

How to determine a price of wholesale line rental? Case comment to the judgment of the Court of the Competition and Consumer Protection of 10 December 2007 – *Tele2* (Ref. No. XVII AmT 17/07)

Facts

Tele2, one of the Polish alternative telecoms operators, applied on 2 November 2004 to the President of the Office of Electronic Communications (hereafter, UKE) for the issuance of a decision modifying the network interconnection agreement of Tele2 and the Polish incumbent telecoms operator Telekomunikacja Polska (hereafter, TP). Tele2 requested the imposition on TP of an obligation to offer Tele2 wholesale line rental (hereinafter, WLR). WLR services make it possible for alternative operators to purchase line rental from the incumbent for a wholesale price, in order for the alternative operators to be able to offer their own telecoms services in the fixed network to the clients of the incumbent.

In this context, Tele2 would take over from TP the whole process of serving its subscribers, as well as all of the costs associated with it. This way, subscribers would stay connected to the network of TP but use the telecoms services offered by Tele2 while remaining party to a contract with a single operator only. The introduction of WLR services helps to open the fixed telephone market to competition. It also creates the basis for cutting retail prices and makes it easier for subscribers to use telecoms services in the fixed network (one bill and one operator to contact).

The request submitted by Tele2 followed its earlier unsuccessful application made directly to TP on 1 July 2004, which contained a request to broaden the scope of the telecoms services provided by TP to Tele2. At that time, TP refused Tele2's request stating that it did not have WLR services in its offer. The President of UKE found this reply to constitute a refusal to provide telecoms access and, as a result, opened administrative proceeding against TP with the aim of issuing a decision on WLR. The proceedings ended on 13 July 2006 with a decision amending the interconnection agreement between TP and Tele2¹ by imposing on TP of an obligation to offer WLR services to Tele2. This decision was later amended as a result of an appeal lodged by

¹ DRT-WWM-60600-43/04 (165) - available at: <http://www.uke.gov.pl>.

the incumbent. After a renewed assessment, the regulator issued on 29 December 2006 a new decision that contained amended annexes².

The incumbent submitted an appeal to the Court of Competition and Consumer Protection (hereinafter, SOKiK). The appeal was examined by SOKiK which revoked the decision on 10 December 2007. The President of UKE appeal the judgment to the Court of Appeal.

Key legal problems of the case and key findings of SOKiK

In its appeal, TP raised several major objections concerning the decisions taken by the President of UKE. Firstly, the incumbent argued that both decisions were issued by a person whose appointment as the President of UKE did not conform to the law. Secondly, TP stated that the scope of network interconnection was determined incorrectly. Thirdly, TP claimed that there was no legal basis for the imposition of a regulatory obligation to provide wholesale access to its network. Fourthly, TP argued that the WLR decisions contained regulatory obligations that are not set out in the legal provisions of the Polish Telecommunications Act (hereinafter, PT)³. Finally, TP stated that the price of WLR set by the President of UKE has been determined on the basis of a calculation method that is not provided in the PT.

One of the main legal problems assessed by SOKiK concerned the motion that both decisions were issued by a person whose appointment as the President of UKE did not conform to the law. With regard to this issue, SOKiK ruled in favour of the reasoning of TP. As a result, the regulatory decisions were said to have been issued in breach of law and thus, were null and void⁴ since the President of UKE did not possess the necessary authorisation. However, the legality of the appointment of the President of UKE has been questioned on a number of occasions. In the end, the issue was resolved by the Polish Supreme Court stating that all of the decisions taken by the President of UKE were issued in conformity with the law and, that courts of general jurisdiction are not empowered to adjudicate the question of the legality of the appointment of the President of UKE⁵.

Considering TP's claim that there was no legal basis to introduce WLR, the fact should be noted that WLR services fall within the ambit of network interconnection as well as constitute an obligation that can be imposed on a telecoms operator with significant market power. Therefore, an operator may be obligated to offer WLR services as a transitional measure on the basis of the ONP regime and appropriate national provisions relating to network interconnection. Surprisingly, SOKiK did not

² DRT-WWM-60600-43/04 (180) - available at: <http://www.uke.gov.pl>.

³ Act of 16 July 2004 (Official Journal 2004, No. 171, item 1800 (as. am.)).

⁴ The Court based its reasoning on Article 156(1(2)) of Administrative Procedure Code according to which, an administrative decision is null and void when issued in breach of the provisions regulating the composition of a certain body, its representation or appointment. The Administrative Procedure Code Act of 14 June 1960, Official Journal 2000, No. 98, item 1071 (as am.).

⁵ Judgment of 20 February 2008, III SZP 1/08, available at: <http://www.uke.gov.pl>

make any major reference to this claim in its judgment. On the other hand, this problem was analysed thoroughly by the President of UKE who initially even refused to impose an obligation to provide WLR services to Tele2 on the grounds that there was no appropriate legal basis for such an obligation. The position of the President of UKE changed however as a result of the consultation process and, in particular, in the light of the opinion expressed in this context by the European Commission.

The latest argument is closely connected to TP's objection relating to the improper definition of network interconnection. SOKiK found this claim unjustified. SOKiK rightly observed that the President of UKE legitimately applied the provisions of the PT in this context by stating that the obligation to provide telecoms access should consist, in particular, of the offering of wholesale services with the purpose of their resale by another firm as well as providing network or telecoms equipment interconnection and related facilities. This line of reasoning suggests that the scope of TP's obligation to provide telecoms access enables alternative operators to require the provision of WLR in every available variant, even where network interconnection is not necessary.

According to SOKiK, the President of UKE did not infringe the provisions of Article 31(2) of the PT by the fact that the WLR decision contained obligations that are not directly named by the legislator. SOKiK rightly observed that Article 31(2) of the PT contains the catalogue of compulsory elements that every network interconnection agreement should contain. The use of the term "at least" indicates however that the list has an open character. According to SOKiK therefore, the President of UKE was entitled to set out in the WLR decision additional elements of the contract that TP was meant to conclude with Tele2. TP claimed, in particular, that the President of UKE was not empowered to include in the decision rules relating to contractual fines. Despite being overlooked by SOKiK, this argument seems however to be incorrect in the light of Article 31(2(3(b))) of the PT according to which, every network interconnection agreement should include provisions regarding the non-performance or inadequate performance of mutually provided telecoms services. The above undoubtedly includes contractual fines.

Another key problem solved by SOKiK concerns the obligation imposed on TP to apply a price of its WLR of an amount calculated on the basis of a method other than the two contained in the PT, that is, other than "justified costs recovery" or "benchmarking of fees". The President of UKE determined the price of WLR in accordance with the so-called "retail minus" method which reflects the costs to be avoided by the incumbent as a result of ceasing to provide telecoms services to end-users as well as reflecting the incremental costs to serve WLR by alternative operators. The price of WLR should therefore reflect the necessity of the incumbent to bear its own costs of offering this wholesale service but also its need to make a profit out of it (bearing in mind that the incumbent will avoid costs of serving subscribers) while the alternative operator has to cover its own costs of providing services to subscribers as well as to make a profit. The regulator should set the fees on such a level however that would enable the alternative operator to provide services for prices that would be competitive to those offered by the incumbent. Having the above in mind, the

authority should analyse the rental fees applied by the incumbent, set the average and apply a discount reflecting the incumbent's cost-saving associated with the fact that the alternative operator takes over the costs of providing subscriber services.

Nevertheless, in the opinion of SOKiK, the fact that the President of UKE used the "retail minus" method to determine the price of WLR meant that an infringement of Article 39 and Article 221 (1(4(h))) of the PT took place. SOKiK explained that while Article 39 of the PT does indeed contain a rule permitting the limitation of the freedom of an undertaking to set its own prices, this provision has to be treated as an exception and thus, it cannot be interpreted in an extended way. When determining the content of an agreement, the President of UKE may therefore obligate an operator to base the level of its prices solely on criteria directly indicated by the legislator, in this case, the recovery of justified costs or benchmarking of fees applied in comparable competitive markets. SOKiK confirmed this position in a subsequent judgment concerning another decision of the President of UKE imposing on TP an obligation to provide WLR to Premium Internet (another alternative operator)⁶.

Final remarks

The price of WLR should be primarily determined on the basis of costs in accordance with the cost methodology described in the secondary provisions and the decision of the President of UKE ("justified costs recovery"). However, such data did not exist at the time of the issue of the decisions. Alternatively, the President of UKE was entitled to determine the price of WLR on the basis of the level of fees applied in comparable competitive markets, as stated in Article 221(1(i)) of the PT ("benchmarking of fees"). In this case, the President of UKE found it impossible however to determine the price of WLR on the basis of this method also since the available data, originating from other member states of the EU that have introduced WLR in the past, was not comparable.

In the light of the above, the question of how to determine the price of WLR should be given serious consideration. The President of UKE tackled a very interesting problem: what pricing methodology should be applied when it is not possible to determine the appropriate fees for network interconnection on the basis of the two methods contained in the legislation? A strictly linguistic interpretation of the provision of the PT, as it was applied by SOKiK, can make it impossible for the President of UKE to set access prices, which is one of the most important powers of that this authority holds.

It is very important to emphasise that the price of WRL should be determined with great caution. If the price is too low, it may be unprofitable for the operator obliged to provide the wholesale service. If, in turn, the price is set too high, it may abate the interest on the side of alternative operators. The "retail minus" method seems

⁶ Judgment of 25 February 2008, XVII Amt 15/07/G, unpublished.

to be most appropriate in this context⁷, conforming also to the recommendations of the European Regulators Group⁸. Perhaps, in this case, it would have been worth considering the necessity to interpret domestic legislation in accordance with the Community legal regime and, specifically, with the provisions of Directive 97/33/EC⁹ and Directive 2002/19/EC¹⁰.

The introduction of WLR is of great importance to the liberalisation of the Polish telecoms sector. Therefore, a decision of the President of UKE to impose on an incumbent of an obligation to provide WLR services to its competitor raised the hope that the alternative operator would be able to compete with the incumbent within this segment of the market. The initiative of the President of UKE met with the approval of the European Commission. It is thus all the more regrettable that it was blocked by SOKiK on the basis that the decisions were issued in breach of law and as such were null and void, due to the doubts concerning the legality of the appointment of the President of UKE especially, since a subsequent judgment of the Supreme Court adjudicated this problem differently.

However, the judgment of SOKiK may have some significance for the development of WLR services in Poland. It settled important problems relating to the scope of this service. It is too bad though that SOKiK abandoned the analysis of the legal basis of imposing an obligation to provide WLR services in Poland and did not refer to EC law when condemning the use of the “retail minus” method in order to determine the price of WLR.

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⁷ J. Kubasik, *Stanowisko dotyczące projektu decyzji Prezesa UKE w sprawie z wniosku Tele2 z siedzibą w Warszawie z dnia 29 października 2004 r. o wydanie decyzji zmieniającej umowę o połączeniu sieci telekomunikacyjnych Tele2 oraz Telekomunikacji Polskiej SA z siedzibą w Warszawie zawartą w dniu 9 grudnia 2002 r.* [The position on the draft decision of the President of UKE on the application of Tele2, Warsaw submitted on 29 October 2004 on the issuance of a decision modifying the agreement on interconnection of networks belonging to Tele2 (the alternative operator) and TP concluded on 9 Decemebr 2002], p. 9.

⁸ Principles of Implementation and Best Practice regarding the use and implementation of Retail Minus Pricing as applied to electronic communications activities.

⁹ Directive 97/33/EC of the European Parliament and of the Council on interconnection in telecommunications with regard to ensuring universal service and interoperability through the application of the principles of open network provision (ONP), OJ [1997] L 199/32.

¹⁰ Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, OJ [2002] L 108/7.