



REPUBLIC OF ALBANIA
-COMPETITION AUTHORITY-
Competition Commission

D E C I S I O N

No. 61, Dated 21. 11. 2007

On

“Some recommendations concerning the mobile telephony market”

The Competition Commission, on its meeting held on 09. 11. 2007, with the participation of:

Mrs. Lindita Milo (Lati)	Chairwoman
Mr. Lush Përpali	Deputy chairman
Mrs. Servete Gruda	Member
Mr. Koço Broka	Member

Discussed the following issue:

Subject: Recommendations to public institutions concerning the mobile Market Telephony.

Legal basis: Law No. 9121, dated 28.07.2003, titled “On Protection of Competition”, Article 24, letter “f”, and Article 70, paragraph 2.

The Competition Commission, upon review of:

The Report of the Working Group for “In-Depth Investigation in the Mobile Telecommunications Market”; and

Opinions of the parties, expressed both in writing, as well as during the Hearing Sessions held, respectively, on 07.06.2007 with AMC; and on 13.06.2007 with Vodafone.

NOTED THAT:

I. Fields of Application for Law on Competition

1. The Law “On Protection of Competition” is applied for those undertakings, or groups of undertakings, which, either directly or indirectly, impact or may impact the market, and that operate within the territory of the Republic of Albania (Article 2 of Law No. 9121, dated 28.07.2003, titled “On Protection of Competition”). AMC and Vodafone offer mobile telecommunications services within the territory of the Republic of Albania and, based on Article 3, paragraph 1 of the Law “On Protection of Competition”, are qualified as

“undertakings”. As a result, the activity of these two undertakings is subject to Law No. 9121, dated 28.07.2003, titled “On Protection of Competition”.

II. The issue under consideration

2. The in-depth investigation was launched in relation to the mobile telecommunications public services, offered by two service providers, AMC and Vodafone.
3. The mobile telecommunications market was created on May 1996, with the licensing of AMC company (License No. 1) and the subsequent commencement of its operations.
On 25.07.2000, Telenor - Cosmote company acquired 85 % of the AMC shares, 12.6% of the shares is owned by the Albanian State, and administered by the Ministry of Economy, Trade and Energy of the Republic of Albania, while 2.4% of the shares are owned by small shareholders, who were employees of AMC at the time of the privatization.
4. On 9 June 2001, Vodafone company was the second licensed operator in the mobile telecommunications market (License No. 2), with 51% of common capital shares owned by Vodafone International Holding, and 49% owned by Panafone International Holding.
5. On 1 March 2004, the third operator in the mobile telecommunications market, Eagle Mobile company was licensed (License No. 3). Eagle Mobile was 100% owned by Albtelekom sh.a. During the period of investigation by the Competition Authority, Eagle Mobile has not exercised any economic activity in the market.
6. Under these conditions, only two undertakings have been operating in the mobile telecommunications market during the investigation period, i.e. AMC and Vodafone.

III. Investigation Period

7. The investigation period in the mobile telecommunications market comprises the period 2004-2005.
8. For the purpose of analyzing the behaviour of the undertakings under consideration during a longer period of time, the Competition Authority has analyzed the mobile telecommunications market for the period 2001-2005.

IV. Investigation Procedures

9. The investigation procedures are based in Chapter III of Law No. 9121, dated 28.07.2003, titled “On Protection of Competition” and the Code of Administrative Procedures.
10. On September 2005, the Competition Authority, on its own initiative, launched an investigation in the Mobile Telecommunications Market. The trigger for taking this step was growing concern of the public opinion for the high prices applied by the operators in the Mobile Telecommunications Market. Such concern was publicly expressed in the media, mainly by associations and institutions engaged with the protection of consumer rights

(the Association for the Protection of Consumers, the Ombudsman, etc.) The same concern had been also stated in the Recommendations provided by the International Union of Telecommunications (ITU)¹.

11. Upon reviewing the documentation made available by the Secretariat and the explanations presented by the two operators in the market, AMC and Vodafone, rendered its judgment based on available evidence by concluding that there could be restrictions of competition in the market.
12. Upon its Decision No. 21, dated 11.10.2005, the Competition Commission resolved to “Launch an in-depth investigation procedure in the mobile telecommunications market, in general, and with a particular focus on the undertakings AMC sh.a and Vodafone sh.a, in relation with the inquiry on the existence or non-existence of abuse of dominant position [by these undertakings], or any other restrictions of competition in this market.”
13. Upon Decision No. 21, dated 11.10.2005, of the Competition Commission, the Secretariat has carried on the investigation proceedings pursuant to Law No. 9121, dated 28.07.2003, titled “On Protection of Competition” and the Code of Administrative Procedures. Upon conclusion of the investigation, the Secretariat has submitted to the Competition Commission the “Report on In-Depth Investigation”. Pursuant to Article 47 of the Code of Administrative Procedures, copies of this Report, which omitted confidential information respective to the other undertaking, have been made available to the undertakings under investigation, i.e. AMC and Vodafone.
14. Pursuant to Article of Law No. 9121, dated 28.07.2003, titled “On Protection of Competition”, the undertakings have expressed their opinion on the Report on In-Depth Investigation, during the hearing sessions held, respectively, on 07.06.2007 with AMC; and on 13.06.2007 with Vodafone.

V. The comments of the interested parties

15. The hearing sessions held on 7 and 13 June 2007 were conducted in complete accordance with Article 39 of Law No. 9121, dated 28.07.2003, titled “On Protection of Competition”. During these hearing sessions, the companies operating in the Mobile Market Telephony, i.e. AMC and Vodafone, presented their comments on the Report on the “In-Depth Investigation in the Mobile Telecommunications Market”, prepared by the Secretariat of the Competition Authority.

VI.A. The relevant product market

16. The relevant product market is the public service of mobile telecommunications, or the transmission of phone calls to the end user (either generated by the end user, or destined for the end user), offered by each of the mobile telecommunication companies, AMC and Vodafone. In the

¹ “...The Telecommunications Regulatory Entity must review the interconnection agreements, entered, respectively, between Albtelkom and AMC, and, Albtelkom and Vodafone, because these agreements are in breach of the Telecommunications Law and harm public interest...”

definition given above, the mobile telecommunications services comprise only voice telephony.

17. The relevant market has been analyzed also on the basis of its derivative services provided by the operators, which are: (i) prepaid, and (ii) contracted (private and business), because the impact of the market, divided into these subsections, is more significant to the level of competition, and has a direct impact on the consumers.

VI.B Geographical market

18. The geographical market of mobile telecommunications services for AMC and Vodafone is the territory of the Republic of Albania. The respective licenses that enable AMC and Vodafone to offer their services define such territory as their geographical market in Albania.

VII. Assessment of dominant position

19. The term “dominant position” means the position in the market, held by one or more undertakings, such that it makes their operations, with regard to supply and demand, independent from those of the other market participants, to include: competitors, clients or consumers”².
20. This disposition is based on European Law, issued in connection with Article 82 of the European Union Treaty, and is furthermore confirmed by the definition provided by the European Court of Justice in Luxembourg (which addresses cases related to competition issues), in one of its resolutions: “... *a position of economic power that enables one undertaking to obstruct effective competition in the relevant market, by allowing it to display highly independent behaviour towards its competitors and clients, and ultimately, consumers*”³.
21. Pursuant to Article 8 of Law No. 9121, dated 28.07.2003, titled “On Protection of Competition”, the assessment of existence of dominant position held by one or more undertakings is done by taking into consideration the criteria stated below:

VI.A Respective shares of relevant market for AMC and Vodafone

22. Pursuant to Article 8 of Law No. 9121, dated 28.07.2003, titled “On Protection of Competition”, one of the fundamental criteria to determine dominant position in the market is the [respective] market share occupied by the undertakings in the product market. This is ranked first under Article 8 referred above. The market shares are estimated on the basis of the number of subscribers, or the respective market revenue for each undertaking.

The estimation of market shares of AMC and Vodafone, done on the basis of the number of subscribers and the respective market revenue, showed that these companies, i.e. AMC and Vodafone own approximately equal market

² Law No. 9121, dated 28.07.2003, titled “On Protection of Competition”, Article 3, paragraph 5.

³Case 27/76, date 14.09.1978 United Brands vs. Commission.

shares during the period 2004-2005, thus **creating a symmetrical division of the market.**

VII.B Market entry barriers (administrative, technical and economic barriers)

23. The mobile telephony market in Albania is regulated by public institutions⁴. The institution in charge for the regulation of the telecommunications market in the Republic of Albania is the Telecommunications Regulatory Entity.
24. Entry barriers are those factors that impede the entry of new operators in a given market. Such barriers can be of administrative, technical and economic nature.

Administrative barriers

25. The number of licenses in Albania is limited, and is based on bylaws, and specifically, by decision of the Council of Ministers of the Republic of Albania. (“...The Government is committed to open the telecommunications sector to competition through the permission of the participation of private interests. However, even after the complete opening to competition of this market, some services shall continue to be provided by a limited number of operators, by reason of limited natural resources, such as radio frequencies.”⁵ (This condition explains the fact that this market has entry barriers of administrative nature.).

Technical barriers

26. The spectrum of radio- frequencies is a limited natural; resource,⁶ whilst the national radio spectrum plan, and any amendments to it, are approved by the Council of Ministers. In order to be able to operate under normal technical conditions, a licensed undertaking should have available, on average, 40-50 radio-frequencies within the 900 MHz band, and about 80-100 radio-frequencies within the 1800 MHz. Band. The European Telecommunications Network has made available to the Republic of Albania about 174 radio frequencies within the 900 MHz band, and about 384 radio frequencies within the 1800 MHz band.

Economic barriers

27. Market entry barriers of economic nature are represented by the large cost of investments that potential operators need to make in order to entry the market. Such costs include the purchase of the operating license and the construction of the mobile telephony network.

⁴ Legal or regulatory barriers do not result from economic conditions, but rather from administrative, legal or other measures undertaken by the State, and that have a direct impact on the entry and/or the positioning of the operators in the relevant market (Recommendation by the European Commission, dated 11.02.2003, titled “On relevant product and services market in the digital communications market”).

⁵ The Telecommunications Development Policy of the Republic of Albania, approved by Decision No. 288, dated 18.06.1999, and amended on 1999, 2001, 2002, and 2003.

⁶ The same document as referred above, Article 69.

28. The incumbent undertakings, i.e. AMC and Vodafone, enjoy considerable advantage in the mobile telephony market. They already have in place their networks, subscribers, management experience, brand name, as well as significant financial and economic capacity. Under these conditions, potential operators shall need considerable time and financial means before becoming effective players in the market. The number of remaining potential subscribers is relatively limited. Therefore, in order to achieve an acceptable level of competitiveness, these potential operators would have to find their subscribers among those who are already subscribers of the other two operators – a process which is difficult to realize because of the advantages of the incumbent undertakings. This process undoubtedly represents a considerable entry barrier for potential operators.
29. The fact that Eagle Mobile, the third operator licensed on March 2004 has not exercised any economic activity in the mobile telephony market during the investigation period, has been at the advantage of the incumbent undertakings, i.e. AMC and Vodafone.

VII.C Potential competition

30. From the analysis of mobile telephony market results that during the period 2004-2005, the competition in this market was low. The reason is mainly the absence of other operators in the market, an absence that is due to the strong market entry barriers.
31. Eagle Mobile has not exercised any economic activity in the mobile telephony market during the investigation period. Therefore, this undertaking has not competed with AMC and Vodafone, and therefore has missed to create any kind of competitive effect in the market.

VII. D Other characteristics of the market

32. The relevant product in the mobile telephony market is homogenous.
33. Demand in the mobile telephony market in Albania has been sustainable⁷.
34. Cost in the mobile telephony market in Albania, is uniform, both because of the almost equal production technology, as well as the similar conditions of the undertakings operating in the market, i.e. AMC and Vodafone.
35. Pursuant to Article 8 Law No. 9121, dated 28.07.2003, titled “On Protection of Competition”, and by reason of [estimated] market share, market entry barriers, potential competition, the economic power of the incumbent undertakings, the negotiating power of the consumers, as well as other market characteristics, results that the companies **AMC and Vodafone have dominant position in the mobile telephony market [in Albania].**

⁷ The rate of demand increase in the mobile telephony has been very high. For example, in the years 2003, 2004 and 2005, the rate of demand increase was, respectively, 29%, 15% and 21%, (calculated on the number of subscribers in a given year).

VIII. The behaviour of the undertakings in the market

36. Both AMC sh.a. and Vodafone sh.a. have declined to implement Decision No. 179, dated 07.05.2004 of the Telecommunications Regulatory Entity. This decision recommended to setting the national termination fee for mobile telephony at no higher than the threshold of 22 Lek/minute. The implementation of this recommendation would lead to having a national termination fee for mobile telephony services no higher than 22 Lek/minute for year 2004, and no higher than 28 Lek/minute for year 2005. The Competition Commission is of the opinion that, at that time, such price would reflect the price applied in an effectively competitive market.
37. The agreed decrease of termination tariffs at the level of 28 Lek/minute at the end of year 2004, has not created, during the investigation period, any decreasing effect on the tariffs of the relevant product for any of the undertakings AMC and Vodafone.
38. Both undertakings, AMC and Vodafone, have applied national termination tariffs that are more than twice higher than the average termination tariffs applied by the countries in the region.

IX. Abuse of dominant power⁸ by AMC sh.a. and Vodafone Albania sh.a.

39. According to Law No. 9121, dated 28.07.2003, titled "On Protection of Competition", **Article 9, paragraph 1** "... is prohibited any abuse of dominant market power, by one or more undertakings", and **paragraph 2, letter "a"**: "Abuse [of dominant power] may constitute the application, done either directly or indirectly, of unfair purchase or sale pricing, or imposition of any other unfair trading conditions".
40. Pursuant to Article 9, paragraph 2, letter "a", "... one of the main forms of abuse of dominant power is the application of unfair prices (*Unfair Pricing* or *Excessive Prices*)⁹. The price applied is unfair when it is much higher than would be in any competitive market. The characterization of the price as being unfair is done, first of all, upon comparing the level of the price with the economic value of the product, or, stated otherwise, with the product's

⁸ The Competition Commission observes that the undertakings holding a dominant position should not be allowed to perform certain operations (even if such operations aim at protecting their interests), when they lead to the strengthening of dominant position and abuse of it. In order to further clarify the above statement, below is given an excerpt from a citation of the court decision made in relation to the Case *Deutsche Gramophone GmbH vs. Metrosb-Grossmarkte*: "Consistent with the court decision, the price change may be a determinant indicator of abuse of dominant position, if the price difference is large and is not supported by objective motivation". The same affirmation is made in connection with *Sirena vs. Eda* Case: "Evidence of abuse of dominant position does not necessarily consist on setting high prices, but nevertheless, it can be a determinant indicator, if unmotivated and too high, or neutral [if the last two conditions do not hold simultaneously true]."

⁹ In relation to the Case *General Motors*, 1975, under Paragraph 12, the European Court of Justice expressed the following consideration: "Abuse [of dominant position] may consist, in particular, in the application of a price that compared to the economic value of the service provided, seems excessive"; The European Court of Justice, in dealing with the case *United Brands*, 1978, has considered as abuse: ("Paragraph 250:...application of an exaggerated price, with no reasonable connection to the economic value of the service provided").

cost¹⁰. If the estimation of the cost of the product is not possible to make, then, the price level and the level of profit should be compared against the price level and the level of profit of similar products, or, alternatively, with the price level and the level of profit of the same products on other geographical markets¹¹. As the case may be, and upon the available information, other methods can be applied, as well¹². The verification of abuse involves three tests. Sufficient proof for abuse with dominant position is to have at least one test passed¹³.

XI.A Application of high prices, without reasonable relation with the economic value of the product

41. The service prices applied by these undertakings do not have any reasonable relation with their cost. “The economic value may be compared to the product cost, price of other similar products, or the cost of a similar product in a different geographical market”¹⁴.
42. If the undertakings would implement a national termination fee for mobile telephony at no higher than the threshold of 22 Lek/minute, recommended by Decision No. 179, dated 07.05.2004 of the Telecommunications Regulatory Entity, and considered as a benchmark for 2004, and a national termination fee of no higher than 28 Lek/minute, which was the benchmark for 2005, then the tariffs of termination would reflect, at least, a minimal change, but no such event was observed during the period of investigation.
43. Based on the above, the Competition Commission, through its Decision No. 59, dated 09.11.2007, has resolved that the undertakings AMC sh.a. and Vodafone sh.a. have abused of dominant position in the mobile telecommunications market, by applying unfair pricing during the investigation period (2004, 2005) and has therefore imposed financial penalties equal to 2 % of the annual turnover in the relevant market of each of the undertakings.

¹⁰ “...In this case it must be verified if an excessive difference between cost and price exists, and if so, must be examined if price setting is unfair, both at the absolute level and relative to the pricing of competitive products”. (*United Brands*, ECJ 1978, paragraph 252).

¹¹ In relation to Case SACEM, joint cases 110/88, 241/88 and 242/88, 1989, in particular under paragraph 25, the European Court of Justice has made the following consideration: “... where an undertaking holding a dominant position applies tariffs that are much higher than those applied in other member countries, and this comparison is made upon a homogenous base, then such difference should be interpreted as an indicator of abuse of dominant position”.

¹² The European Court of Justice has always been transparent on the method it employs to determine unfair pricing. In relation to Case *United Brands*, 1978, paragraph 253, it made the following consideration: “...there can be conceived other methods – and economic doctrines have conceived several – to define the criteria of determining unfair pricing of a product”.

¹³ The Case *British Leyland vs. Commission* ECR no. 311/84, 3283 (1986)

¹⁴ Bellamy&Child (2001) “European Community Law of Competition”.

44. At the same time, the Competition Commission has noted that the public institutions, through the drafting and the implementation of regulatory reforms and policies in the telecommunications sector, have a significant role in the liberalization and further development of the telecommunications market.

FOR THE ABOVE REASONS:

Pursuant to Article 24, letter “f”, and Article 7, paragraph 2, of Law No. 9121, dated 28.07.2003, titled “On the Protection of Competition”, the Competition Commission,

DECIDED:

- 1) To recommend the Council of Ministers and the Telecommunications Regulatory Entity the liberalization of the mobile telecommunications market, through the entrance into the market of the third operator, “Eagle Mobile”, within the legal timeframe as specified in the license criteria and the opening of the procedures for granting it a fourth license to operate in the mobile telecommunications market, on the basis of the radio-frequencies that are still available within the territory of the Republic of Albania.
- 2) To recommend the Telecommunications Regulatory Entity that the dispositions concerning the Operators with Significant Market Power, of Law No. 8618, dated 14.06.2000 “On Telecommunications in the Republic of Albania”, become compliant with the Regulatory Structure for Electronic Communications of the European Union, in particular with the Directives issued in 2002. Furthermore, Chapter XII that addresses inspection, oversight and administrative measures, needs to be revised with an intent to reinforce the financial penalties in case of breach of administrative procedures by the operators.
- 3) To recommend the Telecommunications Regulatory Entity that, in the framework of the enforcement of the legal obligation stipulated under Article 62 of Law No. 8618, dated 14.06.2000 “On Telecommunications in the Republic of Albania”, to prepare, within the first half of 2008, the Methodology for the Regulation of Tariffs for Users and the Interconnection Tariffs for both operators in the mobile telephony market, and that have been proclaimed Operators with Significant Market Power.
- 4) To recommend the Telecommunications Regulatory Entity to increase the transparency and observe the principle of non-discrimination between the operators in the mobile telephony market with regard to the interconnection agreements. In addition, and pursuant to Article 45 of the Law No. 8618, dated 14.06.2000 “On Telecommunications in the Republic of Albania”, must intervene to make sure that the interconnection agreements are not in breach of the competition principles as applied in the telecommunications market.
- 5) To recommend the Telecommunications Regulatory Entity to start the proceedings for the implementation of the right of the subscribers concerning the portability of the phone numbers, within the first half of 2008, in compliance with the “Policy for the Development of

Telecommunications” and the best practice applied in the countries in the region.

6) This decision enters into effect immediately.

COMPETITION AUTHORITY

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