



EUROPEAN COMMISSION

Brussels, 22/06/2012
C(2012)4388

ΕΘΝΙΚΗ ΕΠΙΤΡΟΠΗ
ΤΗΛΕΠΙΚΟΙΝΩΝΙΩΝ ΚΑΙ
ΤΑΧΥΔΡΟΜΕΙΩΝ (ΕΕΤΤ)

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For the attention of:
Mr Dr. Leonidas Kanellos
President

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Dear Mr Kanellos,

Subject: Commission decision concerning Case EL/2012/1331: Wholesale market for terminating segments of leased lines in Greece

Commission decision concerning Case EL/2012/1332: Wholesale market for trunk segments of leased lines in Greece

Commission decision concerning Case EL/2012/1333: Retail market for leased lines up to and including 2 Mbps in Greece

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

I. PROCEDURE

On 22 May 2012, the Commission registered a notification from the Greek national regulatory authority, Hellenic Telecommunications & Post Commission (ΕΕΤΤ)¹, concerning (i) the wholesale market for terminating segments of leased lines², (ii) the

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 with market 6 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.

wholesale market for trunk segments of leased lines³ and (iii) the retail market for leased lines up to and including 2 Mbps⁴ in Greece.

The national consultation⁵ ran from 23 December 2011 to 13 February 2012.

On 1 June 2012, a request for information⁶ was sent to EETT and a response was received on 7 June 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 wholesale markets for terminating segments and trunk segments of leased lines in Greece were previously notified to and assessed by the Commission under cases EL/2006/0422 and EL/2006/0423⁷. The retail market for leased lines of up to and including 2 Mbps was notified to and assessed by the Commission under case EL/2006/0491⁸.

In these first round analyses, EETT designated OTE as having significant market power (SMP) in the above wholesale and retail markets and imposed on it the full set of obligations, including price control and cost orientation on the basis of a top down LRIC cost model for the wholesale markets and a FDC-CCA approach for the retail market. The Commission did not have any comments.

II.2. Market definition

II.2.1 Wholesale markets for terminating and trunk segments

Similar to its conclusions following the first round market review, EETT, in the present notification, draws the market boundary between terminating and trunk segments on the basis of the national network topology, i.e. the boundary is located at the service provider's exchange closest to the end-user.

As a result, terminating segments of leased lines are defined as a dedicated capacity used for the provision of services from the end-user's facilities to the service provider's exchange (tandem/nodal) and trunk segments, subsequently, as dedicated capacity used to provide services between service providers' exchanges.

As in the first round analysis, EETT proposes to identify two relevant markets for

³ Corresponding with market 14 of Commission Recommendation 2003/311/EC of 11 February 2003 on relevant product and services markets within the electronic communications sector susceptible for *ex ante* regulation in accordance with the Framework Directive, OJ L 114, 8.5.2003, p.45. ('the 2003 Recommendation on Relevant Markets').

⁴ Corresponding with market 7 of the 2003 Recommendation on Relevant Markets.

⁵ In accordance with Article 6 of the Framework Directive.

⁶ In accordance with Article 5(2) of the Framework Directive.

⁷ SG-Greffe(2006)D/ 204183.

⁸ SG-Greffe(2006)D/ 205432.

terminating segments on the basis of the bandwidth: (i) a market for terminating segments up to and including 2 Mbps and (ii) a market for terminating segments above 2 Mbps. EETT argues that the pricing structure shows a break in the chain of substitutability at 2 Mbps and that the share of the Ethernet technology is not high enough yet to either lift such market split or to set a different bandwidth intersection point.

EETT does not propose any further distinction on the basis of technology as it finds that (i) analogue and digital leased lines and (ii) Ethernet based lines and traditional PDH/SDH leased lines to be part of the same product market. Finally EETT does not consider that self-supply should be included in the relevant markets.

Both relevant geographic markets are national.

II.2.2 Retail leased lines

Similar to the first round market review, EETT considers that due to generally equivalent functionality both analogue and digital circuits form part of the same product market for retail leased lines, despite digital leased lines offering higher quality. In addition, based on the increasing ability and likelihood of switching between Ethernet and traditional interface leased lines, EETT now also proposes to include Ethernet services in the relevant product market.

Furthermore, due to a break in the chain of substitution at 2 Mbps, EETT also considers that there are two separate product markets on the retail level, one for retail leased lines up to and including 2 Mbps and one for higher bandwidth retail leased lines (i.e. above 2 Mbps).

The relevant geographic retail market is national.

II.3 Three criteria test

Due to the fact that neither the wholesale market for trunk segments nor the retail markets for leased lines continue to be recommended by the European Commission for *ex ante* regulation, EETT conducts a so-called "three criteria test"⁹ in respect of those markets in order to assess whether these markets are still susceptible for *ex ante* regulation.

II.3.1 Wholesale market for trunk segments of leased lines

Due to the high level of sunk costs necessary to compete in the market for trunk segments and the inability of alternative operators to offer trunk segments in combination with terminating segments required as an input to provide point-to-point retail leased lines, EETT considers that the market for trunk segments is still characterised by high and non-transitory barriers to entry. This is reinforced, in EETT's view, by the unrivalled economies of scope and scale of the incumbent operator, OTE, which function as additional structural entry barriers.

Furthermore, despite a notable increase in the market share of alternative operators¹⁰, EETT considers that there is no tendency toward effective competition in the trunk

⁹ This involves assessing whether, for those markets, (i) there are still high and non-transitory barriers to entry, (ii) there is no tendency towards effective competition and (iii) the application of ex post competition law alone does not suffice to address the competitive concerns identified in those markets.

¹⁰ From 2 – 7 % in 2007 to 23 – 31% in 2012, depending on whether a point-to-point wholesale circuit sold by OTE is assumed to include a trunk segment or not.

market, given the still relatively high market shares of around 70% in 2012¹¹. Whilst EETT considers that in the long-term competitive infrastructure might develop and proposes, therefore, to monitor the market situation closely, it is of the view that for the life-time of this market review, OTE's market shares will not drop sufficiently enough to suggest effective competition, in particular given the current economic climate in Greece, which has a negative impact on further infrastructure investment.

Lastly, EETT is of the view that the use of *ex post* competition law would be inappropriate to address identified market failures as the market requires the kind of timely intervention and legal certainty that only *ex ante* regulation is able to provide.

II.3.2 Retail markets for leased lines

Regarding the retail markets for leased lines, EETT considers that only the lower bandwidth market, i.e. retail leased lines up to and including 2 Mbps, still warrants *ex ante* regulation. Similarly to the wholesale market for trunk segments of leased lines, EETT considers that due to its economies of scale and scope of the incumbent operator, OTE, continues to be at a competitive advantage due to its extensive network infrastructure on the wholesale level. EETT assumes high barriers to entry on the retail level, despite the fact – as EETT acknowledges itself – that existing regulation at the wholesale level reduces relevant entry barriers at the retail level significantly.

Furthermore, due to constant very high market shares of OTE in the relevant retail market¹², EETT considers that there is no tendency toward effective competition in this market. EETT also is of the view that given the identified need for a price control *ex post* competition law alone is unlikely able to address the competitive concerns in the market.

II.4. Finding of significant market power

II.4.1 Wholesale markets for terminating segments of leased lines

EETT proposes to designate OTE as having SMP in both wholesale markets for terminating segments of leased lines. The main criteria considered by EETT in reaching its conclusion are: (i) very high market share in the period 2007-2012 in the two scenarios considered^{13,14}; (ii) high entry/expansion barriers as a consequence of high switching costs resulting from long term contracts, initial payment connection fee, time required when implementing the switching, the bundling of trunk and terminating segments and (iii) lack of countervailing buying power of the wholesale customers in the light of the insufficient size of the purchases made by access seekers to OTE and the difficulties for them to provide these wholesale services to themselves (self-supply).

¹¹ Again, depending on varying scenarios of how to treat point-to-point wholesale leased lines, i.e. as including a trunk segment or not, the market share figure varies from 69% - 77%.

¹² The development of market shares of the incumbent, OTE, at the retail level only shows a marginal decrease in market shares from 96% in 2007 to 92% in 2012. This is largely owed to the fact that the relevant market is a shrinking market and competitors are unlikely incentivised to enter the market.

¹³ Since terminating segments are often provided bundled with trunk segments (e.g. through a point to point circuit) EETT considers two scenarios to estimate the volumes of terminating segments: (i) scenario 1 where the point to point circuit is assumed to comprise two terminating segments and (ii) scenario 2 where such circuit would only comprise one terminating segment.

¹⁴ Although OTE's market share has been reduced since 2007, it is still above 75% (scenario 1) and 80% (scenario 2) in the market for low bandwidth terminating segments and it is at 55% (in both scenarios) in the market for high bandwidth termination segments.

II.4.2 Wholesale market for trunk segments of leased lines

Based on similar considerations, EETT proposed to designate OTE as having SMP in the wholesale market for trunk segments of leased lines. Despite a significant decrease in the market shares of OTE in this market, EETT bases its assessment predominantly on (i) the still relatively high market shares¹⁵, (ii) high barriers to entry and/or expansion, (iii) economies of scale combined with a high level of sunk cost and the absence of countervailing buyer power.

II.4.3 Retail market for leased lines up to and including 2 Mbps

In relation to the market for retail leased lines up to and including 2 Mbps, EETT proposes to designate OTE as having SMP. It relies mainly on (i) the very high and relatively stable market shares of OTE of above 90%¹⁶, (ii) high barriers to entry in a shrinking market characterised by relatively high sunk cost¹⁷, and (iii) the absence of countervailing buyer power.

II.5. Regulatory remedies

II.5.1 Wholesale markets for terminating and trunk segments of leased lines

EETT proposes to impose on OTE the following obligations on both wholesale markets for terminating segments and the wholesale market for trunk segments¹⁸:

- access to, and the use of, specific network facilities, whereby OTE must provide (i) trunk segments of leased lines, (ii) terminating segments of leased lines¹⁹, (iii) connected circuits of wholesale leased lines²⁰, (iv) partial circuits of leased lines²¹ and (v) digital point to point connected circuits of wholesale leased lines^{22,23}.

¹⁵ As mentioned above, depending on two different scenarios assessed by EETT, i.e. whether or not the point-to-point wholesale leased lines product offered by OTE is assumed to contain a trunk segment or not, the market shares of OTE for 2012 are calculated at between 69% and 77% (down from 93 % – 98% in 2007).

¹⁶ The development of market shares between 2007 and 2012 shows only a marginal reduction in market shares of OTE (from 96% in 2007 to 92% in 2012) remaining at a very high level.

¹⁷ In doing so, EETT did not, however, assess in much detail the effect existing and proposed regulation at the wholesale level would have on any potential entry barriers.

¹⁸ The proposed regulatory measures, in essence, are the same as have been imposed under the previous round of market reviews.

¹⁹ According to EETT, analogue point to point circuits fall into this service category because they are offered exclusively as end to end circuits without the capability of concentration at a trunk level.

²⁰ A Connected Circuit of a wholesale leased line is a combination of a Terminating Segment and a Trunk Segment of the same capacity which establishes a circuit from an end-user terminal point to a leased lines service exchange.

²¹ In its reply to the request for information EETT pointed out that the partial circuits of wholesale leased lines are currently not provided by OTE. Indeed, the provision of partial circuits is actually made redundant by the provision of terminating segments and connected circuits. Nevertheless, EETT further set out that the partial circuits are subject to ex-ante obligations because OTE could decide to modify the combinations of basic wholesale services which are part of the Reference Offer.

²² In its reply to the request for information, EETT explained that connected circuits of wholesale leased lines, partial circuits of leased lines and digital point to point Connected Circuits of wholesale leased lines are essentially a flexible combination of Terminating and Trunk Segments, and therefore fall partly into the market for terminating segments and partly into the market for trunk segments of leased

- transparency; including the obligations to publish a reference offer and to report EETT on key performance indicators (KPIs);
- non-discrimination; (i) among alternative providers and (ii) between OTE's retail arm and the alternative providers competing in the downstream market;
- price control based on cost orientation and cost accounting;
- accounting separation.

As to the price control obligation EETT proposes to maintain the current obligation on OTE to set the prices of the terminating segments (including analogue segments), trunk segments, connected circuits, digital point-to-point connected circuits, partial circuits and some associated facilities on the basis of a top-down CCA LRAIC model. As to other associated facilities such as co-location services, in-span transmission links and transmission links related to collocated equipment, EETT also proposes to maintain the obligation that prices must be based on a bottom-up model developed by OTE. According to its reply to the request for information, EETT will monitor on an annual basis whether the regulated prices continue to be cost oriented and will adjust them to reflect changes in costs. The next review of the cost orientation of prices is scheduled to take place in the second half of 2012.

II.5.2 Retail market for leased lines up to and including 2 Mbps

EETT proposes to impose the following obligations on OTE in the retail market for low bandwidth leased lines:

- A transparency obligation, which includes the requirement to publish its terms and conditions concerning the provision of relevant retail services (including the typical delivery period, typical period for the repair of faults, additional contractual terms and its compensation procedures);
- A non-discrimination obligation, requiring OTE to apply the same terms and conditions in equivalent circumstances to all end-users;
- price control based on cost orientation and cost accounting applying a Fully Distributed Cost methodology, which uses as its basis a Current Cost Accounting method (FDC-CCA); and
- accounting separation.

III. COMMENTS

The Commission has examined the notification and the additional information provided by EETT and has the following comments:²⁴

lines.

²³ Except for analogue leased line services, the rest can be provided over Ethernet technology. Nonetheless, EETT points out that leased services over Ethernet are currently being provided only as point to point circuits.

²⁴ In accordance with Article 7(3) of the Framework Directive.

The existence of barriers to entry and the development of effective competition in the wholesale market for trunk segments

The market for trunk segments of leased lines was removed from the Recommendation on Relevant Markets, as – in general – entry barriers in this market are considered to be low. However according to the Explanatory note to the Recommendation: "*Individual NRAs may be in a position to demonstrate that trunk segments of leased lines continue to fulfil the three criteria and are susceptible to ex ante regulation.*"

Section 2.2 of the Explanatory note to the Recommendation provides that an important qualification of the first criterion is whether high entry barriers are likely to be non-transitory in the context of a modified Greenfield approach (i.e. in the absence of regulation in the market concerned under this regulatory framework but including regulation which exists outside this framework). In this respect the NRA concerned will, therefore, have to examine whether the industry has experienced entry and whether entry has been or is likely in the future to be sufficiently immediate and persistent to limit market power. Barriers to entry will also depend on the minimum efficient scale of output, and the fraction of costs which are sunk.

EETT's own analysis shows that considerable entry has taken place in the trunk market and that alternative operators have been able to increase significantly their market shares over the past years. At the same time EETT indicates that there is only a limited geographic presence of alternative operators and that due to the continued importance of point-to-point wholesale offers regulated access to terminating segments is not sufficient to reduce entry barriers such that the market for trunk segments would become effectively competitive or would tend towards effective competition over the period of this market review.

Additionally, EETT also claims that there are significant barriers for existing competitors who would want to shift additional traffic onto their networks, as this could require substantial infrastructure investments. Due to the uncertainties associated with the development of traditional interface services and the current unfavourable economic climate in Greece it seems that alternative operators are unwilling or unable to make such new investments.

The Commission would like to stress that in order to establish that the first criterion is met, NRAs have to demonstrate that barriers to entry are high, i.e. that market entry has not put sufficient constraint on the dominant undertaking's market power and that it is likely that the situation will not change in the timeframe of the review. In this regard NRAs also have to show that prices in the market are above the competitive level and are not expected to decrease within the timeframe of the review. On the basis of EETT's reasoning set out above the Commission does not contest EETT's conclusions on the existence of entry barriers. However, the Commission emphasises the need to keep future market developments, in particular concerning a potential further decrease in OTE's market shares under close review and urges EETT to undertake a further market review should additional changes occur within the timeframe of this review.

In addition, the Commission asks EETT to add further detail regarding the prices of trunk segments in its final measures, which can support EETT's conclusion by showing that such prices are above the competitive level and unlikely to decrease over the period of this market review.

Inefficiency of wholesale regulation

According to Article 17 (1) (b) of the Universal Service Directive²⁵ national regulatory authorities shall only impose regulatory obligations in a retail market where it is not effectively competitive and the wholesale remedies imposed would not result in the achievement of the regulatory objectives set out in Article 8 of the Framework Directive. Moreover, the retail leased lines market has been removed from the Recommendation, as – in general – with wholesale regulation in place, there should only be few barriers to entry into this market. The Explanatory Note to the Recommendation further clarifies that, with SMP regulation applied where it is warranted at the wholesale level, consumer harm is unlikely to occur on the retail leased lines market. Wholesale regulation, where appropriate, should be sufficient to ensure that there is competitive supply at the retail level. Firms can make tenders to provide a widely based leased line offer to the customer's premises. Once the problem of making a ubiquitous offer has been overcome, then entry barriers into this market are no longer high.

The Commission notes that EETT's notification does not contain an explicit assessment as to why EETT considers additional retail regulation to be justified and appropriate in light of Article 17 of the Universal Service Directive. EETT, in response to the Commission's request for information, stated that the regulatory measures it imposed at the wholesale level are not yet adequate to sufficiently reduce barriers to entry and expansion to the extent that the three-criteria test for the retail market would no longer be fulfilled or the market would be effectively competitive. It, therefore, considers that given the deficient wholesale regulation and the shrinking nature of the retail leased lines market for lines up to and including 2Mbit/s, competitive conditions in this retail market in Greece are unlikely to improve over the next few years.

The Commission, therefore, asks EETT to demonstrate comprehensively in its final measure, why it considers that retail regulation, despite continued regulation of both trunk and terminating segments of leased lines, remains necessary in light of Article 17 (1) (b) of the Universal Service Directive.

In addition, the Commission urges EETT to enforce strictly its wholesale regulation and rigorously monitor market developments both at retail and at wholesale level. In this respect, (i) should EETT continue to consider that wholesale obligations prove to be ineffective, the Commission asks EETT to adjust them without undue delay; (ii) should wholesale obligations take full effect in the market, EETT is asked to withdraw retail regulation even before the end of the review period of the notified draft measure.

The need for price regulation at the retail level

Even if EETT, in its final measure, can demonstrate the need for continued

²⁵ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, OJ L 108, 24.4.2002, p. 51. as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (Citizens' Rights Directive), OJ L 337, 18.12.2009, p. 11.

regulation of the retail market for leased lines of up to and including 2 Mbps, the Commission questions the need and appropriateness for continued price regulation in this market. EETT justified the proposed imposition of such a remedy with the need to address the risk of excessive (or predatory) pricing by the dominant operator. However, EETT failed to address sufficiently the potential effects wholesale price regulation would have on the ability of the dominant operator to set prices independently of its competitors who should have access to cost oriented wholesale inputs. Even if one were to accept the presence of certain barriers to entry in the market, the availability of cost oriented wholesale inputs may serve as a constraint for the dominant operator to charge excessively high retail prices as it is likely to allow competitors to counter such pricing behaviour with their own retail products.

The Commission, therefore, asks EETT, to further justify in its final measure, in light of the above, the need for continued price regulation on the retail level or to amend its proposal by removing the obligation on OTE to charge retail leased lines up to and including 2 Mbps on a cost oriented basis.

Pursuant to Article 7(7) of the Framework Directive, EETT 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/EC²⁶ 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 Commission²⁷ 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.²⁸ You should give reasons for any such request.

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

²⁶ 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.

²⁷ Your request should be sent either by email: INFSO-COMP-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

²⁸ The Commission may inform the public of the result of its assessment before the end of this three-day period.