

**BEREC Opinion on
Phase II investigation
pursuant to Article 32 of Directive (EU) 2018/1972**

Case DK/2021/2346

Market for high-capacity infrastructure (M1/2020) in Denmark

03 January 2022

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1. Executive summary

On 3 November 2021, the Commission registered a notification from the Danish national regulatory authority (NRA), the Danish Business Authority (DBA), concerning the market for high capacity infrastructure and the market for low capacity infrastructure in Denmark, specifically 17 geographic markets for fixed local and central wholesale access in Denmark.

The draft measures notified by DBA are:

- For the low capacity infrastructure market, a draft market decision (designating TDC as the SMP operator), accompanied by the draft market analysis and by DBA's draft decision that would make TDC's commitments on this market binding;
- For the high capacity infrastructure market, a draft market decision for each of the 14 operators that would be designated as having SMP, accompanied by the draft market analysis (including the product and geographic market definition, the three criteria test and the SMP assessment) of the high capacity infrastructure market. For each of the 4 operators that have submitted commitments, the draft market decision is accompanied by a draft decision that would make the commitments binding.

On 1 December 2021, the Commission sent a serious doubts letter opening a phase II investigation pursuant to Article 32 of Directive (EU) 2018/1972. The Commission's serious doubts concern DBA's SMP assessment and its three criteria test on the markets for high capacity infrastructure. The investigation specifically concerns five designations of SMP in the following Danish geographic markets (*with the respective SMP operators*): Trekantområdet (*EWII S/I*), Skanderborg-Odder (*Aura*), Ikast (*Energi Ikast a.m.b.a.*), Brande (*Midtjyllands Elektricitetsforsynings Selskab a.m.b.a. (MES)*) and Vendsyssel (*Nord Energi a.m.b.a.*).

Subsequently, by a letter of 10 December 2021, DBA withdrew¹ its notifications concerning four SMP designations in the abovementioned geographic markets, namely the markets:

- Brande
- Ikast
- Vendsyssel
- Trekantområdet

In light of DBA's decision to withdraw these notifications, the BEREC Opinion focuses solely on the aspects of the Commission's serious doubts letter with respect to and in the case of the designation of SMP in the Skanderborg-Odder area – i.e. with respect to the operator Aura.

Based on the analysis set out in this Opinion, BEREC considers that the Commission's serious doubts are not justified. With regard to the sufficiency of evidence to justify that the Skanderborg-Odder market is susceptible to ex ante regulation and to support the SMP designation of Aura, BEREC does not share the Commission's serious doubts.

¹ Under point 7 of Recommendation (EU) 2021/554, an NRA may decide at any time to withdraw the notified draft measure. In this case, the NRA should upload a Notice of Withdrawal in the secure electronic interface, CIRCABC.

2. Introduction

On 3 November 2021, the Commission registered a notification from the Danish national regulatory authority (NRA), the Danish Business Authority (DBA), concerning the market for high capacity infrastructure and the market for low capacity infrastructure in Denmark, specifically 17 geographic markets for fixed local and central wholesale access in Denmark.

The Commission sent a request for information to DBA on 11 November 2021, and received a reply on 16 November 2021. The Commission sent a second request for information on 17 November 2021 and received a reply on 19 November 2021. The Commission sent a third request for information on 17 December 2021 with a reply from DBA on 20 December 2021.

The Commission initiated a phase II investigation, pursuant to Article 32 of Directive (EU) 2018/1972, with a serious doubts letter on 1 December 2021. In accordance with its rules of procedure, on 8 December 2021 BEREC established an Expert Working Group (EWG) with the mandate to prepare an independent BEREC Opinion concerning the justification of the Commission's serious doubts in the aforementioned case.

Following the Commission's serious doubts letter, on 10 December 2021 DBA withdrew its notifications related to the SMP designations of four of the concerned operators, namely MES Fibernet, Energi Ikast, Nord Energi and EWII. For the fifth operator, Aura, the Commission's phase II investigation suspends the adoption of DBA's draft measure by two months.

Based on the reading of the information provided by both DBA and the Commission, the EWG sent a number of questions to both DBA and the Commission on 13 December 2021 (having held its first virtual meeting on the same day). On 15 December 2021, the EWG held separate interviews with both DBA and the Commission, providing the opportunity for both to respond to the questions submitted orally. The objective of the EWG in holding these interviews was to reach a clear conclusion on whether the Commission's serious doubts are justified. In addition, both DBA and the Commission also provided written responses.

The EWG met (virtually) subsequently for further discussion on 17 and 23 December 2021. Its draft Opinion was finalised on 23 December 2021, with a final Opinion presented and adopted by a majority of the BEREC Board of Regulators on 3 January 2022. This Opinion is now issued by BEREC in accordance with Article 32 (5) of Directive (EU) 2018/1972.

3. Background

Previous notifications

The markets for wholesale local and central access in Denmark were previously notified to and assessed by the Commission under cases DK/2017/1993 and DK/2017/19947. The product market for wholesale local access (market 3a of the 2014 Recommendation on Relevant Markets) was found to include physical and virtual access to copper and passive access to the fibre network. Despite certain geographic differences in competitive conditions, DBA found that the geographic market was national in scope (in particular due to the importance of nationwide copper prices on TDC's network) but introduced a geographic differentiation of regulatory remedies.

With regard to the market for wholesale central access (market 3b of the 2014 Recommendation on Relevant Markets), DBA concluded that the product market includes virtual wholesale products on copper, fibre, cable and fixed wireless access (FWA) networks that allow for nationwide supply based on limited own physical presence and with limited opportunities for developing differentiated or tailor-made retail products.

In both markets, DBA assessed the operators' market power through an analysis of the competitive situation of wholesale access providers, wholesale clients, market shares, pricing trends and profit margins. On the basis of this analysis, DBA concluded that TDC held SMP in both relevant markets.

In its comments, the Commission asked DBA to closely monitor the further development of competition, in particular in areas where there is network competition and, if appropriate, conduct a new market analysis before the end of the regular review cycle. With regard to the withdrawal of physical access in the more competitive areas, the Commission urged DBA to ensure that where no regulated access to fibre is in place, viable alternative access products are available, in order to ensure competition in such areas.

Current notification and the Commission's serious doubts

Current notification

In the current draft product market definition, DBA reaches the conclusion that the wholesale broadband market should be divided into two sub-markets:

- Market for wholesale broadband access to high capacity infrastructure (fibre and coax)
- Market for wholesale broadband access to low capacity infrastructure (copper and FWA)

DBA concludes that the delineation of the product markets based on technology best reflects the competition dynamics in Denmark. Both wholesale markets cover local and central access services. DBA supports its conclusion regarding the broad market definitions by the following main findings: (i) centrally provided VULA almost replaced copper local loop unbundling; (ii) local and central access products provide the same degree of functionality and flexibility; (iii) only central access is provided in cable networks.

With regard to the wholesale market for high capacity infrastructure, DBA considers that electricity supply areas are the most relevant geographic unit: they present clear and stable boundaries and they largely reflect the current and prospective topology of the various fibre and cable networks competing in Denmark. Therefore, DBA has decided to define 21 geographic markets, based on the boundaries of electricity supply areas.

Three criteria test

Regarding the existence of high entry barriers, DBA considers that there are structural market entry barriers to the extent that sustainable retail market competition could not be expected without regulated access also to centrally provided wholesale products.

DBA observes that there is a considerable demand for centrally accessed products from Danish service providers. DBA indicates that, regarding fibre networks, the flexibility and functionality are the same regardless of where the traffic is collected, and highlights that given

the wide variety of networks to which a service provider must connect to be widely present on the Danish market, central access is more adequate.

With respect to the possible trends towards effective competition, DBA notes that in both markets there is a growing demand for centrally collected products for fibre, and that access to coax network is only possible at central level. In addition, 5G FWA, which would create some competitive pressure, has not entered the Danish market. Therefore, DBA has no reason to expect that 5G FWA would change the situation in the market in the period covered by the market analysis.

Regarding the third criterion, DBA considers that competition law alone is not sufficient to swiftly address any shortcomings that may arise in the markets.

Finding of significant market power

DBA proposes to designate 14 SMP operators in 17 geographic markets. In four geographic markets, DBA identified no SMP operator, either because high capacity networks are not widely deployed, or because none of the operators present is able to act independently. Amongst the 14 SMP operators, 7 are wholesale only operators and 7 are vertically integrated operators.

DBA's designation of SMP is based on an overall assessment of factors such as the market share of the undertaking, the business model of the undertaking (e.g. the distribution of internal vs external sale within the company) and the structural conditions on the geographic market (e.g. homes passed and prevalence of parallel high capacity infrastructure). To conduct its analysis, DBA has taken the following criteria into account: (i) control over infrastructure that cannot be easily duplicated; (ii) entry and expansion barriers; (iii) absence or low countervailing buyer power; (iv) absence of potential competition; (v) absolute and relative size; (vi) vertical integration.

Regarding parallel infrastructure coverage, DBA bases its assessment of parallel infrastructure coverage on its previous methodology. For parallel coverage to be the basis for sustainable conditions, it must consist of close to complete parallel coverage. Moreover, DBA considers that two closed parallel infrastructures are not, in principle, sufficient to create competition in the retail market. On the other hand, DBA has considered in the past that coverage with two parallel infrastructures, one of which is open on commercial terms, may contribute to the creation of competition in the retail market, as there will be more than two providers of broadband services. However, this requires commercially sustainable access to the open infrastructure for service providers.

Commission's serious doubts

The Commission argued that DBA failed to provide sufficient evidence that the three criteria test is met in each of the five geographic markets. The Commission noted that even in the absence of regulatory obligations, alternative operators have been able to enter these markets and successfully compete at retail level. This may bring into question DBA's conclusion about the existence of high and non-transitory barriers to entry.

Furthermore, the fact that alternative operators have been able to gain substantial market shares may indicate a tendency towards effective competition even in the absence of further or new market entry.

Although the Commission largely agreed with DBA's proposals for most of the analysed markets, it raised serious doubts about the SMP designation of five smaller regional fibre networks: Aura (Skanderborg-Odder), MES Fibernet (Brandø), Energi Ikast (Ikast), Nord Energi (Vendsyssel) and EWII S/I (Trekantområdet).

The five geographic markets together represent less than 10% of Danish households and are characterised by an overlapping coverage of fibre and cable networks. In particular, the percentage of parallel infrastructure is close to or above 60% in case of EWII S/I, Energi Ikast and Nord Energi, and above 40% in case of Aura and MES Fibernet.

According to the Commission, the SMP assessment by DBA may not sufficiently reflect the degree of infrastructure competition and the competitive constraints at retail and wholesale level stemming from cable networks, the impact of commercial wholesale access offers and the possible existence of countervailing buying power.

4. Assessment of the serious doubts

On 1 December 2021, the Commission sent a serious doubts letter opening a phase II investigation pursuant to Article 32 of Directive (EU) 2018/1972. The Commission considers that the notified draft measures would create a barrier to the internal market and has serious doubts as to the compatibility of those draft measures with Article 32(4) of the European Electronic Communications Code.

4.1 Lack of sufficient evidence that all the markets for wholesale high quality infrastructure, as notified, justify the imposition of regulatory obligation

Concerns of the Commission

The Commission considers that DBA has not provided sufficient evidence to show that the three criteria test is met in, *inter alia*, the Skanderborg-Odder market. To that end, the Commission notes that at least in some geographic markets, operators other than the designated SMP operators have been able, in the absence of regulatory obligations imposed upon the latter, to compete successfully at retail level.

Furthermore, the Commission is of the opinion that presence of alternative operators in the retail market seems to suggest that not only is it possible for alternative operators to overcome entry barriers, but also to gain substantial market share, bringing dynamics in the market.

The Commission highlights that the mere fact that the wholesale market shares of Aura is high does not per se indicate that the retail market is currently not competitive and that dynamics of the market would not result in a competitive outcome.²

Finally, the Commission also points out that the degree of parallel coverage 55.6% of households will continue to progress as fibre coverage extends. Although the fibre network is

² Commission Decision in Case DK/2021/2346: Market for high-capacity broadband and market for low-capacity infrastructure in Denmark (C(2021) 8890 final) p. 19.

not open at wholesale level, the Commission notes the fact that a smaller part of TDC's cable network is open.³

Views of DBA

DBA has, citing the specific circumstances on the broadband market in Denmark, conducted the three criteria test in relation to centrally collected wholesale products.⁴

As to the first criterion (barriers to entry), DBA has concluded that granting local access is not always an appropriate regulatory remedy nor is it always available commercially in the absence of regulation. Moreover, entry into the wholesale market for centrally collected wholesale products (for which there is high demand by service providers) without local access would require significant infrastructure investments by service providers who are not in possession or control of necessary network infrastructure. DBA therefore considers that there are structural market entry barriers to the extent that sustainable retail market competition could not be expected without regulated access to centrally collected wholesale products.⁵

Concerning the second criterion, DBA describes that demand among service providers for centrally collected wholesale products has not decreased. In addition, market development towards entry into the local access market, as foreseen in the Commission's recommendation, has not taken place in Denmark. DBA therefore considers that the Danish market for centrally collected wholesale products is not characterised by a tendency towards effective competition⁶.

Finally, DBA considers that infrastructure competition on a local level is not sufficient to discipline the market. Accordingly, DBA finds that competition law alone is not sufficient to ensure access to centrally collected wholesale products.⁷

BEREC's Assessment

BEREC notes that the serious doubts raised by the Commission – that DBA has not provided sufficient evidence to justify the imposition of regulatory obligations (i.e. that the three criteria test is not fulfilled) – does not specifically address the Skanderborg-Odder market, but is more generally directed towards DBA's draft analysis of five geographic markets. Given that DBA has chosen to withdraw its' notifications for four of the five concerned markets, BEREC has only assessed the Commission's serious doubts with regard to the Skanderborg-Odder market below.

High and non-transitory barriers to entry

Concerning the first criterion – high and non-transitory barriers to entry – it follows from DBA's notified draft, and information submitted subsequently to BEREC by DBA, that the only network operator on the Skanderborg-Odder market that is rolling out new very high capacity network

³ Presentation from meeting between the European Commission (DG CONNECT) and BEREC's expert working group (2021-12-15)

⁴ Danish Business Authority, Wholesale market analysis - the markets for access to the net for high-capacity infrastructure at a fixed location (M3HC) (translated notified draft in case DK/2021/2346, November 2021) p. 112-113.

⁵ DBA, M3HC - wholesale market analysis (2021) p. 114p.

⁶ DBA, M3HC - wholesale market analysis (2021) p. 115p.

⁷ DBA, M3HC - wholesale market analysis (2021) p. 117.

(VHCN) infrastructure on a significant scale is Aura. Data available to the DBA at the time of the market analysis showed that Aura's fibre network covered 74.9 % of households on the concerned market.⁸ This number has since been corrected and as far as BEREC understands, Aura has rolled out fibre network infrastructure that now covers every household in Skanderborg-Odder.⁹

To BEREC's understanding, the Commission is of the view that the fact that Aura has been able to successfully roll out fibre networks in the concerned market, despite widespread presence of HFC-networks (covering 74.6% of households¹⁰ on the market, but with a very limited degree of overlap between HFC networks), indicates that there is infrastructure competition and, therefore, that the first criterion of the three criteria test is not met¹¹.

BEREC does not share the view of the Commission in this regard. Firstly, while BEREC recognises that while Aura has been able to roll out fibre infrastructure and reach full coverage, despite the presence of existing coaxial networks, this fact does not in itself indicate that there were or are no significant barriers to entry. Rather, this would indicate that when there was less fibre coverage in Skanderborg-Odder, the entry barriers may have been lower. However, during the period covered by DBA's notified market analysis it seems likely that significant barriers to entry will remain.

Secondly, no other network operator has concurrently rolled out VHCN infrastructure on a significant scale. From the information submitted in the case, it seems unlikely that there will be any significant additional network roll-out in the period covered by the notified market analysis.

Thirdly, as DBA has described in its' notified market analysis: there is a high demand for central virtual access products among service providers on the Danish broadband market.¹² In the absence of regulation, it is not apparent to BEREC that this demand would be met in Skanderborg-Odder. Open access on the high-capacity market is provided by TDC, but only in a limited portion of the market.¹³ Thus, entry barriers would most likely still exist for retail providers in a significant part of the relevant market, as the remaining networks are not open for wholesale access. It also appears unlikely for BEREC that it would be commercially viable for other retail providers to roll out their own network infrastructure to a significant extent in Skanderborg-Odder in the period covered by the notified market analysis, since all the households are already covered by VHCN networks.

⁸ DBA, M3HC - wholesale market analysis (2021) p. 280.

⁹ Danish Business Authority, Case DK/2021/2346: Wholesale local and central access provided a fixed location - Answers to Request for information pursuant to Article 20(2) of Directive (EU) 2018/19721 (20-12-2021) p. 1; See also: <https://www.aura.dk/om-aura/nyheder/osttyderne-er-vilde-med-fiber/> (accessed on 17 December 2021).

¹⁰ DBA, M3HC - wholesale market analysis (2021) p. 284.

¹¹ Presentation from meeting between the European commission (DG CONNECT) and BEREC's expert working group (15 December 2021).

¹² DBA, M3HC - wholesale market analysis (2021) p. 116.

¹³ DBA, Answer to RFI (20-12-2021) p. 9.

Tendency towards effective competition

Concerning the second criterion of the three criteria test (tendency towards effective competition), the Commission states that alternative operators have been able to gain substantial market shares on the concerned market¹⁴.

In BEREC's view, however, the information submitted by DBA rather suggests that the market shares of the alternative operators have decreased while AURA has increased not only network coverage, but also its' retail market share.¹⁵ Therefore, as stated in the submitted draft market analysis, the market situation in Skanderborg-Odder seems to be characterised by a high level of concentration as opposed to effective retail competition.¹⁶ BEREC also notes that the level of external sales is currently very low.¹⁷ In addition, the fact that AURA's market share is increasing would, in BEREC's opinion, suggest that the level of competition is decreasing. The fact that the price for retail services in Aura's network are among the highest in Skanderborg-Odder further adds to this perception.¹⁸

Furthermore, since it is only TDC who provides open access in part of its network in Skanderborg-Odder,¹⁹ retail competition will be limited in large portions of the market. Instead, competition will mainly take place between vertically integrated network operators and in most cases between no more than two operators, as three or more networks within the Skanderborg-Odder market only overlap to a very limited degree.²⁰ Since it is not certain that open access will be provided at fair and sustainable conditions by any other network operator than TDC in a forward-looking perspective, it seems likely that the current market situation would persist in the period covered by the notified market analysis absent regulatory intervention.

For the reasons stated above, in conclusion, BEREC does not share the Commission's serious doubts concerning the application of the three criteria test on the Skanderborg-Odder market. BEREC is therefore of the opinion that DBA has provided sufficient evidence that the market is susceptible to ex ante regulation.

4.2 Insufficient evidence supporting the SMP designation of some of the energy utility companies on the market for high capacity infrastructure

Concerns of the Commission

The Commission refers to the concept of SMP (Art. 63(2) of the Code) and the criteria upon which the SMP assessment must be based on (Art. 64(2) of the Code and the SMP guidelines²¹). In particular, the Commission refers to Points 54 and 55 of the SMP guidelines and to the fact that market shares should be interpreted in light of the relevant conditions, and

¹⁴ The Commission includes Aura into the category of alternative operators. However, BEREC considers in its opinion that Aura as a potential SMP operator should not be considered as alternative operator.

¹⁵ With the exception of Odder which has retained its' market share throughout the period of analysis.

¹⁶ DBA, M3HC - wholesale market analysis (2021) p. 278.

¹⁷ DBA, Answer to RFI (20-12-2021) p. 4.

¹⁸ DBA, Answer to RFI (20-12-2021) p. 2.

¹⁹ DBA, Answer to RFI (20-12-2021) p. 9.

²⁰ DBA, M3HC - wholesale market analysis (2021) p. 285.

²¹ Commission guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services (SMP guidelines), OJ C 159/1 of 7.5.2018

in particular of the dynamics of the market and of the extent to which products are differentiated. The Commission underlines the four following factors:

- The fact that an undertaking with a strong position in the market faces developing infrastructure competition may well indicate that the market is becoming competitive over time.
- Even an undertaking with a high market share may not be able to act to an appreciable extent independently of customers with sufficient bargaining strength.
- Significant fluctuation of market share over time may be indicative of a lack of market power in the relevant market.
- The ability of a new entrant to increase its market share quickly may also reflect that the relevant market in question is more competitive and that entry barriers can be overcome within a reasonable timeframe.

The Commission notes that the Danish high capacity markets are characterised by a very large coverage of VHCN resulting from both a large footprint of cable networks and considerable fibre deployments, driven by utility companies. The Commission further notes that these markets are characterised by the wholesale opening of many of the high capacity networks (through wholesale only models and commercial offers proposed by vertically integrated operators).

As a consequence thereof and, based on the evidence available, the Commission considers that in some cases, the SMP assessment conducted by DBA may not sufficiently reflect the degree of infrastructure competition and the significance of the wholesale agreements, voluntarily concluded by the network owners and access seekers.

The Commission further develops its reasoning based on some illustrative examples taken from the geographical areas where it disputes the conclusions reached by DBA.

In the context of its interview with BEREC, the Commission further explained that, specifically for Aura, although it is a vertically integrated operator, its behaviour is potentially constrained by the fact that it is cooperatively owned by its electricity consumers and is committed to connect all households in its supply area²². In addition, it has no influence on retail prices, which are set by the content provider WAOO. The Commission also added that this sub-market is increasing and although Aura's sales are increasing even more rapidly, TDC and Norlys have continued to expand their customer base. Moreover, the fact that TDC's cable network is open at wholesale level could also contribute to an increasing degree of competition where it is present.²³

In conclusion,²⁴ the Commission considers that the evidence provided by DBA is not sufficient to conclude that some of the proposed SMP operators are able to behave independently from

²² The Commission mentions that assuming the roll out pace recently observed, Aura may have reached a very significant coverage before the end of the review cycle, this increase in fiber coverage would in turn lead to an increase of parallel coverage

²³ Email of 16 December 2021.

²⁴ Taking into account (i) the significant and increasing degree of parallel coverage, (ii) the competitive constraints at wholesale and retail level stemming from cable networks (in particular where these networks are open at wholesale level), (iii) the positive impact on competition of wholesale opening of the fibre networks, and (iv) the possible existence of countervailing buying power.

their competitors and customers. These doubts are directed towards the SMP designation of five utility companies (EWII S/I, Aura, Energi Ikast, MES Fiber and Nord Energi).

Views of DBA

DBA's SMP designation is based on an overall assessment of factors such as the market share of the undertaking, the business model of the undertaking, the distribution of internal vs. external wholesale sales and the structural conditions on the geographic market (e.g. homes passed and prevalence of parallel high capacity infrastructure). DBA further explains it is of the opinion that access to two closed infrastructures is insufficient to accommodate sustainable competitive conditions and that for parallel coverage to be the basis of sustainable conditions, it must consist of close to complete parallel coverage. However, even in such a case, there may be competitive concerns as the two infrastructures might not be competing under efficient circumstances but might instead result in an outcome similar to a duopoly at wholesale level.

DBA indicated that the degree of parallel infrastructure in Denmark is considerably below complete parallel rollout, and DBA does not expect it to reach complete parallel coverage in the future. Moreover, a considerable amount of the alternative infrastructure (coax) consists of smaller, closed networks servicing organised customers (often residents' associations), where there is no obligation to provide wholesale access.

DBA is of the opinion that it is vital for the improvement of the competitive conditions on the market for high-capacity broadband that access is provided to the large SMP-designated networks, which in turn will provide end-users with more than two options stemming from closed networks.

With respect to Aura,²⁵ DBA's overall assessment is that Aura has, and over the next few years will continue to have, SMP in the Skanderborg-Odder sub-market, since:

- Aura had a wholesale market share of around 47 % on the sub-market according to the notified material (and the market share has subsequently likely increased).²⁶
- Aura is a vertically integrated company.
- Aura has only internal sales.
- Aura covers now 100% of the sub-market with high-capacity infrastructure and plans to cover all shareholders in Skanderborg-Odder.²⁷
- The level of parallel coverage was 56% according to the notified material (and has then increased as Aura has increased its footprint).

DBA explains that Aura's fibre-network is the largest infrastructure on the submarket, and Aura has obtained significant market power (SMP) in recent years as its coverage and market share have increased leading to economies of scale. Aura is a vertically integrated operator, and Aura's fibre-network, which covers the majority of households in the sub-market is not yet open

²⁵ On 10 December 2021, DBA informed the Commission that it withdraws its draft measures regarding four of these companies (EWII, Energi Ikast, MES Fiber and Nord Energi), therefore only the specific case of Aura is presented here.

²⁶ During the discussions with the BEREC, DBA explained that it is likely that Aura's market share is today above 50% and that this was expected, given the growth in their market share between 2017 and 2020, and their statements in their annual report that their fibre operations have had a record year.

²⁷ In the notified material, DBA explained that according to the information provided, the company has not immediately set a year when this roll-out is expected to be completed. During a call with BEREC, DBA explained that it received indications that the rollout would now be completed.

for external wholesale. Aura purchases its service provision content from the brand Wao, meaning that while Aura retains the ownership of the end-user, the content and branding come from Wao. Aura defines the competitive terms that are the basis of Wao setting its retail prices. While Aura may not set the retail prices for their product, they do affect the conditions that the pricing is defined from (via the absence of competition on its network and the wholesale price). Aura has been able to maintain the standard prices from Wao, without giving deference to competing infrastructures while still increasing its market share year on year.

DBA further notes that the level of parallel coverage is not sufficient for infrastructure-based competition alone to ensure a proper functioning of competition in the retail market and that coverage with three parallel infrastructures is largely non-existent in this sub-market.

Aura is a vertically integrated undertaking. Historically Aura's network has not been open to wholesale. Although in June 2021, Aura signed an agreement to make use of Fibia's wholesale platform for the opening of its fibre-network²⁸, DBA considers that a wholesale opening will only be the first step towards ensuring sustainable competition and that it is dependent on the ability and willingness of Aura to enter into fair and reasonable agreements with service providers.

Given that Aura's future wholesale customers will become its competitors on the retail market and that Aura has the only high speed infrastructure for a large proportion of households in its area, DBA believes it has the possibility and incentive to offer wholesale prices and conditions that distort competition on the retail market to its own advantage.

Therefore, DBA's overall assessment is that Aura's position on the sub-market enables it to act independently of competitors and customers and that Aura will therefore be able to act in a way that is detrimental to overall competition in the retail market. With increasing demand for high-capacity infrastructure, effective access to high-capacity infrastructure for wholesale customers is essential for retail competition, as service-based competition is crucial for the conditions of competition in a market with high barriers to entry. DBA further clarifies that Aura's fibre-network on this submarket is not open for external wholesale and that a smaller portion of Aura's network is open for external wholesale. The remainder of coax-networks are closed networks servicing organized customers.

BEREC's Assessment

On 10 December 2021, DBA informed the Commission that it withdraws its draft measures regarding four of the five companies (EWI, Energi Icast, MES Fiber and Nord Energi) for which the Commission expressed serious doubts regarding the SMP position, therefore this BEREC opinion will solely focus on the specific case of Aura.

First, BEREC observes that the comment letter contains no or very few elements that specifically relate to Aura. The illustrative examples provided by the Commission rather relate to the other geographic areas for which the Commission disputes DBA's conclusion on the existence of an SMP undertaking.

²⁸ Further, in late December 2021, Aura publicly announced a "soft" opening of their network in the beginning of 2022. However, Aura has not provided further information about any details of this opening regarding type of access product, non-discrimination and transparency.

Second, BEREC has analysed in light of Aura's situation the four factors that the Commission put forward to challenge the SMP position of the five companies.

The developing infrastructure competition

Aura today has a coverage (100%) significantly higher than the one of the second operator (TDC, 45%). In the recent years, Aura has increased its coverage more than its competitors. The fact that Aura's coverage now is complete increases the level of parallel coverage in Aura's area, but this increase is at the advantage of Aura (that has increased its coverage advantage against its competitors).²⁹

The bargaining strength of Aura's customers

BEREC underlines that Aura is vertically integrated, although some retail functions (pricing, branding and marketing) are outsourced to a third party (Wao). Aura controls the entire network as well as the relation with the end-users³⁰. It is BEREC's understanding that Aura has the possibility to step away from WAOO by internalizing all retail functions³¹ or by switching to another external partner. BEREC notes that Aura has no external sales on the wholesale market up to now. Aura recently signed an agreement to make use of Fibia's wholesale platform but does not have yet any service provider on its network.³² To BEREC's understanding, there are at present no wholesale agreements in place, nor a wholesale offer actually available. In such circumstances, BEREC is of the opinion that it cannot be concluded that Aura's wholesale customers have sufficient bargaining strength and that it is not yet possible to evaluate the competitive pressure that (potential) future wholesale customers could exert on Aura. BEREC however recognizes that the agreement with FIBIA may have consequences in the future and that the market developments in this respect should be closely monitored. BEREC also notes that Aura has a coverage larger than its competitors and that only a part of TDC's coax network is effectively open to service providers.³³ External sales play a very minor part, which means wholesale customers have a weak position in the market overall. These elements are likely to limit the counter-vailing buying power of Aura's (future) wholesale customers. During the discussions with the EWG, the European Commission mentioned that Aura is potentially constrained by the fact it is cooperatively owned by the electricity consumers and "committed" to connect all households in its supply area. BEREC notes that such a consideration is not usual as a criteria to assess the bargaining strength of an operator and that the Commission did not substantiate how this fact may effectively affect Aura's bargaining strength in the present case. For its part, DBA underlined during the discussions with the EWG that Aura is able to charge some of the highest prices on the market.³⁴

²⁹ During the discussions with the EWG, DBA considered unlikely that TDC or another operator will contribute significantly to the rollout of fibre in submarket Skanderborg-Odder, owing to the high degree of fibre-coverage already reached in this area.

³⁰ While some retail elements, including pricing, has been outsourced to Wao, Wao is not a service provider in the sense that it owns the end customer relationship. The end customer ownership remains with Aura.

³¹ BEREC notes that in the past Aura owned its own brand Kazoom.

³² In observations submitted to the Commission on 17 December 2021, Aura informed that it decided on December 16th to open up its network to independent Service Providers immediately.

³³ There are no other commercial wholesale-products than those offered by TDC (cf. DBA's answer to a request for information of the Commission, 20 December 2021).

³⁴ For the most relevant retail product (1000 Mbit/s), the coaxial-based retail-products are considerably cheaper than the fibre-based Wao (on Aura's network) retail product. Wao's current price-tag for its 200 Mbit/s fibre-based retail products (319 DKK) is higher than that of YouSee's 1000 Mbit/s coax-based retail product (299 DKK). Cf. DBA's answer to a request for information of the Commission, 20 December 2021.

The fluctuation of market share over time

The figures provided by DBA in the notified draft decision do not show fluctuations of market shares but illustrate that Aura has growing market shares in the period 2017-2020. In comparison, Aura's competitors have relatively stable market shares. If the volumes sold by competitors increased, Aura's volumes increased even further. As Aura increased the coverage advantage he had already on its competitors, there is a real probability that Aura will exceed the 50% threshold in the period covered by DBA's market analysis (possibly already in 2021). The observed evolution of the market shares as well as their anticipated evolution do not contradict DBA's conclusions that Aura holds SMP.

The ability of a new entrant to increase its market share

The figure provided by DBA in the notified draft decision do not reveal a significant entry or a significant increase of the market shares of Aura's competitors in the period 2017-2020. External sales exist, but the current level of these external sales is particularly small (<2% of the total market in 2020). In absence of regulation, the potential of these external sales is likely to be limited due to the fact that (i) coax networks are only partially open for independent service providers and (ii) fibre networks other than Aura have only a limited coverage.

Taking into account the above elements, BEREC is of the opinion that the Commission's serious doubt related to the SMP designation of Aura on the market for high capacity infrastructure is not justified.

5. Conclusions

Based on the detailed analysis set out in section 4 above, BEREC is of the opinion that DBA has provided sufficient evidence that the Skanderborg-Odder market is susceptible to ex ante regulation and that there is also sufficient evidence supporting the SMP designation of Aura. BEREC considers that the Commission's serious doubts regarding the application of the three criteria test (on the Skanderborg-Odder market) and related to the SMP designation (of Aura) are not justified.