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Telekomunikačný úrad
Slovenskej republiky (TÚ SR)

Továrenská 7
810 06 Bratislava
Slovakia

For the attention of:
Mr Ladislav Mikuš
President

Fax: + 421 2 52 93 20 95

Dear Mr Mikuš,

Subject: Commission decision concerning Case SK/2012/1308: Wholesale (physical) network infrastructure access (including shared and fully unbundled access) at a fixed location in Slovakia

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

I. PROCEDURE

The notification was received from the Slovak Regulatory Authority, *Telekomunikačný úrad Slovenskej republiky* (TÚSR)[1], on 19 March 2012 and became effective on that day. It concerns the second review of the market for wholesale (physical) infrastructure access (including shared or fully unbundled access) at a fixed location in Slovakia[2].

The national consultation[3] was held from 16 January 2012 until 16 February 2012.

On 26 March 2012 a request for information (RFI)[4] was sent to the TÚSR and a response

[1] In accordance with 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] In accordance with Article 6 of the Framework Directive.

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

was received on 29 March 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) infrastructure access (including shared or fully unbundled access) at a fixed location was first notified to and assessed by the Commission in 2004 under case SK/2004/0107.[5] The TÚSR designated the incumbent operator, Slovak Telekom a.s. (Slovak Telekom), with significant market power (SMP) in the relevant market and proposed to impose on it a set of obligations including: (i) access to and use of specific facilities, (ii) transparency, (iii) non-discrimination, (iv) accounting separation, and (v) price control, including the obligation of cost orientation.

In its "comments" letter, the Commission underlined the lack of details regarding the price control obligation, both in terms of methodology and level of wholesale charges. In its final measure, the TÚSR, however, did not impose any price control remedy, even though such remedy was proposed in its notification.

The second market review was first notified in June 2009 under case SK/2009/0929. The TÚSR proposed excluding fibre networks from the relevant market definition. Following discussions with the Commission services during Phase I of the EU consultation, the TÚSR decided to withdraw its draft measure.

The second market review was subsequently notified again in April 2011 under case SK/2011/1210[6]. The TÚSR included into the relevant market local loops and sub-loops over copper and fibre. The copper-based access services were proposed to be price regulated through a 'benchmarking' method, which did not take into account actual costs incurred.

In its "comments" letter, the Commission invited the TÚSR to impose cost oriented prices for access to copper loops instead of 'benchmarking' and underlined that prices for fibre access services should be set on the basis of cost oriented prices, appropriately adjusted for investment risks.

The second market review was again notified to the Commission in November 2011 under case SK/2011/1262 as the previously imposed measure was legally challenged by the incumbent operator due to modifications related to the transparency obligation, which were not subject to previous national and EU consultations. Following discussions with the Commission services during Phase I of the EU consultation, the TÚSR decided to withdraw its draft measure.

II.2. Market definition

For its market analysis the TÚSR took into account the current status of network developments in the Slovak Republic[7] and of services available on a forward looking basis.

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5 SG-Greffe(2004)D/205500.

6 SG-Greffe(2011) D/7880.

7 Operators develop different optical network technologies; the market share of FTTB technology of all optical technologies is 57.2%, the share of FTTH is 42.6 %, and the share of FTTC and FTTN is 0.2% (figures of 30 June 2011). The retail market shares of the operators providing xDSL type services through FTTx networks (according to the number of active connections) is the following: Orange Slovensko a.s.

TÚSR includes into the relevant market the self-supply and external provision of (i) local loops and sub-loops (including full and shared access) over copper, (ii) fibre loops, as well as (iii) shared use of facilities or co-location. TÚSR excludes cable networks (CATV)[8], Fixed Wireless Access (FWA), WiFi and mobile network access from the relevant market, due to lack of substitutability. Despite the development of fibre networks, the TÚSR considers that their current coverage[9] will not be greatly extended.

The TÚSR considers that the relevant geographic market is the territory of Slovakia.

II. 3 Finding of significant market power

The TÚSR proposes designating Slovak Telekom as having SMP. The TÚSR took into consideration: (i) the size of the undertaking in relation to the relevant market, as well as changes of its relative market share over time[10], (ii) the control of a non-easily duplicable infrastructure, (iii) the existence of technological advantages, (iv) countervailing buying power, (v) the level of differentiation of services, (vi) the existence of potential competition, (vii) the market's entry barriers and (viii) the current status of competition in the relevant market.

The TÚSR underlines Slovak Telekom's control over an essential infrastructure. Slovak Telekom is the only undertaking which provides physical access through local copper loops. The TÚSR also points out that since the reference offer of Slovak Telekom was published in 2005, only one operator, GTS Slovakia, a.s. (GTS)[11], signed a framework contract, which came into force in May 2009, with Slovak Telekom on access to the local loop. GTS uses the local loop to provide services for non-residential customers[12].

II.4 Regulatory remedies

The TÚSR proposes imposing the following obligations on Slovak Telekom: (i) access to

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(Orange Slovensko) [20-30]%, Slovak Telekom [10-20]%, Antik Telecom s.r.o. (Antik) [10-20]%, Swan a.s. (Swan) [0-10]%, Slovanet a.s. (Slovanet) [0-10]% and others [20-30]% (figures of 30 June 2011).

8 This network is based on the Data Over Cable Service Interface Specification (DOCSIS) or its European equivalent euroDOCSIS.

9 The operators are planning to invest more into the enhancement of existing fibre networks (density, capacity, etc.) than further geographic deployment in the near future.

10 The TÚSR starts its analysis at the retail level and concludes that there are many operators offering broadband services in Slovakia over different networks. At the *retail* fixed (broadband) level, Slovak Telekom is by far the largest operator and has a market share of [50-60]%. Orange Slovensko has a market share of [0-10]%. The cable operator UPC has a market share of [5-15]%. Alternative operators using the access network of Slovak Telekom have a market share of [0-10]% (figures of 30 June 2011). As of 30 June 2011, Slovak Telekom's share of the relevant *wholesale* market amounted to [60-70]%, Orange held [0-10]%, and Antik [0-10]%, while the remainder of shares was dispersed.

11 GTS Slovakia is an alternative operator covering the whole territory of Slovakia and has so far used its own FWA network in the 26 GHz and 3.5 GHz bands, which allows connections mainly for business customers in more than 30 cities in Slovakia.

12 The fees for access decreased from 2005 on average by 80 %. The last proposed modification from Slovak Telekom are applied from 15 May 2011. Currently, the charges for using full and shared local loop access (LLU) are as follows:

	Set up fees in EUR		Monthly Rental Fees in EUR	
	Full LLU	Shared LLU	Full LLU	Shared LLU
Slovak Telekom	42.00	44.00	4.20	2.50

and use of specific facilities, (ii) transparency,[13] (iii) non-discrimination, (iv) accounting separation, and (v) price control, including the obligation of cost orientation.

The access obligation is proposed for both copper and fibre networks and comprises (i) full and shared access to copper loop and sub-loop, (ii) fibre access on the basis of Virtual Unbundled Local Access (VULA) to G-PON fibre networks, (iii) full fibre access to PtP fibre networks, (iv) access to ducts and necessary infrastructure, and (v) copper and fibre co-location.

In the reply to the RFI, the TÚSR confirmed that VULA will be made available in the same premises as MDF access for LLU. Moreover, the TÚSR specified that VULA will give full control from the access point to the end user, and allows the service provider to set all parameters (including quality of service, categorisation, aggregation) for its customers.[14]

The TÚSR does not propose to impose WDM access to G-PON fibre networks since *inter alia* it considers that this technology will not be commercially available at least over the next two years.

Moreover, the TÚSR does not propose to impose access to the optical splitter due to the investment costs of this unbundling option for the alternative network operators (ANOs). There is a considerable (20km) distance to the metropolitan point of presence (MPoP) coupled with the fact that there is no space for co-location. In the reply to the RFI, the TÚSR specified that no operator expressed an interest in such access.

In the reply to the RFI, the TÚSR specified that it plans to impose the price control remedy for all the access types and copper and fibre co-location based on the BU-LRIC methodology. The TÚSR clarified that details of the price control remedy will be prepared by an external consultant by the end of 2012, and will be subject to a subsequent public consultation at national and EU level.

III. COMMENTS

The Commission has examined the notification and additional information and has the following comments:[15]

Transitory nature of virtual unbundled products

The TÚSR limits its access remedy in the G-PON fibre network architecture to VULA. The Commission points out that according to Recital 21 of the NGA Recommendation NRAs should be able to adopt measures for a transitional period mandating alternative access products which offer the nearest equivalent constituting a substitute to physical unbundling, provided that these are accompanied by the most appropriate safeguards to ensure equivalence of access and effective competition. Hence, while VULA can be implemented as a transitional measure it should be replaced by fibre unbundling as soon as it is technically and economically feasible, or possibly continue to be required in addition to full fibre unbundling. It is on this basis that the Commission invites the TÚSR to reassess the proposed access remedies as soon as the technology enabling fibre unbundling (e.g. WDM) is available.

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13 Including an obligation to publish a reference offer related to both copper and fibre networks.

14 Slovak Telekom will only carry out an operational oversight.

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

Need to ensure that divergent regulatory approaches to non-discrimination obligations do not create a barrier to the internal market

The Commission welcomes the fact that the TÚSR proposes to impose a price control remedy on a cost-oriented basis, on all forms of access, and co-location. However, the Commission underlines that proper enforcement of the non-discrimination remedy is important to prevent any potential non-price related discriminatory behaviour of the incumbent operator. In view of the work currently undertaken by the Commission on the draft Recommendation on the application of a non-discrimination obligation, the Commission invites the TÚSR to review the details of the non-discrimination remedy once the Recommendation is published.

Pursuant to Article 7(7) of the Framework Directive, the TÚSR 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/EC[16] 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 Commission[17] 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.[18] You should give reasons for any such request.

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

[16] 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.

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

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