



Brussels, 24.1.2011
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C(2011) 355 final

[...]

Subject: Case COMP/39.707 Si.mobil / Mobitel
(Please quote this reference in all correspondence)

Dear Sir/Madam,

I refer to your complaint of 14 August 2009 lodged with the Commission on behalf of Si.mobil against Mobitel d.d. (Mobitel) regarding alleged violations of Article 102 of the Treaty on the Functioning of the European Union (TFEU) in connection with the Slovenian mobile communication retail and wholesale markets. I should also like to refer to your letters of 16 October 2009, 10 December 2009, 18 February 2010 and 18 March 2010 by which you provided additional information on the above matter, as well as to your Supplementary Complaint of 18 February 2010.

I also refer to the letter of Mr Lücking, Head of Unit in the Competition Directorate-General of the Commission, pursuant to Article 9 of Regulation 773/2004¹ of 24 November 2009 as well as the Commission's letter pursuant to Articles 7(1) and 9 of Commission Regulation No 773/2004 of 3 June 2010 in which you were informed that the Commission took the preliminary view that there is no sufficient degree of interest of the European Union for conducting a further investigation into the alleged infringements on the wholesale market. In this letter you were also informed that the alleged abuse raised in the Supplementary Complaint is already dealt with by the Slovenian Competition Protection Office (hereinafter referred to as UVK²). You responded by letter of 5 July 2010 in which you provided information and argumentation on why you believe the Commission's preliminary assessment in its letter of 3 June 2010 is wrong.

¹ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Official Journal L 123, 27.04.2004, pages 18-24. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and, respectively, 102 of the TFEU. The two sets of provisions are in substance identical. For the purposes of this Decision references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82 of the EC Treaty when appropriate.

² Urad Republike Slovenije za varstvo konkurence.

For the reasons set out below, the Commission considers that there is no sufficient degree of European Union interest for conducting a further investigation into the alleged infringements concerning the wholesale market and therefore rejects your complaint concerning alleged infringements on this market pursuant to Article 7(2) of the Commission Regulation (EC) 773/2004³. As concerns the alleged infringements on the retail market, i.e. the alleged predatory pricing and/or margin squeeze, I inform you that the Commission rejects your complaint pursuant to Article 13 of Council Regulation 1/2003⁴.

1. THE COMPLAINT

In your initial complaint of 14 August 2009, which was further developed in your letter of 16 October 2009, you alleged that Mobitel infringed Article 102 TFEU by abusing its dominant position by applying a foreclosing strategy on the Slovenian mobile communications market. According to your complaint, Mobitel's foreclosing strategy consists of two elements, each of which is mutually reinforcing in its anti-competitive effects. You claim that Mobitel forecloses competition at retail level by the introduction of its "Džabest" retail product, which creates a margin squeeze. You furthermore claim that Mobitel reinforces the effects of its actions at retail level by applying a foreclosure strategy at the wholesale mobile access and call origination (MACO) market, by enlarging the pool of on-net calls so as to inhibit the possibility for Si.mobil to compete for wholesale customers inter alia by selling wholesale MACO at unrealistically low rates. The effect of these strategies is that Si.mobil cannot add retail or wholesale customers to grow its network. You also state that Si.mobil to win wholesale customers needs to discount the regulated rate offered by Mobitel, and/or to match Mobitel's geographic coverage, which it can only do at a significant cost. It is not economically viable to make these investments due to the current level of wholesale pricing. You furthermore claim that Mobitel is discriminating amongst wholesale buyers by charging wholesale on-net calls on Mobitel's network at 1.5 times the origination rate (instead of origination plus termination), thus making wholesale on-net calls artificially cheap. You finally claim that the regulated termination rate for Mobitel is too high and should not be regulated at a symmetric level with Si.mobil's termination rates.

To remedy this situation you suggest that Mobitel should be obliged to apply similar access terms and conditions to all wholesale customers, both as compared to its own retail operations and with respect to those operators that are hosted on its own network. You moreover state that Mobitel should not be allowed to provide origination services which are below cost, calculated on a regional basis.

By letter of 16 October 2009 you elaborated and updated the information supplied in your complaint, inter alia by explaining that Si.mobil is not able to grow its wholesale business due to Mobitel's aggressive pricing on the wholesale level. You inter alia state that the (regulated) symmetrical termination rates are not efficient in a country like Slovenia where there is one network operator with significant scale advantages. You also claim that the - at that time - recently published MACO reference offer has a too low price level that means that remaining

³ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Official Journal L 123, 27.04.2004, pages 18-24.

⁴ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 1, 04.01.2003, pages 1-25.

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a wholesale customer, rather than building up an own network, is the most cost efficient option.

By letter of 24 November 2009 Mr Lücking informed you that the UVK, under reference 306-14/2009-4, is actively dealing with the same practice Si.mobil complains about. You were informed that pursuant to Article 13 of Council Regulation 1/2003, the Commission may reject a complaint on the ground that a competition authority of a Member State is dealing or has dealt with the case.

By letter of 10 December 2009, and subsequent telephone discussions with you and Mr Lücking and his case team, and by letters of 18 February 2010 and 18 March 2010, you expressed that the Commission is better placed to adjudicate on the issues raised in the complaint of Si.mobil. You also expressed that the current proceedings before the UVK exclude any review of the competitive impact of Mobitel's actions on the wholesale MACO market, i.e. the second part of the initial complaint.

In your Supplementary Complaint of 18 February 2010 you further alleged that Mobitel's conduct on the retail mobile market amounts to predatory pricing. You claim that Mobitel has engaged in predatory pricing through the use of a so-called "fighting brand" product (i.e. selective price rebates) in an important segment of the overall mobile retail market. The Supplementary Complaint is based on the same factual elements as the first part of the original complaint, i.e. the alleged margin squeeze.

In an e-mail of 18 March 2010, you clarified that the Supplementary Complaint should be regarded as complementing the original complaint, rather than being a separate new complaint.

In a letter of the same date, i.e. 18 March 2010, you claim that Mobitel's recently presented MACO prices should be understood as allowing Mobitel to migrate its retail fighting brand strategy (the predatory pricing) onto third party operators. You moreover claim that the use of the LRIC costing model to assess Mobitel's MACO pricing is flawed and that Mobitel's pricing is too low to allow for wholesale competition. You finally claim that Mobitel's wholesale pricing illegally discriminates between those who only purchase wholesale termination and hosted network operators.

In your submission of 5 July 2010, in reply to the Commission's letter pursuant to Articles 7(1) and 9 of Reg. 773/2004 indicating its intention to close the case, you argued in particular that the proceedings before the UVK do not deal with the case concerning alleged margin squeeze and/or predatory pricing and that there is therefore no basis for rejecting these parts of your complaint under Article 13 of Regulation 1/2003. You further alleged that the Commission is in any way better suited to deal with the complaint inter alia due to the institutional failings of the Slovenian regulator and the UVK; as the UVK does not deal with the wholesale aspects of the complaint; and as the Slovenian state owns a majority stake in Mobitel. In sum, you argue that the competition law claims are not dealt with, and are not capable of being dealt with adequately, by the UVK.

You moreover claim that an alleged predatory pricing would not be remedied by a decision on the issue of a margin squeeze.

You also do not agree with the Commission's preliminary finding that the alleged abuses on the wholesale level have a limited impact on the functioning of the internal market. You argue

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that a balancing test is required for establishing if there is sufficient interest of the European Union in investigating the case, and that this test has not been applied to the alleged abuses on the retail level. You claim that the effects of Mobitel's alleged behaviour is indeed felt by other smaller mobile network operators (MNO) and not only Si.mobil. Moreover, you claim that the fact that the impugned practices are national is not a viable argument against the Commission taking action, especially considering that the Commission is currently investigating several cases in the telephony sector where there are no cross-border effects. Also, the fact that the relevant market at issue has been excluded from markets that are generally under ex ante regulation makes it all the more suitable for Commission intervention.

As concerns the arguments relating to the complexity of investigation and limited likelihood of establishing proof of an abuse on the wholesale market, you say in particular that the Commission's statement that there is no precedent for such a case is unfounded and cite *Compagnie Maritime Belge*⁵, and case-law from the United Kingdom and the Kingdom of Jordan, in support of your allegations.

You supplied additional information by letter of 9 September 2010.⁶ In this letter you reiterate arguments concerning so called fighting ships in the maritime sector, and also cite practices from other jurisdictions that might be referred to as fighting brand. You further argue that there exist regulatory shortcomings that necessitates the ex post intervention by the Commission and in this regard inter alia refer to the lack of action on the part of the Slovenian Competition Authority in relation to a complaint regarding an alleged abuse of dominant position by Mobitel on the market for mobile voice call termination (market 7).

You furthermore supplied information on planned market exit by the third and fourth mobile network operator. You also state that it is clear that Mobitel is offering an undisclosed package of services to smaller operators such as Debitel and Izimobil which depart from its Reference Wholesale Offer. You also claim that the effect of this fighting brands strategy is exacerbated by the fact that Mobitel makes early termination of contracts difficult for their customers. You finally again emphasise the Slovenian institutional shortcomings, manifested through several newspaper articles indicating inter alia the resignation of the Minister of Economy and the lack of leadership at the Slovenian regulatory authority.

In a letter of 20 September 2010 you informed the Commission of certain institutional developments, that Mobitel had raised its retail price of the Dzabest package whilst at the same time allowing significant rebates to porting customers. You also supplied some information of developments in the MACO market. You finally informed the Commission that Si.mobil has now stopped paying the full regulated termination rate to Mobitel, which is threatening with an action to achieve unilateral compensation.

⁵ Case C-395/96 P *Compagnie Maritime Belge Transport SA v Commission*.

⁶ The Commission is not obliged to take into account submissions made after the expiry of the time-limit in the Article 7(1) letter, last sentence Article 7(1) of Reg 773/2004.

2. ASSESSMENT

2.1. Alleged abuse on the retail market (margin squeeze and predatory pricing)

Pursuant to Article 13 of Council Regulation 1/2003, the Commission may reject a complaint on the ground that a competition authority of a Member State is dealing or has dealt with the case.

According to a letter signed by the director of the UVK, received by the Commission on 17 November 2009, the procedure before the UVK concerns [...] "the suspected abuse of dominant position of mobile network operator Mobitel on the retail and wholesale mobile communications market from 2008. The investigation concerns inter alia the retail product Džabest, and whether Mobitel has engaged into a margin squeeze and/or predatory pricing."

The procedure of the UVK thus concerns the same alleged infringements on the same market within the same timeframe and the Commission may therefore reject the complaint relating to the retail practices on the basis of Article 13 of Regulation 1/2003. It could also be noted that as the complaint relating to the retail practices is assessed under Article 13, there is no need to apply a balancing test to ascertain if there is sufficient interest of the European Union in investigating the case as regards the retail practices. Moreover, as the UVK deals with the matter as a predatory pricing and/or margin squeeze, there is no need to ascertain if the predatory pricing claim is a new cause of action; it is in any event dealt with by the UVK which is sufficient grounds for rejecting the complaint.

The Commission has had continued contacts with the UVK concerning the case. According to these contacts, it appears that the UVK is actively dealing with the case. Moreover, there has been no indication to corroborate your allegations concerning institutional shortcomings, or that the UVK should not be investigating the case.

Where the Commission rejects a complaint pursuant to Article 13 of Regulation No 1/2003, it shall inform the complainant without delay of the national competition authority which is dealing with the case.⁷ In the letters of 24 November 2009 and 3 June 2010, the Commission services informed you that the UVK is actively dealing with a case that concerns the same retail practices that you complain against in the first part of the original complaint (margin squeeze through the Džabest product) and in the Supplementary Complaint (predatory pricing through the Džabest product). You were also informed that DG Competition had forwarded your complaint to the UVK.

For these reasons, I inform you that, pursuant to Article 13 of Council Regulation 1/2003, the Commission rejects your complaints concerning alleged margin squeeze and/or predatory pricing.

2.2. Alleged abuse on the wholesale market

Concerning the second part of your initial complaint, i.e. the alleged abuse on wholesale market, which was elaborated upon in your letters of 16 October 2009 and 18 March 2010, the following could be said. First, I note that according to the initial complaint, the abuse on

⁷ Article 9 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, *Official Journal L 123, 27.04.2004, pages 18-24.*

the retail market and the abuse on the wholesale market are "mutually reinforcing in its anti-competitive effect". The effect of the second variant of abuse is, again according to the complaint, "to exacerbate the effects of market foreclosure generated through [Mobitel's] retail tariff package". As the wholesale and retail parts of the complaints are interlinked and relate to foreclosure of competitors, the complaints on the wholesale market could be deemed to concern the same factual elements as the complaint relating to margin squeeze and predatory pricing, which is already being dealt with by the UVK. Nevertheless, and for the avoidance of doubt, the Commission below assesses the interest of the European Union in conducting further investigation into the complaints concerning the wholesale market. A weighing of the interest of the European Union in conducting a separate analysis must however be done in the light of that the UVK is currently conducting an investigation into the alleged retail practices of Mobitel, and that these have a bearing on the situation on the wholesale market.

According to the settled case law of the Courts of the European Union, the Commission is not required to conduct an investigation in each complaint it receives.⁸ The courts of the European Union have also recognized that the Commission has discretion in its treatment of complaints.⁹ In particular, the Commission is entitled to give differing degrees of priority and refer to the interest of the European Union in order to determine the degree of priority to be applied to the various complaints brought before it.¹⁰

In assessing the interest of the European Union as regards the continuation of the investigation of a case, the Commission may in particular balance (i) the significance of the alleged infringement in view of the functioning of the internal market, (ii) the probability of establishing the existence of the infringement and (iii) the scope of the investigation required.¹¹

As regards your complaint, the Commission considers that the further investigation of the alleged abuse whereby Si.Mobil limits access to the wholesale market for mobile access and call origination by *inter alia* increasing the pool of so called on-net calls, by charging artificially low prices, and by charging discriminatory prices would be disproportionate in light of the limited impact that this conduct is likely to have on the functioning of the internal market as well as the complexity of the investigation required and the limited likelihood of establishing proof of an infringement of Article 102 TFEU.

2.2.1. *Limited impact on the functioning of the internal market*

As outlined in your complaint, the effects of the alleged infringements are essentially confined to the territory of one member state, namely Slovenia.

It should also be noted that it seems that your finding of an abuse on the wholesale market is dependent on the particular features of the Slovenian market where Mobitel, according to the

⁸ See Case T-24/90, *Automec v Commission*, [1992] ECR II-2223, para. 76.

⁹ See Cases C-119/97 P, *Ufex v Commission*, [1999] ECR I-1341, para. 88; T-193/02, *Laurent Piau v Commission*, [2005] ECR II-209, paras. 44 and 80.

¹⁰ *Automec, supra*, paras. 77 and 85.

¹¹ *Automec, supra*, para. 86.

complaint, has a dominant position on the termination *and* origination market. This situation is, again according to the complaint, "highly unusual in the mobile sector".

Moreover, there is already an ongoing investigation concerning Mobitel's alleged abusive behaviour, albeit on the retail market. In the complaint it is stated that the abuse on the wholesale market "exacerbate the effects of the market foreclosure generated through its anti-competitive retail tariff package" and that the two elements of the foreclosing strategy "are mutually reinforcing in its anti-competitive effect". As concerns the alleged predatory pricing, it could be noted that in the letter of 18 March 2010 it is stated that the predatory "fighting brand" strategy has "further evolved beyond the predatory retail product called Dzabest, so that it is now also being facilitated at the wholesale level through its pricing of wholesale [MACO]". According to you own submission, the alleged abuses on the retail and wholesale markets are thus supposedly interlinked. In light of this, it cannot be excluded that the effect of the alleged abuse on the wholesale market would be limited should an abuse on the retail market be established and consequently remedied by the UVK. Nevertheless, as is seen below, the wholesale complaint does not on its own merit a separate investigation to be carried out by the European Commission.

2.2.2. *Complexity of the investigation required, limited likelihood of establishing proof of infringements and disproportionality of further investigation*

Further investigation into the matter would moreover be disproportionate in view of the complexity of the investigation required and the limited likelihood of establishing the proof of such infringements.

You suggest that the anticompetitive conducts consist in discrimination between wholesale buyers. In this regard it could be noted that anticompetitive discrimination occurs when dissimilar conditions are applied to equivalent transactions, and that it could be argued that buying termination bundled with origination is not equivalent to buying termination and origination separately. You also suggest that origination is sold at a too low price. In this regard it can be noted that low prices amount to predatory pricing where the price charged is below average variable cost, or variable total cost if intent is proven. It could in this regard be noted that you state that Mobitel itself has claimed that its termination *costs* are lower than the regulated termination rate, thus making it less clear that a bundled price lower than the regulated termination rate plus wholesale origination would be below Mobitel's cost. Moreover, you consistently claim that it is foremost Mobitel's scale advantages that allow it to offer low wholesale prices, and not that prices are below cost. You also consistently claim that Si.mobil needs to discount its offers to be competitive. In this regard it must be stressed that to the extent that the different competitive conditions are caused by scale differences, competition law cannot remedy such differences. Finally, concerning the allegation that Mobitel has deployed a so called fighting ships strategy, i.e. selective rebates, the Commission notes that there are no indications that Mobitel has specifically targeted Si.mobil's existing customers with selective rebates. Moreover, as regards your claim that Mobitel has introduced a retail fighting brand through hosted MACO customers (mentioned in your letter of 18 March 2010), it suffices to say that there are no indications that Mobitel could control the retail price of its hosted MACO customers. Therefore no direct link between the retail pricing of MACO customers and Mobitel's wholesale input price has been established.

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In any event, as the allegation concerns an infringement of Article 102 TFEU, establishing proof of the alleged infringement in the present case would require a complex factual and economic analysis.

Given the limited likelihood of establishing the proof of such infringements and the substantial investigatory resources which the Commission would have to invest in order to obtain the evidence for their existence, allocating the resources necessary to further investigate the case would be disproportionate, in light of its limited impact on the functioning of the internal market.

Therefore, after a thorough examination of the facts, the Commission has concluded that the complaint lacks European Union interest.

3. CONCLUSION

In view of the above considerations, the Commission has come to the conclusion that there is no sufficient degree of European Union interest for conducting a further investigation into the alleged infringements concerning the wholesale market and consequently rejects the complaint pursuant to Article 7(2) of Regulation 773/2004. The Commission for the reasons stated in 2.1 above also inform you that it rejects your complaint concerning alleged infringement on the retail level pursuant to Article 13 of Council Regulation 1/2003.

4. PROCEDURE

An action challenging this Decision may be brought before the General Court of the European Union in accordance with Article 263 TFEU.

For the Commission

Joaquín Almunia
Vice-President