

NOTIFICATIONS RECEIVED UNDER ARTICLE 7 OF THE FRAMEWORK DIRECTIVE

- UPDATE ON ARTICLE 7 PROCEEDINGS -

COMMISSION REPORT TO ERG

25 NOVEMBER 2004

Notifications by National Regulatory Authorities of draft measures under the Article 7 procedures commenced in August 2003. As of 25 November 2004, the Commission has received 118 notifications from 11 Member States (Austria, Greece, Finland, France, Hungary, Ireland, the Netherlands, Portugal, Slovakia, Sweden, and the United Kingdom). Of these, 103 have been closed. The Commission has issued 58 “comments” or “no comments” letters, 3 “serious doubts” letters; considered 2 notifications to be “incomplete” and issued 3 veto decisions¹, two of them since the last ERG plenary in September 2004.

Cooperation between NRAs and the Commission has remained very effective, at both the pre-notification and the notification stage. This is mirrored by the fact that not only all deadlines were respected but also that the vast majority of the cases closed could be dealt with without major problems during the Phase I process.

In the course of our recent notifications - and since the last ERG plenary in September, a number of interesting points have emerged in Article 7 proceedings.

In case FI/2004/0082 regarding the mobile access and call origination market in Finland, the Commission issued a decision on 5 October 2004 requesting Ficora to withdraw its draft measures. The Commission did not agree with the NRA’s draft decision according to which the mobile operator with the highest market share had SMP in the relevant market. The Commission concluded that the situation and the developments in the Finnish mobile markets did not support the finding of SMP. In the view of the Commission, the ability of service providers to conclude wholesale agreements with different mobile network operators points towards sufficient competition in the relevant market.

In case AT/2004/0090, on the transit market in Austria, in its decision of 20 October 2004, the Commission requested TTK to withdraw its draft measures. The Commission challenged the proposal of the Austrian NRA to cease regulating wholesale transit services in the fixed public telephone network, on the basis of a finding of no SMP in the relevant market. In particular, the Commission did not agree with the NRA’s approach to include operators that no longer demand transit services in the supply side of the market. In the Commission’s view, this would have underestimated the incumbent operator’s market power, in particular vis-à-vis operators that cannot cease to demand transit. For these operators, there was an absence of a real commercial alternative, since the operators that had arranged for their own transit services were not offering them to other companies. Further, insufficient consideration was given to the possibilities that would be open to operators currently dependent on regulated transit services in the event regulation were lifted, and which have insufficient traffic volumes to justify further roll-out of their networks.

Another interesting point arose in case UK/2004/0094 relating to the local loop. Ofcom concluded that, given the indirect pricing constraint exercised by cable-based services at retail level, the wholesale market for unbundled local loops includes both copper loop-based and cable-based wholesale services. It argued that the indirect pricing constraint exercised by cable-based services at the retail level is sufficient in itself to justify the inclusion of wholesale cable-based services in the relevant product market. The Commission recalled that, when including cable-based wholesale services in the relevant market, consideration should be given to the technical, practical and economic feasibility for cable operators to offer facilities equivalent to unbundled local loops. The Commission believes that references to indirect constraints - for example, through substitutability at retail level - are in general to be

¹ Each Commission action may relate to several notified draft measures.

considered at the level of the SMP assessment and not as part of the market definition². The Commission nevertheless only issued a “comments letter” since the exclusion of cable-based wholesale services from the market definition in that case would not have led to a different result in the SMP analysis.

In several other notifications³, the regulators concerned did not specify to an appropriate extent the details of implementation underpinning a proposed cost-orientation obligation. The Commission considers that such an approach to remedies does not appear to provide adequate transparency and legal certainty for market players and could further delay the reduction of wholesale charges, thereby limiting the measure’s effectiveness. In principle, the Commission should be able to assess the compatibility of the implementing measures with the requirements of Article 8(4) of the Access Directive. Therefore, the Commission recalled that the regulators concerned should notify, under Article 7(3) of the Framework Directive, these implementing measures setting out the timeframe, stages applicable for the reduction of wholesale charges, the targeted price ceilings and/or the costing methodologies to be implemented.

In terms of notifications currently under review, the Commission is assessing a notification from Ofcom on UK broadcasting transmission services (UK/2004/0111). Among the notified markets is the market for the provision of so-called “managed transmission services”⁴ to broadcasters and multiplexes for the purpose of providing analogue and/or digital terrestrial broadcasting transmission services within the UK (i.e. a refinement of market 18). Ofcom considers that the two operators active in this market enjoy a position of joint dominance. The deadline for the Commission’s (Phase I) review expires on 22 December 2004.

With a view to ensuring a productive and solid cooperation between the Commission and the NRAs, the Commission services have held 67 pre-notification meetings with NRAs from 17 Member States (including three of the new Member States: Hungary, Malta and Slovakia). The Commission would encourage NRAs to continue to discuss intended notifications with the Commission services, particularly where they concern complex markets or novel approaches to assessing markets. A number of meetings are already scheduled for the coming weeks and more draft measures are expected to be notified in the coming weeks.

* * *

² The issue of inclusion of cable networks in the wholesale broadband access market is discussed in more details in a Commission note to the ERG (ERG (04) 32 rev1).

³ For instance, cases AT/2004/0099 and HU/2004/0101

⁴ MTS providers take responsibility for a broadcast stream arriving at a transmission site and make the arrangements necessary for it to be transmitted from an antenna at that site, monitoring and assuring quality of the transmitted signal and making arrangements for maintenance of the transmission equipment.