BoR (13) 73

BEREC Opinion on

Phase II investigation

pursuant to Article 7 (3) of Directive 2002/21/EC as amended by Directive 2009/140/EC:

Case AT/2013/1442

Wholesale terminating segments of leased lines (Market 6) in Austria.

3 June 2013

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1. EXECUTIVE SUMMARY

On 3 April 2013, the Commission registered a notification by the Austrian Regulatory Authority, Rundfunk und Telekom Regulierungs-GmbH (RTR), concerning the wholesale terminating segments of leased lines (Market 6).

The product market definition includes terminating segments of leased lines with traditional interfaces for all bandwidths, terminating segments of Ethernet services with guaranteed bandwidth for all bandwidths, and terminating segments for dark fibre. The market concerned also includes self-supplied services. The relevant geographic market for wholesale terminating segments of leased lines is national.

RTR proposes to designate A1 TA as an undertaking having SMP in the wholesale terminating segment of leased lines market.

RTR proposes to repeal all obligations imposed on A1 TA pursuant to its previous market analysis and to impose full set of remedies to all lines.

On 3 May 2013 the Commission sent a serious doubts letter opening a phase II investigation pursuant to Article 7 of Directive 2002/21/EC as amended by Directive 2009/140/EC. The Commission's doubts concern:

1) Competitive conditions are not homogeneous in the low and high capacity market segments (i.e. up to and including 2 Mbit/s and above 2 Mbit/s of bandwidth).
2) Insufficient market data supporting the designation of A1 TA as SMP operator, at least in the high capacity segment of the market.
3) Creation of barrier to the internal market

On the basis of the economic analysis set out in this Opinion, BEREC considers that the Commission's serious doubts are justified.

BEREC suggests that RTR should reconsider and redraft its decision, providing a reliable evidential basis for reaching its conclusions on Market Definition and SMP assessment, and to amend its decision if the further consideration of the evidence suggests that a change is appropriate.

2. INTRODUCTION

On 3 April 2013, the Commission registered a notification by the Austrian Regulatory Authority, Rundfunk und Telekom Regulierungs-GmbH (RTR), concerning the wholesale terminating segments of leased lines (Market 6). On 11 April 2013, a request for information (RFI) was sent to RTR, and a response was received on 16 April 2013.

The Commission initiated a phase II investigation, pursuant to Article 7 of Directive 2002/21/EC as amended by Directive 2009/140/EC, with a serious doubts letter on 3 May 2013. In accordance with the BEREC rules of procedure the Expert Working Group (EWG) was established immediately after that date with the mandate to prepare an independent BEREC opinion on the justification of the Commission's serious doubts on the case.

On 10 May 2013, the EWG sent a list of questions to RTR. Answers were received from RTR on13 May 2013.

The EWG met on 15 May in Brussels. During this meeting the EWG held a discussion with RTR to gather further information and clarification in response to the questions sent the week before and to address additional questions. The objective of the EWG was to reach clear conclusions on whether or not the Commission's serious doubts are justified.

A draft opinion was finalized on 31 May 2013 and a final opinion was presented and adopted by a majority of the BEREC Board of Regulators on 3 June 2013. This opinion is now issued by BEREC in accordance with Article 7 of the Framework Directive.

3. BACKGROUND

Previous notifications

In 2008, the market definition of the wholesale leased lines was notified to and assessed by the Commission under case AT/2008/0836.

RTR distinguished between three segments (low, high and very high bandwidths) and concluded that only the low and high capacity segments should be subject to ex ante regulation. Furthermore, in the high bandwidth segment RTR carried out a geographical segmentation and excluded 12 cities from ex-ante regulation.

Current notification and the Commission's serious doubts

On 3 April 2013, the Commission registered a notification from the Austrian national regulatory authority, Rundfunk und Telekom Regulierungs-GmbH (RTR) concerning the retail market for leased lines up to and including 2 Mbit/s and the wholesale terminating segments of leased lines in Austria.

The national consultation ran from 22 January to 1 March 2013. The VAT (Verband Alternativer Telekom-Netzbetreiber) and the ISPA (Internet Service Providers Austria) endorse the enhancements to the leased-line terminating segment market from both in respect of the single market for bandwidths and from a geographical viewpoint.

On 11 April 2013, a request for information (RFI) was sent to RTR and a response was received on 16 April 2013. Additional information was also provided by RTR on 22 April 2013.

The Commission's doubts concern:

1. Competitive conditions are not homogeneous in the low and high capacity market segments (i.e. up to and including 2 Mbit/s and above 2 Mbit/s of bandwidth). The relatively low market shares of A1 TA for high bandwidth lines in urban areas suggest

that the competitive conditions identified by RTR in its previous market review - where in some municipal areas high capacity leased lines were competitive - remain unchanged. The Commission is concerned that reintroduction of regulatory remedies in those areas which are characterized by competitive conditions, could seriously damage the business plans of alternative operators,

2. Insufficient market data supporting the designation of A1 TA as SMP operator, at least in the high capacity segment of the market. The inclusion of so called 'captive sales' is not substantiated by any further analysis. In particular, RTR does not specify what kind of captive sales it takes into account (e.g. leased lines provided to the operator's subsidiaries for the purpose of further merchant sales at retail level or leased lines provided for internal use of daughter companies) and how these sales affect A1 TA's market power in the merchant market for terminating segments of leased lines. The above-mentioned market shares seem to demonstrate that alternative operators have managed to gain a substantial part of the terminating segments of leased lines market in Austria, which suggests economic feasibility of the duplication of infrastructure, at least in those areas where there is sufficient demand for high bandwidth leased lines products.
3. The Commission concludes, at this stage, that RTR's draft decision would create a barrier to the development of the internal market. The finding of lack of competition, at least for high capacity terminating segments of leased lines which contradicts RTR's previous assessment, could have significant negative consequences for actual or potential competing operators from other Member States.

4. ASSESSMENT OF THE SERIOUS DOUBTS

On 3 May 2013, the Commission sent a serious doubts letter opening a phase II investigation pursuant to Article 7(3) of Directive 2002/21/EC as amended by Directive 2009/140/EC. Commission's doubts concern compliance with Article 8 (5) (a) to (c), Article 15(3) and Articles 14 to 16 of the Framework Directive, in particular:

Homogenous product market definition,

Concerns of the Commission

On the basis of the limited information provided by RTR so far, the Commission came to the preliminary conclusion that competitive conditions are heterogeneous in the low and high capacity market segments (i.e. up to and including 2 Mbit/s and above 2 Mbit/s of bandwidth), and could justify a further delineation of markets according to bandwidth.

In the absence of a sound substitutability analysis based on more detailed data, the Commission expresses serious doubts whether the draft measure complies with Article 8(5)

(a) to (c) of the Framework Directives, in particular whether by way of the proposed measure RTR contributes to the development of the internal market by promoting regulatory predictability, ensuring that there is no discrimination in the treatment of undertakings and safeguarding competition and promoting infrastructure-based competition. Moreover the Commission has serious doubts whether the relevant product market has been delineated in accordance with the principles of competition law and therefore whether it complies with Article 15 (3) of the Framework Directive.

Views of RTR

In its market analysis, RTR defines a single wholesale product and geographic market for terminating segments of leased lines. RTR`s arguments are mainly based on the following features:

- The product market definition includes terminating segments of leased lines with traditional interfaces for all bandwidths, terminating segments of Ethernet services[1] with guaranteed bandwidth for all bandwidths, and terminating segments for dark fibre. The market concerned also includes self-supplied services[2].

- RTR states that there is a chain of substitution that justifies the inclusion of all bandwidth categories[3] in a single market.

- According to RTR, the number of high bandwidth terminating segments of leased lines based on Ethernet services has increased continuously in recent years and will continue to grow (mainly due to LTE/NGA expansion).

- RTR also includes dark fibre in the market defined[4]. RTR argues that despite a significant demand for dark fibre, there is still no nationwide offer. According to RTR, the sole provider of a national comprehensive network of dark fibre, A1 TA, provides dark fibre to its own mobile branch and has strong incentives to actively refuse access to other mobile telephony companies and providers on the leased line market[5]. In RTR's view this puts competitors at a disadvantage in the market and could undermine the expansion of high-speed technologies in Austria.

[1] There are 25 providers of leased lines in Austria, 13 of which offer Ethernet with guaranteed bandwidth. The demand for Ethernet services, although lower than for leased lines, is showing strong growth. According to RTR, between 2008 and 2010 the demand for terminating segments of leased lines decreased by 7.500 lines, while the demand for Ethernet services increased by 7.000 lines. 10 out of 15 companies questioned regarded Ethernet as a viable alternative to traditional leased lines.

[2] According to RTR, self-supply must be included based on the assumption that the internal supply would be made available to the merchant market in response to changes in market prices.

[3] RTR found that the differences between bandwidths of e.g., 64 kbit/s, nx64 kbit/s, 2 Mbit/s, 34 Mbit/s, and 150 Mbit/s are sufficiently small that the price of any given bandwidth is influenced by the price of the neighbouring one.

[4] So far, The Austrian Telecommunications Act 2003 allows consumers the right of joint use in relation to dark fibre in order to make individual point-to-point connections. According to RTR, these procedures which are directed to A1 TA, regional energy suppliers and the Austrian Federal Railways, are now considered unsuitable for extensive rural development and will be replaced by the access to dark fibre obligation.

[5] According to operators such as Hutchison 3G Austria GmbH (whose position has been submitted with the notification) and Orange Telecommunication GmbH, a refusal to provide dark fibre has already taken place. They consider that by securing efficient access to dark fibre in the medium and long term is important in the context of the roll-out of the 4G mobile telephony infrastructures. This position is shared by VAT (Association of Alternative Telecom Network Operators) and ISPA (Internet Service Providers Austria).

- With regard to the relation of prices between leased lines and dark fibre, RTR states that Ethernet services are several times (up to 10 times) more expensive than dark fibre (without necessary equipment costs to activate the line). According to RTR, Austrian operators already use dark fibre (instead of leased lines/Ethernet services of higher bandwidths) whenever possible.

- The relevant geographic market for wholesale terminating segments of leased lines is national.[6]

In the explanation given to the expert group, RTR stated that the principal market failure is the refusal to provide non-regulated leased lines to mobile operators and also not to provide dark fibre (which is mobile operators' preferred solution).

RTR stated also that main competitors in the main cities are local utilities for whom telecom services provision is not a key business and that, in consequence, they do not provide the same level of quality of service requested by some wholesale buyers, mainly mobile operators. RTR stated that for this reason the relevant geographical market was not as competitive as had been expected.

RTR does not wish to impose a reduction in A1 Telekom Austria's prices; the remedy is to price cap A1 TA's pricing at their current levels.

BEREC's Assessment

BEREC believes that RTR did not provide enough evidence regarding the homogenous product market definition. In light of the evidence brought forward by RTR, BEREC considers that the Commission's serious doubts concerning the market definition are therefore justified.

The following is BEREC's assessment of the Commissions letter of serious doubts.

In its decision, RTR assumes one product market which includes all bandwidths. BEREC did not carry out a market analysis of its own and instead analysed the facts, assumptions and reasoning provided by RTR. In this regard, BEREC came to the conclusion that RTR's line of argumentation is not sufficiently developed. A1 TA has denied provision of leased lines with high bandwidths or of dark fibre to one undertaking. If a chain of substitution exists, then leased lines with lower bandwidths could be a substitute. However, the undertaking in question does not seem to consider these products to be valid substitutes. From BEREC's view it has not been established that there is a high degree of demand side substitution between low and high bandwidth on the market in Austria.

In RTR`s decision it is also unclear how dark fibre is treated in the calculation of market shares. It is also uncertain how far self supplied services constitute parts of the terminating segments market. Data for the "market segment" leased lines with bandwidths higher than 155 Mbit/s are not available in RTR`s decision even though the market does include such leased lines. It does not seem likely that leased lines with such bandwidths are not sold or, alternatively, are not used to provide own retail services. In conclusion, the analysis of the

[6] According to RTR, terminating segments are offered and requested nationwide in similar competitive conditions. Market shares, although slightly different in some municipalities compared to the rest of Austria, exceed 70% (including self-supply) and there are no sufficiently large differences in prices at geographic level to warrant different geographical markets.

various types of leased lines does not seem reliably to reflect the real situation on the market. This could lead to problems when the existence of SMP is determined.

BEREC believes that following these considerations, RTR did not provide sufficient market data and thus not enough evidence to support its homogenous product market definition.

BEREC does not propose its own conclusion on the market definition, and has not concluded that RTR's market definition is necessarily incorrect. BEREC's evaluation is that RTR must provide more evidence about his market delienation in terms of substituability between lines of different bandwidths and in different geographic areas before it can reliably draw a conclusion as to the relevant market .

Insufficient market data supporting the designation of A1 TA as an SMP operator, at least in the high capacity segment of the market

Concerns of the Commission

The Commission is of the view that so far RTR has not provided sufficient evidence on A1 TA's SMP in the market for wholesale terminating segments of leased lines.

The Commission is not convinced at this stage that there is a lack of duplicability of A1 TA's infrastructure. The information available to the Commission does not support the conclusion that RTR has undertaken the assessment in accordance with Articles 14 to 16 of the Framework Directive, in particular with regard to Article 8(2) (b) of the Framework Directive. In these circumstances the Commission expresses its serious doubts about the designation of A1 TA as SMP operator in the high capacity segment of the market.

Views of RTR

In RTR's view, A1 TA has SMP on a national market for wholesale terminating segments of leased lines. In their analysis, RTR (point 1.2.2) presents market shares for A1 TA over time measured in three ways: the number of lines, capacities up to 155 Mbit/s, and capacities weighted according to the price for the equivalent of 64 kbit/s. This last category was taken into account as data concerning revenue market shares was not available. Additionally, RTR includes dark fibre in their analysis. However, the calculations of weighted capacities exclude dark fibre, as it is impossible to apply a weight associated with capacity to this service type. Moreover, RTR explained that bandwidths higher than 155Mbit/s were not included, as that market is not subject to regulation and A1 TA has an incentive to refuse access. In RTR's opinion, including the provision of >155Mbit/s lines in the share calculation would distort the analysis. RTR points out that in all categories A1 TA's market shares remain high and stable (50% or above) and that no alternative operator has a share of more than 10% in any category. All figures presented include self-supply (for retail leased lines and leased lines for the mobile arm). In RTR's opinion, self-supply should be included due to indirect constraints on hypothetical wholesale monopolists, who are only providing the service externally. These constraints may be generated by entities providing internal services.

Self-supply to A1 TA's mobile arm – Mobilkom Austria AG - has been included in the market shares because at the previous regulatory review, A1 TA's mobile arm was a separate company and the lines provided by A1 TA to it were counted as external wholesale supply. The integration of A1 TA's mobile arm does not substantively change the market situation, and it was appropriate to continue to take wholesale provision of lines to the integrated mobile arm of A1 TA into account. Additionally, according to RTR, excluding self-supply may cause an incentive for entities with high market power to strategically refuse to sell the service to third parties. By doing so the dominant company can manipulate its market share, while at the same time maintaining its strong position on the relevant market. In RTR's opinion, services currently provided internally could, in principle, be easily offered to the merchant market.

In its analysis, RTR concludes that the market for terminating segments of leased lines includes all bandwidths. As a response to the Commission's RFI, RTR presented capacity shares on the market broken down by different segments of bandwidths. These figures showed significant differences in market shares for different segments. For lower capacities (up to 34 Mbit/s), A1 TA's market shares (including self-supply) range from 60% to 80%, whereas in the segment 155 Mbit/s and over, A1 TA's market share drops to nearly 40%. In the merchant market (i.e. excluding self-supply), A1 TA's market shares in lower capacities do not exceed 70%, while in higher capacities the market shares range from 15% (in the segment over 2Mbit/s and up to 155 Mbit/s) to 5% (in the segment over 155 Mbit/s). Furthermore, as a response to the Commission's RFI, RTR presented A1 TA's market shares in terms of turnover (40% market share) and by capacity in the merchant market (20% market share for lines with bandwidth up to 155Mbit/s). Both figures have remained at stable levels since the 3rd quarter of 2010, when they decreased significantly due to the integration of A1 TA and its mobile arm.

According to RTR, the strongest criterion that proves that A1 TA has SMP (also related to the inclusion of self-supply) is that A1 TA has denied access to terminating segments of leased lines (particularly Ethernet services and dark fibre). RTR stated that they have evidence of denial of access to an alternative mobile operator by A1 TA. In RTR's opinion, the possible denial of access specifically affects the provision of mobile broadband services, which benefits A1 TA's mobile arm and also A1 TA's fixed broadband services (which in Austria are viewed as a substitute for fixed broadband services). RTR states that the demand for high bandwidth leased lines, used for connecting base stations by alternative operators, is growing fast and there are many restrictions on the current non-fibre optic technology. As a result of this, access to existing infrastructure is important for maintaining competition on the mobile broadband market that is, in Austria, also the main competitor to fixed broadband as assessed in markets 4 and 5.

BEREC's Assessment

RTR's conclusion of the SMP analysis is based on its calculated market share for A1 TA and the possibility for A1 TA to deny access to rival mobile operators. RTR puts more weight on the denial of access than on the market share.

BEREC agrees with the Commission that it is not clear if the calculation of the market shares has been done in a consistent manner, especially with respect to self-supply and dark fibre and in respect of the weighting of dark fibre in the market shares calculated. BEREC considers that the relative importance of the merchant market and of captive sales should be assessed. It is possible that such an assessment would show that the inclusion of self-supply may be justified. The calculated market share, especially for the segment of high capacity leased lines, is strongly dependent of this work and there is insufficient data at present to allow such further analysis.

Furthermore the SMP analysis is based on the view that A1 TA has denied access for leased lines with bandwidths above 155 Mbit/s. Denial of access can be a strong indication of dominance, especially if no alternative offers are available and the roll-out of own fibre by mobile operators is not a viable option. RTR has not conducted an analysis that gives insight into the (geographical) coverage of the (joint) alternative networks. Such an analysis could proof helpful in relation to the location of the approximately 30,000 base stations per mobile operator.

RTR also has not conducted any analysis of the business case for rolling out own fibre to connect mobile base stations. Such an analysis is desirable to support the determination of the SMP position by considering the technical and economic viability of self-supply in the context of assessing barriers to entry and/or expansion faced by other mobile operators.

BEREC's assessment is that the Commission's conclusion is justified that there is insufficient data supporting the designation of A1 TA as SMP operator, at least in the high capacity segment of the market. In its further information and clarification RTR made clear that it is likely that A1 TA can to a certain extent act independently from other operators. However, according to BEREC, this is insufficiently substantiated with evidence.

5. CONCLUSIONS

On the basis of the economic analysis set out in section 3 above, BEREC considers that the Commission's serious doubts regarding the draft decision of the Austrian Regulatory Authority on Wholesale terminating segments of leased lines (Market 6) - as expressed in the EC's letter to Rundfunk und Telekom Regulierungs-GmbH (RTR) of 3 May 2013 - are justified.

BEREC is of the opinion that

- The evidence provided for Market definition is insufficient to support the proposed market delineation.
- The data used to calculate the market shares are insufficiently reliable to support RTR's SMP assessment.
- This lack of evidence does not permit to BEREC to itself reach firm conclusions about market definition and SMP; accordingly BEREC does not offer an opinion that an alternative market definition or SMP assessment is necessarily justified.

In the light of the Commission's serious doubts and the argumentation above, BEREC would recommend that RTR should reconsider and redraft its decision, providing a reliable evidential basis for reaching its conclusions on Market Definition and SMP assessment, with careful analysis of merchant market, captive sales and self-supply, and to amend its decision if the further consideration of the evidence suggests that a change is appropriate.