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Γραφείο Επιτρόπου Ρυθμίσεως
Ηλεκτρονικών Επικοινωνιών Και
Ταχυδρομείων (OCECPR)

Helioupoleos 12
1101 Λευκωσία
Cyprus

For the attention of:
Dr Polis Michaelides
Commissioner

Fax: +357 226 93 030

Dear Mr Michaelides,

Subject: Commission Decision concerning Case CY/2012/1396: Wholesale (physical) network infrastructure access at a fixed location in Cyprus

Commission Decision concerning Case CY/2012/1397: Wholesale broadband access in Cyprus

Comments pursuant to Article 7(3) of Directive 2002/21/EC

I. PROCEDURE

On 15 November 2012, the Commission registered a notification from the Cypriot national regulatory authority, Γραφείο Επιτρόπου Ρυθμίσεως Ηλεκτρονικών Επικοινωνιών Και Ταχυδρομείων (OCECPR)¹, concerning the markets for wholesale (physical) network infrastructure access at a fixed location² and wholesale broadband access³ in Cyprus.

¹ Under Article 7 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

² Corresponding to market 4 in Commission Recommendation 2007/879/EC of 17 December 2007 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 344, 28.12.2007, p. 65.

³ Corresponding to market 5 in the Recommendation on Relevant Markets.

The national consultation⁴ regarding market 4 ran from 22 May 2012 to 22 June 2012, and regarding market 5 from 9 July 2012 to 10 August 2012.

On 26 November 2012, a request for information⁵ was sent to OCECPR and a response was received on 29 November 2012.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), the Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on notified draft measures to the NRA concerned.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

The market for wholesale (physical) network infrastructure access at a fixed location in Cyprus was previously notified to and assessed by the Commission under case CY/2009/869⁶. OCECPR defined the relevant product market as shared or fully unbundled access to copper local loops and sub-loops for the purpose of providing broadband and voice services. OCECPR excluded fibre infrastructures from the market, as at the time fibre was only used in a pilot programme. The relevant geographic market was defined as the national territory of Cyprus. CYTA, the incumbent operator, was designated as holding significant market power (SMP), and the following obligations were imposed: access to the local loop and sub-loop, including co-location and access to ducts; transparency and publication of a reference offer; non-discrimination; accounting separation; and price control (based on an LRIC model) along with a margin squeeze test.

The market for wholesale broadband access in Cyprus was previously notified to and assessed by the Commission under case CY/2009/870⁷. OCECPR concluded that the market includes self-supplied copper bitstream services, as well as the provision of such services to third parties. The relevant geographic market was defined as the national territory of Cyprus. CYTA was designated as holding SMP, and the following obligations were imposed: bitstream and naked DSL access including co-location; transparency and publication of a reference offer; non-discrimination; accounting separation; and price control (based on an LRIC model) along with a margin squeeze test.

Regarding both notifications, the Commission commented on the fact that fibre infrastructures were excluded from the market, pointing out that the proposed access obligations might not prove to be sufficient to ensure effective competition at the retail level. The Commission invited OCECPR to analyse the substitutability between copper and fibre based products in both markets in a forward looking, technologically neutral manner and, if appropriate, impose remedies on fibre in its next market review.

II.2. Market definition

Market 4

OCECPR finds that the relevant market includes offers of access via (a) metal cables using xDSL technologies⁸ and (b) fibre optic networks⁹, including shared and fully

⁴ In accordance with Article 6 of the Framework Directive.

⁵ In accordance with Article 5(2) of the Framework Directive.

⁶ E(2009)964.

⁷ E(2009)964.

⁸ CYTA introduced VDSL2 services as of 1 December 2012.

unbundled access to the local sub/loop. The relevant geographic market is national and covers the entire territory of the Republic of Cyprus.

Market 5

OCECPR finds that the relevant market includes the supply (including self-supply) of wholesale broadband services via xDSL technologies¹⁰. Where CYTA's copper lines will be replaced by fibre optic, the market also includes the provision of WBA services through FTTx technologies. OCECPR finds that the relevant geographic market is national and covers the entire territory of the Republic of Cyprus.

II.3. Finding of significant market power

The incumbent operator CYTA is designated as having SMP in both markets 4 and 5. OCECPR analysed the market structure and market shares¹¹, control of infrastructure not easily duplicated, existence of countervailing buying power, economies of scale, vertical integration and entry barriers, and absence of potential competition.

II.4. Regulatory remedies

Market 4

OCECPR proposes to impose the following obligations on the SMP operator CYTA:

- Access to the local loop and sub-loop and special facilities;

OCECPR proposes to maintain¹² and broaden the existing obligation, having in mind the anticipated development of CYTA's NGA network. CYTA will be obliged to provide unbundled access to the fibre lines, along with access to dark fibre, collocation, backhaul and access to civil engineering infrastructure¹³. OCECPR notes that the details of the access method and the implementation methodology will be defined at a later stage once CYTA's NGA topology is known. However, OCECPR explains in the response to the RFI that CYTA already announced that their intention is to invest in a GPON topology where all fibre lines will be aggregated at a concentration point. Such a topology, in OCECPR's view, would make unbundling feasible at that concentration point. Alternative operators will be able to unbundle the fibre at that concentration point and depending on their business plan adopt a P2P or P2MP topology. Consequently, OCECPR explains that there is no need for the imposition of a virtual access obligation at this stage.

⁹ According to OCECPR, CYTA has so far deployed a small-scale pilot GPON fibre network. No wholesale offers are currently available over fibre infrastructures.

¹⁰ According to OCECPR, until 2011 there were five alternative providers that used CYTA's WBA offer. Although the total number of connections is low (around 1.5% of the total), there has been a significant increase since 2009 in the take up of WBA.

¹¹ As for retail market shares, CYTA has 71.3% of the market, Primetel and Cablenet 13.5% each, and the remaining 1.7% of the market is shared by two operators. Moreover, 86.2% of the subscribers are using xDSL and 12.4% have a connection through cable. Regarding wholesale markets, CYTA was found to have 100% market shares including and excluding self-supply in both markets 4 and 5.

¹² Operators Primetel, Cablenet and MTN are currently using CYTA's LLU product.

¹³ Regarding the prices for duct access, OCECPR explains that measures regarding duct collocation are already in place. They set the methodology and parameters to be taken into account in order to calculate duct sharing prices, and also include a duct co-location financial model which calculates prices on a historic cost basis.

- Transparency;

In addition to the obligation to publish terms and conditions, as well as sample Service Level Agreements (SLAs)¹⁴, CYTA will now be obliged to identify the time schedules and determine the transition procedures from copper to fibre technologies in the access network before 2020. Moreover, CYTA must notify its plans to abolish certain interconnection points to OCECPR and alternative providers within a reasonable time, unless a different time schedule is agreed between all operators. According to the results of the public consultation, as explained by OCECPR in the response to the RFI, alternative operators will require a short transition period from copper to fibre. OCECPR explains that such an approach is in line with Recommend 39 of the NGA Recommendation¹⁵, which allows for a period shorter than 5 years if fully equivalent access is provided at the point of interconnection. Based on CYTA's rollout plans, OCECPR believes that this will be the case in the Republic of Cyprus.

- Non-discrimination;

The proposed non-discrimination obligation requires CYTA to publish key performance indicators (KPIs) on a quarterly basis. Moreover, OCECPR plans to implement a margin squeeze test to be performed on the basis of an equally efficient operator.

- Accounting separation obligation; and
- Price control (cost orientation)¹⁶.

OCECPR proposes to calculate the prices on the basis of a bottom-up Long-Run Average Incremental Cost (BU-LRAIC) model. If NGA roll-out takes place as expected, OCECPR intends to take into account the business risk incurred by the SMP operator and effects on competition during the transition to NGA, and plans to re-examine the wholesale prices for copper access.

Market 5

OCECPR proposes to impose the following obligations on the SMP operator CYTA:

- Wholesale broadband access and joint use of facilities¹⁷;

Similarly to market 4, OCECPR explains that the details of the WBA remedy concerning fibre technologies will be defined at a later stage when the NGA network topology of the SMP operator is known. However, OCECPR emphasizes that the remedy will have to be formulated in such a way as to ensure access to as many points as possible, different levels of supply of quality of services¹⁸, and the possibility for alternative operators to

¹⁴ The SLAs must include non-compliance clauses for the services provided in the context of unbundled access to the local loop and sub-loop (including the provision of unbundled access products, transition services, failure repair, products delivery, collocation services, and supply of information). It must now also cover provision of services over NGA networks.

¹⁵ Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA), OJ L 251, 25.9.2010, p. 35-46.

¹⁶ The current wholesale monthly tariff for LLU is 8.51€ and for SLU 5.45€ (excluding VAT). These figures were calculated by applying a margin squeeze test. OCECPR explains that between the regulatory obligations of cost-orientation and non-discrimination, non-discrimination prevails if the price calculated by applying a margin squeeze test is lower. Currently, civil engineering is valued at current costs in the cost model which according to OCECPR lead to relatively high cost-oriented access when compared to retail prices.

¹⁷ The obligation also includes supply of naked DSL, provision of collocation or other form of joint use of facilities, including ducts and buildings.

¹⁸ Including characteristics like bandwidth, packet loss, and delay.

offer video services like IPTV and video on demand¹⁹.

- Transparency;
- Non-discrimination including the publication of KPIs;
- Accounting separation obligation; and
- Price control (cost orientation).

OCECPR proposes to calculate the prices on the basis of a bottom-up Long-Run Average Incremental Cost (BU-LRAIC) model²⁰.

III. COMMENTS

The Commission has examined the notification and the additional information provided by OCECPR and has the following comments:²¹

Need to monitor the effectiveness of the access to fibre obligation

The Commission notes that OCECPR proposes to impose an access obligation on fibre infrastructures, with the details of the access and implementation method to follow once the SMP operator's NGA topology is known.

The Commission reminds OCECPR of the importance of the transition period from copper to NGA networks and that efforts need to be made to preserve and further develop competition as the NGA rollout progresses. Therefore, it is essential to ensure that the imposed access remedy is fully functioning so as to prevent a possible re-monopolization of these markets by the SMP operator.

In the light of the above, the Commission invites OCECPR to adopt more detailed measures on the implementation of the access to fibre obligation as soon as possible, to monitor the market and ensure that the measure grants effective access to NGA networks as soon as these are deployed by the SMP operator. If effective unbundled access to the SMP operator's fibre network could not be ensured at that point in time, the Commission asks OCECPR to impose a virtual access obligation in the interim until effective unbundled access can be granted.

The scope of the access obligation in market 5

The Commission notes that OCECPR's access obligation in market 5 should, amongst other things, ensure that the bitstream services offered enable alternative operators to provide video services like IPTV and video on demand.

The Commission points out that it has accepted the inclusion of such multicast functionality when imposing bitstream access²² only on condition that such an

¹⁹ OCECPR notes that it is technically possible to provide services such as television and video on demand, however there are restrictions with regard to the quality and the bandwidth supported of the service currently offered. OCECPR also explains that consumers have a preference for bundles, with a trend to favour those offering television.

²⁰ Current wholesale prices for copper bitstream have been calculated using the retail minus methodology, and a margin squeeze test was applied. OCECPR revised these tariffs on 30 October 2012. Depending on the speed offered, a monthly fee for xDSL ranges from €3.31 to €21.65, and for VSDL 2 from €24.25 to €65.26.

²¹ In accordance with Article 7(3) of the Framework Directive.

²² Case BE/2011/1228.

obligation is justified and proportional. Such circumstances would include the existence of a verified trend towards the provision of multiple play offers, with the capacity to offer TV services constituting an essential element in the provision of competitive bundled offers.

Against this background, the Commission invites OCECPR to substantiate in more detail in its final measure why it considers that the imposition of a multicast functionality is essential in order to ensure that alternative operators can effectively compete in the retail broadband market in the Republic of Cyprus.

Forthcoming guidance on non-discrimination and costing methodologies

The Commission notes that OCECPR is currently working on a LRIC model which will be used for calculating wholesale access prices. The Commission welcomes OCECPR's plans to re-examine the current copper prices once the fibre deployment becomes significant, particularly in view of the observation that so far the model used for cost-orientation does not appear to have avoided a risk of margin squeeze.

Given the importance of regulating key wholesale access products in the transition period to NGA networks in an effective and consistent manner across the EU, the Commission is currently working on a recommendation which will provide guidance on the non-discrimination obligation and costing methodologies for key access prices. In the light of this, the Commission invites OCECPR to review its analysis upon publication of the relevant recommendation.

With regard to the fibre infrastructure, the Commission points out that an *ex ante* price control obligation for fibre infrastructure would not be necessary if there were sufficient competition safeguards in place. In the latter case, OCECPR should consider imposing at least the following:

- (a) Equivalence of input (EoI), which generally requires SMP operators' own downstream operations to use the same products, processes, and prices as those used by their retail rivals. As equivalence of input can only be fully implemented over a longer time period, this requirement could consist in immediate terms in a firm obligation on and commitment by the SMP operator to undertake certain key initiatives over a set time period. Since the SMP operator may soon embark upon a more extensive FTTH rollout phase, OCECPR may consider engaging as soon as possible in dialogue with stakeholders to assess the feasibility of implementing EoI in Cyprus;
- (b) A transparency obligation regarding fibre, comprising a number of clearly specified KPIs, an effective enforcement and monitoring mechanism (such as internal or external regular audits) and publication of the KPIs;
- (c) A replicability requirement also for fibre-based retail products;
- (d) An accounting separation obligation also covering fibre products.

Against this background, OCECPR could consider lifting the cost orientation requirement for the SMP operator's fibre lines as soon as the above safeguards are effective in Cyprus and OCECPR would establish that the SMP operator's pricing behaviour is properly constrained by either cost-oriented copper prices or by significant competitive constraints, indicated in particular by the presence of well-developed alternative infrastructures with comparable reach.

Pursuant to Article 7(7) of the Framework Directive, OCECPR shall take the utmost

account of the comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measure; where it does so, shall communicate it to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC²³ the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission²⁴ within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication.²⁵ You should give reasons for any such request.

Yours sincerely,
For the Commission,
Robert Madelin
Director-General

²³ Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 301, 12.11.2008, p. 23.

²⁴ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

²⁵ The Commission may inform the public of the result of its assessment before the end of this three-day period.