

BEREC Opinion on

Phase II investigation

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

Case AT/2017/2020

Wholesale markets for broadcasting transmission services
(Market 18) in Austria

11 December 2017

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Executive summary

On 12 October 2017, the European Commission (the Commission) registered a notification from the Austrian Regulatory Authority, *Kommunikationsbehörde Austria* (KommAustria)¹, concerning the wholesale markets for broadcasting transmission services in Austria².

KommAustria proposes to define the following product/services wholesale markets: (i) the wholesale market for the “transmission of analogue terrestrial (FM) radio broadcasting signals to end users”; (ii) the wholesale market for the “multiplexing of broadcasting signals via the platforms MUX A and MUX B; and (iii) the wholesale market for “the transmission of digital terrestrial tv broadcasting signals to end users”.

As the markets for broadcasting transmission services are no longer listed in the Recommendation on Relevant Markets, KommAustria carried out the three criteria test³ with regard to the notified markets. KommAustria concludes that the only relevant product/service market remaining susceptible to *ex ante* regulation is the wholesale market for the transmission of analogue terrestrial (FM) radio broadcasting signals to end users since all three criteria are cumulatively met.

KommAustria proposes to designate ORS comm GmbH & Co KG (ORS)⁴ with significant market power (SMP) on the wholesale market for the transmission of analogue terrestrial (FM) radio broadcasting signals to end users, based on market share, high barriers to market entry due to the need for significant infrastructure investments and legal requirements for the acquisition of broadcasting licenses and insufficient countervailing buyer power.

The services (i.e. self-supply) provided to the public service broadcaster Österreichische Rundfunksender GmbH & CO KG (ORF) by SMP operator ORS - (its vertically integrated and controlled subsidiary)- are not included in the relevant market defined by KommAustria.

¹ KommAustria is the formal decision making body in this case. KommAustria is supported by RTR which acts as an office to KommAustria. RTR provided the economic analysis in this case.

² Corresponding to market 18 of Commission Recommendation 2003/311/EC of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with the Framework Directive, OJ L 114, 8.05.2003, p. 45. This market has been removed from the list of the relevant markets that may warrant *ex ante* regulation which is contained in the currently applicable Commission Recommendation 2014/710/EU of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (Recommendation on Relevant Markets), OJ L 295, 11.10.2014, p. 79.

³ In accordance with Point 2 in conjunction with Recital 5 of the Recommendation on Relevant Markets, when identifying markets other than those mentioned in the Annex, national regulatory authorities should ensure that the following three criteria are cumulatively met: (1) there must be high and non-transitory entry barriers, (2) the structure of the market must not tend towards effective competition within the relevant time horizon and (3) the application of competition law alone would not adequately address the market failure(s) concerned.

⁴ Österreichische Rundfunksender GmbH & Co KG and ORS comm GmbH & Co KG are operating the network for digital terrestrial transmission of TV-signals as well as the network for analogue terrestrial transmission of FM radio signals in Austria. ORS is a subsidiary of ORF, the Austrian public service broadcaster, which owns 60 % of the shares of ORS.

On 13 November 2017, the Commission sent a serious doubts letter opening a phase II investigation pursuant to Article 7 and 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC.

Pursuant to Article 7 of the Framework Directive, the Commission's doubts concern the exclusion in the relevant market definition of analogue radio of the broadcasting transmission services provided to the public broadcaster ORF by SMP operator. The Commission is of the view that such self-supply should be considered to be part of the same market as external supply and that such exclusion is not in line with the principles of competition law and can have a significant effect on both the finding of SMP and the assessment of the scope and appropriateness of the remedies, such as the non-discrimination obligation.

On the basis of the analysis set out in this opinion, BEREC considers that the Commission's serious doubts pursuant to Article 7 of the Framework Directive regarding the draft decision of KommAustria on wholesale markets for broadcasting transmission services in Austria are justified.

Concerning the definition of the relevant market, BEREC agrees that the radio broadcasting transmission services provided to ORF by its vertically integrated and controlled subsidiary SMP operator ORS should be considered to be part of the same market as external supply. BEREC considers that both, self-supply and external supply, are indistinguishable from a consumer perspective (i.e. the listeners) and the services provided by the public radio broadcaster and the private radio broadcasters to the consumers are functionally similar and interchangeable, irrespective the fact that the programmes of ORF are broadcasted to fulfil the public service obligation enshrined in national law.

Indeed, BEREC is of the view that the inclusion of the self-supply in the relevant market, particularly in case of vertical integration, as the case in question, is relevant to impose the non-discrimination remedy, applicable to all services provided by SMP operators both internally, to its vertically integrated public broadcaster and externally to private operators.

Therefore, a separate opinion on the serious doubts expressed by the Commission in accordance to Article 7a of the Framework Directive will not be issued since the insertion of such self-supply in the relevant market could, in this particular case, be crucial to impose the non-discrimination obligation, which should capture both the services provided internally and those offered to other wholesale customers.

1. Introduction

On 12 October 2017, the Commission registered a notification by KommAustria, concerning the wholesale markets for broadcasting transmission services in Austria. On 19 October 2017, a request for information (RFI) was sent to KommAustria and a response was received on 24 October 2017.

The Commission initiated a phase II investigation, pursuant to Article 7 and 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC, with a serious doubts letter on 13

November 2017. 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 21 November 2017 the EWG sent a list of questions to RTR. Answers were received on 22 November 2017.

The EWG met on 23 November 2017 in Riga. During this meeting the EWG met RTR to gather further information and clarification in response to the questions sent and to 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 8 December 2017 and a final opinion was presented and adopted by a majority of the BEREC Board of Regulators on 11 December. This opinion is now issued by BEREC in accordance with Article 7(5) of the Framework Directive on the compatibility of the proposed relevant market definition.

2. Background

Previous notifications

The previous review of the wholesale markets for broadcasting transmission services was notified to and assessed by the Commission under case AT/2013/1452. In this notification KommAustria identified three different markets, which were all found to be national in scope: (i) the wholesale market for the "transmission of analogue terrestrial (FM) radio broadcasting signals to end users"; (ii) the wholesale market for the "multiplexing of broadcasting signals via the platforms MUX A and MUX B"; (iii) the wholesale market for "the transmission of digital terrestrial TV broadcasting signals to end users".

KommAustria found Österreichische Rundfunksender GmbH & CO KG ('ORF') together with ORS comm GmbH & Co KG ('ORS') to have a significant market power on the (i) wholesale market for the transmission of analogue terrestrial (FM) radio broadcasting signals to end users and (ii) the transmission of digital terrestrial TV broadcasting signals to end users. With regard to the market for the multiplexing of broadcasting signals via the platforms MUX A and MUX B, KommAustria found that no undertaking had significant market power on the relevant market. On the market for the "transmission of analogue terrestrial (FM) radio broadcasting signals to end users" and the wholesale market for "the transmission of digital terrestrial TV broadcasting signals to end users", KommAustria imposed a full set of remedies, including unbundled access to broadcasting transmission services, a cost orientation based price control and a non-discrimination obligation.

In relation to this case, the Commission commented on the draft measure and invited KommAustria to closely monitor the developments in the market in terms of infrastructure and service competition.

Current notification and the Commission's serious doubts

Summary of notification

The notified draft measure concerns the full analysis of the wholesale markets for broadcasting transmission services in Austria.

KommAustria defines the following product/service markets: i) the wholesale market for the "transmission of analogue terrestrial (FM) radio broadcasting signals to end users"; ii) the wholesale market for the "multiplexing of broadcasting signals via the platforms MUX A and MUX B"; iii) the wholesale market for "the transmission of digital terrestrial TV broadcasting signals to end users". The relevant geographic market is defined as being national.

As the markets for broadcasting transmission services are no longer listed in the Recommendation on Relevant Markets KommAustria carried out the three criteria test with regard to the notified markets.

According to KommAustria, the wholesale markets "multiplexing of broadcasting signals via the platforms MUX A and MUX B" and "transmission of digital terrestrial TV broadcasting signals to end users" are no longer deemed susceptible to *ex ante* regulation. KommAustria concludes that the only relevant product/service market remaining susceptible to *ex ante* regulation is the wholesale market for the transmission of analogue terrestrial (FM) radio broadcasting signals to end users since all three criteria are cumulatively met. There have not been any significant competitive developments at the wholesale level since the last market review.

KommAustria proposes to designate ORS as having SMP on the wholesale market for the "transmission of analogue terrestrial (FM) radio broadcasting signals to end users". KommAustria indicates, in particular, that ORS has a very high market share of approximately 90% (excluding self-supply).

According to KommAustria, services provided to the public broadcaster ORF in the fulfilment of the public service coverage obligation laid down in the national law are not part of the wholesale market for the transmission of analogue terrestrial (FM) radio broadcasting. KommAustria describes the following potential competition problems that might arise in the relevant market: (i) creation of entry barriers to the market, (ii) discrimination of access seekers, (iii) requiring access seekers to buy products as part of a bundle, which are not required for service provision and (iv) excessive prices. The potential competition problems identified are of the same nature as the ones identified in the last market analysis.

Finally, KommAustria proposes the imposition of the following remedies on ORS: (i) obligation to give unbundled access to broadcasting transmission services to deliver content to end users on request, (ii) cost oriented (prices costs based on the efficient service provision – Kosten der effizienten Leistungserbringung or 'KeL'), (iii) price control, (iv) non-discrimination, (v) publication of a reference offer and (vi) accounting separation.

Summary of serious doubts

On 13 November 2017, the Commission sent a serious doubts letter opening a phase II investigation pursuant to Article 7 and 7a of the Framework Directive.

The Commission notes that the exclusion of analogue radio broadcasting transmission services provided to ORF by SMP operator – from the relevant market definition is not in line with the principles of competition law and that such exclusion can have a significant effect on both the finding of SMP and the assessment of the scope and appropriateness of the remedies.

The Commission is of the view that such self-supply should be considered to be part of the same market as external supply, because both, self-supply and external supply are indistinguishable from a consumer perspective.

Regarding the serious doubts pursuant to Article 7a of the Framework Directive, the Commission considers that: (i) the obligation proposed by KommAustria (based on the narrow market definition) to apply a non-discrimination remedy only to services provided to private radio operators but to exclude the provision of such service to ORF from the scope of the non-discrimination obligation, is likely to have a restrictive effect on competition in the market for analogue radio broadcasting transmission; (ii) at this stage, the regulatory goal to promote sustainable competition, including infrastructure competition, is not sufficiently reflected in the draft measure. The Commission notes that it may be necessary to assess the likely effects of possibly different price control remedies, such as regional prices, prices for individual transmission stations, the use of a different costing methodology as well as the sole reliance on a strict non-discrimination obligation.

3. Assessment of the serious doubts

On 13 November 2017, the Commission sent a serious doubts letter opening a phase II investigation pursuant to Article 7 and 7a of Directive 2002/21/EC as amended by Directive 2009/140/EC.

Concerns of the Commission

The Commission's doubts pursuant to Article 7 of the Framework Directive concern the compatibility of the proposed product market definition with Article 15(3) and Article 16(1) of the Framework Directive in light of the objective laid down in Article 8 of the Framework Directive. In relation to how KommAustria has defined the relevant product market, the Commission considers that:

- i) According to KommAustria, services provided in the fulfilment of the public service coverage obligation laid down in the ORF Act⁵ are not part of the wholesale market for the transmission of analogue terrestrial (FM) radio broadcasting.

⁵ Federal Act on the Austrian Broadcasting Corporation (ORF Act). Federal Law Gazette No. 379/1984 as amended by Federal Law Gazette I No. 115/2017.

- ii) The broadcasting transmission services actually provided to ORF are consequently not included in the relevant market, whereas services provided by ORS to ORF's competitors are.
- iii) The analogue radio broadcasting transmission services provided to ORF are supplied by its vertically integrated and controlled subsidiary ORS and therefore, could be considered as self-supply.
- iv) Both self-supply and external supply are indistinguishable from a consumer perspective. At the retail level, i.e. from the consumer perspective, the services are virtually the same, irrespective of the fact that the programmes of ORF are broadcast to fulfil a statutory public service obligation while private radio programmes are offered for commercial purposes.
- v) The Commission considers that the exclusion of such services from the market is not in line with the principles of competition law and that such exclusion can have significant effect on both the SMP finding and the assessment of the scope and appropriateness of remedies, most notably the non-discrimination obligation.

In the context of the considerations outlined above, the Commission is of the view that such self-supply should be considered to be part of same market as external supply. The Commission recognises that the question of inclusion self-supply to ORF may not change the outcome of the case as far as the finding of SMP is concerned, i.e. that ORS holds significant power in the relevant market. Nevertheless, the Commission sees that the inclusion of the transmission services (i.e. self-supply) provided by ORS to ORF in the relevant market could be of significant relevance to the question as to whether it would be objectively justified and appropriate to impose a non-discrimination obligation, which should capture both the services provided by ORS to ORF and those offered to other wholesale customers.

Views of KommAustria

Regarding the definition of relevant market proposed, KommAustria considers that:

- i) The relevant market in question is the wholesale market for the transmission of analogue terrestrial (FM) radio broadcasting signals to end users. The relevant geographic market is national in scope.
- ii) ORS is operating the network for analogue terrestrial transmission of FM radio signals in Austria and is a subsidiary of ORF (the Austrian public service broadcaster, which owns 60%), i.e. vertically integrated.
- iii) ORS is the sole operator able to provide wholesale services on a nationwide level. The only significant competitor to ORS operates a very limited number of broadcasting sites in certain regions. KommAustria proposes to designate ORS as having SMP, with its 90 (excluding self-supply) to 100 percent market share.
- iv) All services demanded by ORF from ORS are considered by KommAustria as part of the public service coverage obligation. ORF is not actually buying transmission services from ORS, but is using ORS as a tool to fulfil its legal duty.

- v) For the public service broadcaster (ORF) the number, and terrestrial coverage, of the public service radio programmes is determined in national law.
- vi) The internal services in general provided by ORS to ORF have been included by KommAustria in the 2009 previous market analysis.

BEREC's Assessment

Based on the Framework Directive, BEREC is issuing the current opinion on the serious doubt expressed by the Commission in accordance to Article 7(5).

BEREC shares the Commission's serious doubts as regards the market delineation by KommAustria.

In this regard, BEREC agrees with the Commission that the radio broadcasting transmission services provided to ORF by its vertically integrated and controlled subsidiary ORS (i.e. self-supply, defined as internal services by KommAustria) should be considered to be part of the same market as external supply, as it was in the previous market analysis notified by KommAustria.

BEREC considers that both, self-supply and external supply, are indistinguishable from a consumer perspective (i.e. the listeners) and the services provided by the public radio broadcaster and the private radio broadcasters to the consumers are functionally similar and interchangeable, irrespective the fact that the programmes of ORF are broadcast to fulfil public service obligation enshrined in national law.

Therefore, if the self-supply in question is not included in the relevant market, the competition problems and the remedies, which have to be proportionate, would merely hit the relation and conditions between ORS and the private radio broadcasters, while the radio programmes from the vertically integrated subsidiary ORF would be unaffected.

BEREC considers it important to point out that it certainly would be possible, at least theoretically and, despite the statutory public service obligation, for ORF/ORS to act in a way that is favourable for itself at the expense of private players and ultimately the end consumers. The regulation should be targeted to tackle these competition problems, even if they are, as claimed, not likely to occur in practice.

Moreover, as referred to Point 78 of the SMP Guidelines⁶ the existence of vertical integration is a relevant parameter for assessing the existence of significant power in the market in question because vertical integration influences to a decisive extent incentives for anti-competitive behaviour towards competitors.

BEREC agrees with the Commission that, given ORS's position and market share in the relevant market, the question of inclusion of the supply to ORF may not change the outcome of the market analysis. However, BEREC is of the view that an appropriate market definition is essential in order to carry out a proper market analysis and correctly identify the competition

⁶ Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03) OJ C 165/6.

problems and the appropriate remedies. Indeed, BEREC considers that the inclusion of self-supply in the relevant market, particularly in the case of vertical integration, as the case in question, is relevant to impose the non-discrimination remedy, applicable to all services provided by SMP operators both internally, to its vertically integrated public broadcaster, and externally to private operators.

Therefore, a separate opinion on the serious doubts expressed by the Commission in accordance to Article 7a of the Framework Directive will be not issued since the insertion of such self-supply in the relevant market could, in this particular case, be crucial to impose the non-discrimination obligation, which should capture both the services provided internally and those offered to other wholesale customers.

4. Conclusions

On the basis of the analysis set out in section 3 above, BEREC considers that the Commission's serious doubts pursuant to Article 7 of the Framework Directive regarding the draft decision of KommAustria on wholesale markets for broadcasting transmission services in Austria, as expressed in the EC's letter to KommAustria of 13 November 2017, are justified.

Considering the definition of the relevant market, BEREC agrees with the Commission that the radio broadcasting transmission services provided to ORF by its vertically integrated and controlled subsidiary ORS should be considered to be part of the same market as external supply.

BEREC is of the view that an appropriate market definition is essential in order to carry out a proper market analysis and correctly identify the competition problems and the appropriate remedies.