

## **Dilemma of Intervention between Governments Agencies, Competition vs Telecommunication Regulatory the Case of Mobile Telephony in Albania how the Investigation Starts, Vodafone's Requirements to Call off the Procedures, Lack of Commitment and the Final Decision, not Fined but Asked for Market Adjustment**

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### **Abstract**

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Market playing rules can be compared to those of a soccer match in the sense that every wrong interference from a player worries the opponent but the foul punishment depends on the referee (in the case of competition the antitrust body). The referee can decide whether not to punish at all, give a yellow card or expel the player from the game with a red card. Foul could be that harsh as to expel the opponent from the match or worse take him off the possibility to ever play football again. (get him out of the market). A similar treatment is applied from the Competition Authorities especially to the abuse with the dominant position where the basic principle is Rule of Reason, in contrast to the cartels where the rule Perse is implemented. In football history there are some cases, not a few, when great teams have profited from the referee's mistakes(e.x France during the qualification for the World Cup 2010 with Henry's goal performed by hand) but no matter the endless discussion, it's the referee the one who decides for that match. The federation's decisions on the referee's behaviour matters only to the referee not to the teams and their fate in the pitch any longer. Vodafone case is a similar one concluded by the Albanian Competition Commission with the Decision no.303/2014<sup>2</sup> but we have still the dilemma how and who will find a solution between competition and telecommunication regulatory agencies?!

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**Keywords:** competition, abusing, regulatory, mobile, dominance, relevant market, agencies

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<sup>2</sup> <http://caa.gov.al/decisions/read/id/490>

## **Introduction**

According to the Authority press release<sup>3</sup> at the end of 2012 the two mobile telephony companies, AMC and Plus, placed a complaint in two different tracks against Vodafone Albania for its possible abuse with the dominant position in the market, doubting in a margin squeeze (AMC complaint) and against the discrimination of competitors through on net vs off net strategy determined as an excluding behaviour (Plus complaint). The only operator not involving itself in was Eagle Mobile. Competition Commission decided for the first time "On opening of the procedures for prior investigation in mobile telephony retail market", Decision no:258 of 21.12.2012. With Decision no:260 of 11.01.2013 because of an apparently conflict of interests the Commission decided the revocation of Decision no: 258 and through Decision no 261 of 11.01.2013 it was re-established "On opening of the procedures for prior investigation in mobile telephony retail market", to look into whether there are or not signs of competition restriction.

Based on the report of the prior investigation, Competition Commission through Decision no:275 of 25.03.2013, changed with Decision no:280 of 22.04.2012 decided on opening of the procedures for a hollow investigation into Vodafone Albania SHA in the mobile telephony retail market". Vodafone asked the revocation of the decision on opening a hollow investigation as specified in Decision no:285 of 20.05.2013 yet the Commission decided to not accept this requirement for revocation. The Secretariat handed the follow investigation report into the mobile telephony retail market to the Competition Commission. The company under investigation was informed about the report and based on article 39 of competition law, on 10 December 2013 the first hearing with the party under investigation, Vodafone, was organised. The final decision taken by Commission is the number 303 one which was revealed on 16 January 2014 deciding on the closure of the investigation with no fine and giving recommendations for AKEP to facilitate competition in mobile telephony market.

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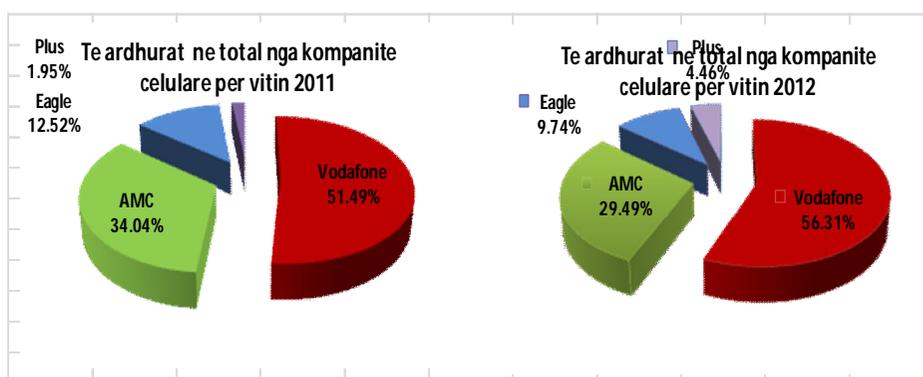
<sup>3</sup> <http://caa.gov.al/news/read/id/240>

## Market sharing and dominant position

Mobile telephony market in Albania is shared among 4 operators: the first which entered the market AMC<sup>4</sup> is now owned by Deutsche Telekom Group, the second to enter the market was Vodafone Albania<sup>5</sup>, part of the greatest mobile telephony group in the world Vodafone group, Eagle Mobile<sup>6</sup> is the third operator in the market which last year joined Alb telecom, the giant fixed line telephone company, privatized with 76% of its shares by a Turkish investing group Cetel and the remaining percentage of the shares is owned by the Albanian government; and Plus<sup>7</sup>, an Albanian joint-venture, is the last operator to enter the market.

The respective market of the product included all the public services of mobile telephony offered by the mobile telephony companies. Commission concluded based on market parts according to the incomes 56.3% of Vodafone's for 2012, the market entrance obstacles; the powerful competition; enterprises' economic and financial power; countervailing buyer power and other features of the market; turns out that based on the Article 8 of Competition Law, but even from the best practices of the European competition Law, Vodafone Albania judged by Competition Commission owns a dominant position in the mobile telephony retail market for 2011-2012.

Market shares by total revenues 2011-2012<sup>8</sup>



<sup>4</sup> <http://www.amc.al/en/c/154/AMC>

<sup>5</sup> [http://www.vodafone.al/vodafone/About\\_Us\\_497\\_2.php](http://www.vodafone.al/vodafone/About_Us_497_2.php)

<sup>6</sup> <http://www.albtelecom.al/en/history>

<sup>7</sup> <http://www.plus.al/en/about-plus>

<sup>8</sup> [http://caa.gov.al/uploads/decisions/Vendimi\\_303- HTH\\_Vodafone.pdf](http://caa.gov.al/uploads/decisions/Vendimi_303- HTH_Vodafone.pdf), graph no. 4, pg no 8

## **Is or isn't There any Abuse with the Dominant Position?!**

This case is analysed in the so-discussed point of view of economic literature<sup>9</sup> when the dominant positioned operator has the power to implement differentiation in tariffs in and out the market holding in the customers using 0 cost offers for calls within the network and creating barriers for customers who want to shift to another operator.

Cases of tariffs discrimination on net vs off net refer mainly to what is known as "club" effect or tribu and the Competition Commission in its 75th paragraph of the decision concluded that "there's a strategy followed by Vodafone that creates the so-called "Club Effect", according to which only one specific group of subscribers benefit from the low prices and this become more evidential even when a differentiation among Vodafone subscribers using different tariff plans is noticed".

In paragraph 86 of the decision Commission concludes that "the wholesale price(termination tarif) for Vodafone and AMC is the same (termination tariff 6.l for both Vodafone and AMC), but the retail prices for the calls out the network from Vodafone to AMC are considerably higher than the average price for the calls within the Vodafone network (from 20 ALL without VAT within V club to 45 ALL without VAT toward AMC or 2.25 times higher). The differentiation<sup>3</sup> of retail prices on-net of Vodafone toward other operators has nothing to do with wholesale prices that Vodafone has to pay to operators for the call terminations based on the AKEP regulations.

But yet, why are the on net –off net differentiations punishable when apparently it seems like subscribers benefit from the low cost tariffs. Actually the competition in the market is restricted due to the similar offers imposed to small competitors to emulate, but it's concluded that because of the small number of the subscribers in their networks, the later ones generally make out of network calls, mainly toward the most powerful operator in the market which also owns the highest probability to generate income from the call termination of small operators towards its subscribers.

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<sup>9</sup> On-Net/Off-Net Price Discrimination and 'Bill-and-Keep' vs. 'Cost-Based' Regulation of Mobile Termination Rates. [www.nicta.gov.pg/.../BeMobile%20Response%20\(CROSS%20SUBMISS, www.comcom.govt.nz/dmsdocument/](http://www.nicta.gov.pg/.../BeMobile%20Response%20(CROSS%20SUBMISS, www.comcom.govt.nz/dmsdocument/)

Competition Commission , in #93 expresses that “the analyse is applied on the Vodafone monthly bid, 1000 lek (833.33 without VAT). The calculations show that if a client of other operators consumes 4.55 minutes per day with a client of Vodafone, and these operators have to pay to Vodafone 833.33 lek per month as a wholesale termination cost to this operator. In this way, to other operators remain nothing to cover their costs. For 3000 minutes terminated to Vodafone, these operators would have a termination cost of 18300 albanian lek which is much higher than Vodafone weekly package”

So the Commission argues that “ in these conditions, the small enterprises have to decrease more their prices in order to be competitive, such fact increases their costs. The asymmetry in the subscribers’ number causes low traffic toward small operators and brings negative income from the termination. This fact is evidenced in the termination balance of Vodafone Albania (incomes that the company has generated, detailed according to each company for 2011-2012 on annual basis, also the payment of Vodafone to other mobile telephony companies)positive for Vodafone and negative for the three other competitors.”

According to Competition Commission “in these conditions the different prices may be considered as unjustified and oriented to urge the clients choose or remain in Vodafone club network”. The Commission itself in the decision’s 26th reference says “price difference between on-net/off-net calls is a common practice in the telephony and telecommunication retail market. As such it is subject to different investigation and sanctioned/banned in some countries, see French Authority decision... this practice of price differentiation, with no economic objective justification, intends to restrict and distort competition in the mobile telephony retail market”.

The solutions to similar cases, given by competition authorities and other regulatory parties from different countries, vary from failure to apply administrative measure to recommendation and /or placement of fine for abusing with the dominant position.

In the case scrutinized by European Court of Justice<sup>10</sup>, “if a practise may pose price discrimination, it’s consequently an exclusive abuse with the dominant position in the market. To reach the conclusion that an abuse with the dominant position is being faced, should be proved that a competitor as efficient as the company with dominant position could not compete in the market if its prices would be the ones applied from this company, without causing losses to the latter, losses that company could not afford in a long-term period.”

### **Yellow Card to Vodafone**

In the regulated market, the role of the Competition Authorities is combined with the one of the regulatory entities due to the lack of existence of a complete competition in these markets and the principle that the competition law in itself is insufficient to address only the competition issues. The principles of an effective and free competition are for the majority of the regulated sectors’ legislations, especially the one for electronic communication, as an integral part of them. For this reason a decision taken by Antitrust in a regulated market may address the problems of competition that can be solved by Regulatory intervention.

At the end of the decision, in paragraph no 108, Competition Commission concluded that “ from the analyzes made to the behaviour of the company being under investigation, results that the strategy adopted by the operator causes not only worries about the competition in the relevant market but also negative effects for the long-term competition to smaller competitors, through the application of differentiation strategy to the prices of calls on and off net (on-net vs off-net). The differentiation of price on and of net my be used as a closing market mechanism by the big operators to the small ones that risk the exit from the relevant market, and this fact poses a concern for the market well functioning in a long-term period”.

So Vodafone is punished, in a way, by being given a “yellow card” by the Competition Commission, because it has posed “concerns for competition” and “ prices differentiation that risks market exits”.

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<http://curia.europa.eu/juris/document/document.jsf?text=&docid=121061&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=89885>

## Occasional Loss for Commitments

European legislation and practices widely know the practice of picking up commitments from the parties<sup>11</sup> which are turned into obligatory decisions by Commission and in this way the resolution of the case regarding the competition concerns is softer (without any administrative measure) if the party realizes the commitments to regain competition in the relevant market. The last case was related to e-books where 4 popular companies, among which Apple<sup>12</sup>, were committed not to apply the retail final price and this commitments were turned into decision by Commission.

Even Albanian competition law, article 45, paragraph 2, knows the possibility of picking up commitments from the parties in preliminary assessment and this commitments on Commission decision may be turned into conditions and obligations for the parties.

Vodafone at no stage of the proceedings<sup>13</sup> has ever talked about commitments but what it has done is opposing every decision of Competition Commission<sup>3</sup> by demanding the revocation of the Commission decision for preliminary and hollow hearings<sup>14</sup>. Regarding this case, in the press release the Authority has considered that "Vodafone is publicly committed in order to equal the tariffs on and off net for Vodafone club and decrease the differentiation of the calls on and off net until it is completely eliminated". Considering the specifications of mobile telephony, where more than 95% of the users use the offerings in the decision device, Commission has asked AKEP to monitor the Vodafone public commitment to equal the tariffs on and off net and especially the reduction of differentiation for on and off net tariff not only for the nominal tariffs but even for units included in optional packages of national communication (weekly, monthly annual offerings and packages).

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<sup>11</sup> [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=1\\_39847](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39847)

<sup>12</sup> [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39847/39847\\_18960\\_6.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39847/39847_18960_6.pdf)

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[http://caa.gov.al/uploads/decisions/Vendimi\\_280\\_per\\_shtese\\_ne\\_vendimin\\_e\\_hetimit\\_te\\_thelluar\\_V\\_F.pdf](http://caa.gov.al/uploads/decisions/Vendimi_280_per_shtese_ne_vendimin_e_hetimit_te_thelluar_V_F.pdf)

<sup>14</sup> [http://caa.gov.al/uploads/decisions/VENDIM\\_285\\_REVOKIMI\\_VODAFONE.pdf](http://caa.gov.al/uploads/decisions/VENDIM_285_REVOKIMI_VODAFONE.pdf)

## **Final Decision: Not Red Card?!**

But according to Commission still it has not fulfilled the conditions for punishment with “red card” that in this case means administrative measure for dominant position abuse. In paragraph 109 Commission has concluded that “Vodafone Albania” enterprise has not abused with its dominant position during the period under investigation”. Competition commission has given a lot of recommendations to AKEP for an immediate intervention mainly to alleviate the discrimination on and off net that will give breath to competition among small operators.

Plus complainant<sup>15</sup> had a very severe reaction toward Commission’s decision asking for explanations from Competition Commission for the contradictions between the decision and investigative report while Vodafone Albania<sup>16</sup> hasn’t published any public notice about this decision. Vodafone<sup>17</sup> had previously refused answering media’s interest regarding the case”.

Albanian media<sup>18</sup> facedly conveyed the news by not mentioning the Commission’s decision at all because the companies of mobile telephony are their sponsors<sup>19</sup> too through advertisements that based on independent assessment for all the mobile telephony companies during January – June 2012 is estimated 18.75 million Euros.

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[http://www.plus.al/download/29\\_01\\_2014\\_Press\\_Statement\\_Decision\\_on\\_Vodafone\\_Dominance\\_en.pdf](http://www.plus.al/download/29_01_2014_Press_Statement_Decision_on_Vodafone_Dominance_en.pdf)

<sup>16</sup> [http://www.vodafone.al/vodafone/Press\\_Releases\\_218\\_2.php](http://www.vodafone.al/vodafone/Press_Releases_218_2.php)

<sup>17</sup> <http://www.balkaninsight.com/en/article/vodafone-albania-eyes-antitrust-ruling>

<sup>18</sup> <http://gazeta-shqip.com/lajme/2014/01/29/konkurrenca-perkedhel-abuzimin-masa/>

<http://gazetadita.al/autoriteti-i-konkurrences-mbyll-hetimin-ndaj-vodafone>,

<http://www.monitor.al/julien-coustaury-jemi-cuditur-me-vendimin-e-autoritetit-te-konkurrences>

<http://gazeta-shqip.com/lajme/2014/02/01/konkurrenca-kontradiktore-refuzon-te-njohe-abuzimin-e-vodafone-albania/>

<http://gazeta-shqip.com/lajme/2014/01/27/ak-vodafone-dominon-tregun-e-telefonise-mobile-dhe-ka-shkaktuar-probleme-per-konkurrenca/>

<sup>19</sup> <http://mediaobservatory.net/radar/big-advertisers-subvert-albanian-media-freedom> Data from Idramedia, a media research company in Tirana, show that from January to June 2012 the top five TV advertisers - all telecommunication companies - spent 18.75 million euro on adverts

## Measures to Regulate the Market

The market of mobile telephony is a regulated market, therefore for the evaluation of the functioning of this market have been consulted the decisions and the market analysis reports of the mobile telephony of the Electronic and Postal Communications Authority.

The existence of dominant position and emergence of concerns about competition, has exposed Vodafone in front of regulatory actions of AKEP ( Electronic and Postal Communication Authority) recommended by Competition Commission. AKEP itself on the decision of Governing Board no.2118, on 04.07.2012, " For the approval of document "Mobile market analysis: wholesale market of the termination and access/origination, final document"<sup>20</sup>, on page 81 finds that: " .....in the market we can see an anti- competition phenomenon related to the highlighted differentiation of the tariffs for on and off net calls from consolidated mobile operators in the market regardless that the cost of on net calls is approximate to the off net ones. This phenomenon conditions the behaviour of Albanian consumer, causes negative impact to free competition in the market and its limitation due to causes coming from the discrimination of on and off net calls application..."

In the conclusion of the decision Competition Commission recommended AKEP to take intermediate and immediate precautions, before the end of the analysis of mobile telephony retail market, to make the solutions for market regulation applicable, to prevent the exits from the market something which would have long term consequences on competition.

More specifically Competition Authority has recommended:

- a) To modify the model BULRAIC by reducing significantly the cost of termination for smaller operator to larger operators in this market, in order to urge free and effective competition in the relevant market.
- b) To force the real reduction of the difference for on and off net tariffs, packages and specific tariff plans for the operators owning a dominant position.

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<sup>20</sup> <http://akep.al/images/stories/AKEP/publikime/2012/Vendim-nr2118date4072012.pdf>

What Competition Commission requires from AKEP is to analyse the mobile telephony retail market to address the solutions for competition concerns in this market by undertaking concrete regulatory measures to reduce tariff pronounced differentiation for on and off net call of Vodafone operator.

The last recommendation of competition for AKEP is to monitor, as a regulator, the implementation of Vodafone public commitment (to fixed telephony, AMC, Eagle and Plus) and especially, the reflection of real reduction of this difference not only for nominal tariffs(off-net, on-net) but even for units included in optional packages of national communication (weekly, monthly annual offerings and packages).

Now the addressing of the competition concerns and recommendations given by Competition Commission depends on the Regulatory to ease, to some extent, the competition in the market in order to avoid what Competition Commission fears the most "small operators that may risk the exit from the relevant market".