

The Authority acknowledges AK's decision to designate all active MNOs as SMP operators. However, in view of the large number of SPs which currently do not constitute their own termination markets but are either registered as MVNOs or hold MVNO licences, the Authority invites AK to monitor the market in this

regard and notify the Authority of all decisions identifying new entrants as SMP operators in their respective markets and the imposition of obligations on them in accordance with the Article 7 notification procedure.

In that respect, the Authority recalls that the revised Procedural Recommendation[20] has significantly lessened the procedural burden on NRAs by giving them the possibility to use a short notification form when proposing to extend existing measures on a relevant market (that has already been analysed) to another market player in a similar situation, without materially changing the principles applied in the previous notification.

3.4 Market review timing

The Authority welcomes the long-awaited notification of the draft analysis of mobile termination markets in Liechtenstein and the intention of AK to regulate this market as of 1 July 2011. However, in view of the extensive lapse of time between the entry into force of the Regulatory Framework in the EFTA States and this notification, the Authority wishes to point out its dissatisfaction with the lengthy analysis process of the relevant markets by AK. In this context, the Authority invites AK to undertake regular assessments of these markets in the future.

In this regard, the Authority also underlines that under the revised draft Article 16(6) of the Framework Directive[21], NRAs shall carry out an analysis of the relevant markets under normal circumstances within three years from the adoption of a previous measure in order to take account of the high level of technical innovation and the highly dynamic nature of the electronic communications sector.

4 Final remarks

The Authority has taken note of the reference made by AK to the adaptation text in the EEA Joint Committee Decision on adopting the Access Directive[22].

On a procedural note, the Authority recalls that any future amendments to, or more detailed implementation of, the draft remedies consulted on in the current notification will require re-notification in accordance with Article 7(3) of the Framework Directive.

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[20] EFTA Surveillance Procedural Recommendation of 2 December 2009 on notifications, time limits and consultations provided for in Article 7 of the Act referred to at point 5cl of Annex XI to the Agreement on the European Economic Area (Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services), as adapted by Protocol 1 thereto, not published yet, available on the Authority's website http://www.eftasurv.int/media/internal-market/recommendation.pdf.

[21] As amended by Directive 2009/140/EC, OJ L 337, 18.2 2009, p.37 and Regulation 544/2009, OJ L 167, 18.6.2009, p.12 The revised Framework Directive enters into force in the EU Member States on 25 May 2011. For the EFTA States it is currently in the preparatory stage for the appropriate incorporation into the EEA Agreement.

[22] Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2001 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ L 108, 24.4.2002, p. 7), as referred to at point 5cj of Annex XI to the EEA Agreement and as adapted to the Agreement by Protocol 1.

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Pursuant to Article 7(5) of the Framework Directive, the AK may adopt the resulting draft measure and, if it does so, shall communicate the final measure to the Authority.

The Authority's position on the current notification is without prejudice to any position the Authority may take in respect of other notified draft national measures.

Pursuant to point 15 of the Procedural Recommendation, the Authority will publish this comments letter on its eCOM Online Notification Registry. The Authority does not consider the information contained in this letter to be confidential. However, you are invited to inform the Authority within three working days[23] following receipt of this letter if you consider, in accordance with EEA and national rules on confidentiality, that this letter contains confidential information which you would like to be deleted prior to publication. You should provide reasons for any such request.

Yours sincerely,

[redacted]

Ólafur Jóhannes Einarsson
Director
Internal Market Affairs Directorate

[redacted]

Per Andreas Bjørgan
Director
Competition and State Aid Directorate

[23] The request should be submitted through the eCOM Registry or by facsimile to +32 2 286 1800, marked for the attention of the eCOM Task Force.