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**ERG GM CP 2008 – public consultation on ERG draft Common Position on Geographic Aspects of Market Analysis (definition and remedies)**

Dear Madam or Sir,

The Austrian Association of Alternative Telecommunications operators (VAT) welcomes the opportunity to submit a statement in the public consultation on ERG draft Common Position on Geographic Aspects of Market Analysis (definition and remedies). As the Austrian market is one of the few markets in Europe where geographically differentiated remedies have been recently imposed on the wholesale broadband access market, we even more appreciate to contribute with our experience derived from various national discussions and procedures on European level.

**1) Preliminary conditions to conduct a detailed geographic analysis (Chapter 2)**

In addition to the criteria mentioned in chapter 2 of the consultation document, the following criteria should be evaluated before going into the details of a geographic analysis:

- 1) The tendency of market shares of the incumbent to increase on a national level although regulatory measures are imposed

The continuous increase of the market share of the incumbent (and consequently the loss of market share of alternative operators) brings forward evidence that the regulatory measures imposed are not sufficient to enable sustainable competition. Geographic segmentation (by market definition or by remedies) is not an appropriate instrument to invert this tendency and to increase the effectiveness of current regulatory obligations.

- 2) Functional separation of the incumbent's wholesale and retail division

Segmented markets suffer from an inherent higher risk of cross-subsidising (both, between the segments and between retail and wholesale markets), and give higher incentives to discrimination and intransparent pricing strategies compared to non-segmented markets.

If evidence for these risks has already emerged in the un-segmented market and if said practices were even subject to supervisory proceedings and if no functional separation of the incumbent has been imposed, geographic segmentation (by market definition or by

remedies) is not an appropriate instrument to correct this misconduct in the market and to make current regulatory obligations more effective than before.

To countersteer to these risks, functional separation must be imposed in order to give equal access to wholesale services to all market players before geographic segmentation is to be evaluated and imposed.

### 3) Effective ex-post control by competition authorities

Segmented markets or areas, and the interplay of de-regulated and regulated markets or areas increase the complexity for market players and consumers. This implies a risk of abuse of market power or of a dominant position. The Competition authority is in charge to cease such abuse by means of ex-post control. If such ex post control is not effective, no segmentation and no de-regulation can be made without increasing the risk of a damage or harm for the market players and rival companies (such as ANO). Therefore the effectiveness of ex-post control by competition authorities (e.g. resources, duration of proceedings) has to be analysed. If no effective ex post control is established, segmentation and de-regulation must not be introduced as this would be an additional burden in the market.

### 4) Market for business customers

Both, wholesale and retail markets for business customers follow other rules and necessities than the markets for residential customers. In the business customer market, ANO particularly rely more on bitstream wholesale services to climb their ladder of investment as business customers usually have separately located widely spread premises or entities, the services need to be provided for (e.g. nationwide company networks). Even for ANO with own infrastructure and superior LLU coverage, services for business customers are difficult to establish without using wholesale products from the incumbent as business customers may reside in not easily accessible areas due to rural structural stimulation programs or similar governmental aid. Segmentation or de-regulation unquestionably lead to the effect, that these business customers will be more difficult to serve by ANO (which leads to a reduced number of operators able to submit an offer to this customer) or business customers will be served at a higher price due to higher wholesale costs. Thus the benefit for business customers would be decreased by regulatory means, segmentation and de-regulation must therefore not be imposed on the market.

These criteria may serve as an additional supervisory or sanity check before a time and resource consuming geographic analysis is made and thus increases the efficiency of regulatory proceedings.

If either of these criteria is not fulfilled, a geographic analysis must not be made as the regulatory goals (i.e. to increase the benefit for consumers and to increase sustainable competition) are unthinkably to be achieved by means of geographic segmentation.

## 2) Basic principles to carry out any regulatory analysis

These basic principles should be included in the document in order to give guidelines for the applicable proceedings for a market analysis.

1. Any regulatory analysis shall be conducted on the basis of existing facts (which is the starting point) and shall develop its arguments based on the present situation (e.g. market data, existing wholesale offers, current business models, regulatory obligations and so on).
2. Tendencies shall be derived from currently existing facts and its development from past to present. Extrapolating these tendencies leads to assumptions on the future.

3. Currently non-existing facts (i.e. particularly non existing wholesale offers) shall be no valid starting point to develop assumptions on the future as these assumptions may only be hypothetical with a certain possibility whether they will or will not exist in the future.
4. The more essential certain facts are for business now, the less hypothetical shall be its occurrence in the future.

Examples:

- Increasing market shares in a regulated environment do not qualify for the assumption that market shares will decrease in a de-regulated environment in the future as the de-regulation is not a suitable condition to assume this new tendency.
- Current prerequisite for ANO's business is a wholesale offer.
  - a) The fact that no wholesale services are currently offered by an ANO to other ANOs does not qualify for the assumption that ANO's will change their business models in order to offer such wholesale services in the future unless such intention is stated in a legally binding way. A hypothetical wholesale offer that will or will not come to the existence in the future must not be deemed to be a sufficient basis for an essential business prerequisite.
  - b) The fact that the incumbent offers wholesale to ANOs due to regulatory obligations does not qualify for the assumption that the incumbent will offer voluntary wholesale services in the future unless such intention is stated in a legally binding way. A hypothetical wholesale offer that will or will not come to the existence in the future must not be deemed to be a sufficient basis for an essential business prerequisite.
- Evidence for discrimination by the incumbent on wholesale level in a regulated environment does not qualify for the assumption that the incumbent has sufficient incentives to offer wholesale services at a fair price in a de-regulated environment in the future as the de-regulation is not a suitable condition to assume a change in the incumbent's behaviour or market strategy.

### **3) Which areas should be aggregated (Chapter 4.2.)**

The following proceedings for inserting boundaries should be included in the document as they must be considered while evaluating which areas should be aggregated:

With a market share of more than 40% European competition law deems SMP to exist.

With a market share of less than 25% European competition law deems SMP not to exist.

Before aggregating areas, those areas with market share > 40% must be identified. Those areas are not subject to any further aggregation as the SMP-position is evident and as regulatory measures must be imposed.

> 40% areas must not be aggregated with other areas even if SMP is found in those other areas as the regulatory measures might be less intense when areas are mingled.

In areas with a market share of < 25% it must be further evaluated if SMP exists in conjunction with other areas with higher market share. If areas are aggregated, regulatory measures must even be imposed on areas with a market share of < 25% as there is a risk of leveraging between areas.

### **4) Local geographic markets or differentiated remedies (Chapter 5)**

The geographical differentiation of remedies and the definition of several geographic markets are not equal options as they may lead to a different outcome in respect of SMP findings.

Especially in high competitive areas, operators other than the incumbent may (also) have SMP due to their high market share. This may lead to the following situation:

If several markets were defined and if one of these markets (i.e. a specific region) is highly competitive (e.g. because one operator is having high market share in this specific region while having low nationwide market share, while the incumbent is having a high nationwide market share while having a lower market share in this specific region) the following regulatory scenarios are possible:

- a) the incumbent has no longer SMP position
- b) the other operator has SMP position while the incumbent has lost its former SMP position
- c) the incumbent and the other operator have a joined dominance position

If remedies were geographically differentiated and if one of those areas is highly competitive, a certain scenario is likely to occur:

- 1. the incumbent has no longer SMP position as the area is competitive
- 2. the other operator is unlikely to have SMP position as its market share is low in the nationwide market (but high in the respective area)

The outcome for alternative operators are the following:

- a) mandatory wholesale services offered by the other SMP operator (and additional wholesale services offered by the incumbent in case of joined dominance) if geographically different markets were defined
- b) no wholesale services offered if only the remedies were geographically differentiated

As the outcome for ANO are crucial for its business and therefore also crucial for sustainable competition it must be factually and substantially justified why the NRA has decided for one option and not for the other.

As this decision is of vital importance for sustainable competition (and hence to the benefit of the consumer), transparent clear and comprehensible boundaries must be set before one or the other measure is applied by NRA.

This requires a code of practice and guidelines that must be included in the consultation document. These guidelines should be based on factually evaluable assumptions and considerations and should clearly distinct between the two market scenarios. Then the guidelines should clearly state why in one scenario the definition of geographic markets is more appropriate to increase the benefit to the consumer and to increase sustainable competition (while taking the incumbent and ANO's interest into account) and why in the other scenario geographic market definition is more appropriate for the consumer and market player's welfare.

The following considerations shall inter alia be taken into account:

- a) legal certainty can only be achieved whenever a factually and substantially justified process is applied
- b) segmentation and de-regulation are irreversible processes with a high risk to sustainably damaging competition
- c) in the light of maximising the benefit to the consumer, de-regulation is only justified if sustainable competition exists and if de-regulation increases the benefit to the consumer and if de-regulation increases the sustainability of competition

Further considerations might follow from further analysis of the specific market situation in UK and Austria as both regulatory measures have been recently applied in these countries and as the alternative operators believe that the NRA's wouldn't impose different regulatory measures without factual justification for this different treatment.

## **5) Possible implications (Chapter 6)**

As geographic segmentation not only increases the complexity of regulation and higher data requirements, the list of possible implications shall be amended by the following issues:

- a) Geographic segmentation requires further and more strictly accomplished and more severely executed mandatory margin squeeze test in order to safeguard ANO's from the increased possibilities and incentives of the incumbent to act intransparently and in a discriminatory way.
- b) As there is no effective substitute for a wholesale offer by the incumbent and as this offer is viable for ANO's business, de-regulation is only justified if it is ensured in a legally binding way that wholesale services will be offered in future at fair conditions – the incentive to offer wholesale services must not be hypothetical but factual (see also section 2 of this letter).
- c) If more than one wholesale offer is required to offer nationwide services or business services (see section 1 of this letter), transaction costs of ANO will be higher than they have been before.
  - It must be ensured that the pricing of wholesale services is not made in a way that ANO's are hustled out of the market (or gently suggesting them to do so) as it is a reasonably strategy of the incumbent to squeeze rivals out of the market. Possibly successful means are cross-subsidizing, differentiated wholesale and/or end-user prices or quality of service in regulated and de-regulated areas and so on. Markets must be monitored closely and ex-post control must be effective (see section 1 of this letter).
  - ANO might no longer be in the position to offer nationwide uniform prices or services to the consumer as wholesale prices and the quality of wholesale services might differ.

## **6) Final evaluation**

As the list of possible implications is long and as incumbents will certainly increase their creativity in creating competitive barriers over the time, we suggest to amend this chapter by a mandatory final sanity-test that must be executed at the very end of the proceedings in case geographic segmentation (either by market or by remedy) is imposed.

This final evaluation shall reveal whether the competitiveness of ANO's is shortened by the intended regulatory measure and shall further reveal if this shortage is justified by an increase of competition or an increase of the benefit of the consumer that derive from the intended regulatory measure (so that the disadvantage of ANO's is compensated by the higher advantages for competition and for consumers). If such compensation is likely to take place, geographic segmentation is justified. If not, other regulatory measures must be taken in order to patch the identified market failure.

Best regards,

VAT – VERBAND ALTERNATIVER TELEKOM-NETZBETREIBER

Ute Rabussay