



EUROPEAN COMMISSION

Brussels, 23/07/2012
C(2012) 5360

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/2012/1345: Wholesale broadband access 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 22 June 2012 and became effective on that day. It concerns the second review of the market for wholesale broadband access in Slovakia².

The national consultation³ ran from 23 April 2012 to 23 May 2012.

On 3 July 2012 a request for information (RFI)⁴ was sent to the TÚSR and a response was received on 9 July 2012.

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 5 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.

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 broadband access was first notified to and assessed by the Commission in 2006 under case SK/2006/0465.⁵ 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, (ii) transparency including the obligation to publish a reference offer, (iii) non-discrimination, (iv) accounting separation, and (v) an *ex ante* price control on a 'retail minus' basis.

The TÚSR instead imposed, without further EU consultation, on Slovak Telekom only a broadly and generally defined obligation to set prices based on actual costs incurred while the identification of specific costs is subject to a Fully Allocated Historical Cost (FAHC) methodology.⁶

The second market review was first notified in March 2012 under case SK/2012/1307. The TÚSR proposed to impose a 'retail minus' price control methodology for access services. 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

The TÚSR includes copper⁷ and fibre⁸ networks and excludes cable networks from the relevant product market (of technologies with bandwidth over 256 kbit/s). Self-supply of all network operators is included irrespective of the size of the undertakings.

The TÚSR concludes 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, (ii) the control of a non-easily duplicable infrastructure, (iii) the existence of technological advantages⁹, (iv) weak countervailing buyer power, (v) significant market entry barriers, (vi) the current status of competition in the relevant market.

The TÚSR underlines that Slovak Telekom is the only undertaking currently providing wholesale broadband access in the merchant market. Other undertakings, which use their

⁵ SG-Greffe(2006) D/204818.

⁶ In its response to the RFI TÚSR considers the price control regulation currently in force (i.e., FAHC) as 'effective'.

⁷ Based on xDSL technologies.

⁸ Referred to in the notification as FTTx.

⁹ The TÚSR points out that the xDSL infrastructure of Slovak Telekom in combination with its fibre infrastructure represents a technological advantage in the relevant market.

own local fibre infrastructures for the provision of retail services, are active on the wholesale broadband access market through self-supply.

According to TÚSR's response to the RFI Slovak Telekom holds a [60-70] %¹⁰ share of the relevant wholesale market including self supply.

The market share of Slovak Telekom at the retail level is [50-60]% if retail access services provided through copper, fibre and cable technologies are taken into account¹¹. That market share does not include those retail access services which are provided through e.g. WiFi or FWA. TÚSR expects Slovak Telekom's market share to grow in the future due to the increasing number of xDSL access lines and Slovak Telekom's growing FTTx coverage.

The TÚSR states that 13 alternative operators, representing 8.96% of all xDSL accesses, relied on Slovak Telekom's xDSL wholesale offer on 30 June 2011. The TÚSR points out that the alternative operators have little interest in wholesale access services offered by Slovak Telekom including co-location services, and that due to this low interest Slovak Telekom maintains a significant position on the retail market for broadband access. The TÚSR also points out that the absence of competition on the wholesale broadband access market affects the status of competition in neighbouring markets, and affects the provision of retail broadband services to end users. The position of Slovak Telekom is, according to TÚSR, also due to the fact that Slovak Telekom owns the only nationwide infrastructure.

II.4. Regulatory remedies

The TÚSR proposes imposing the following obligations on Slovak Telekom: (i) transparency of access,¹² (ii) non-discriminatory approach to access,¹³ (iii) accounting separation, (iv) access to specific network facilities, and (v) price control, based on a BU-LRAIC methodology for access services and for collocation services.

The TÚSR intends to notify the details of the proposed BU-LRAIC methodology separately¹⁴. The TÚSR does, however, not provide any estimation on when such methodology could be notified and effectively imposed in practice.

The access obligation is proposed for both copper and fibre networks and is to be imposed at IP and Ethernet level.

¹⁰ The market share of Orange Slovensko a.s. (Orange Slovensko) amounts to [5-10] %. The remainder of shares are fragmented (figures of 31 December 2011).

¹¹ The market share of UPC Slovensko s.r.o. amounts to [5-15] %, and Orange Slovensko's amounts to [5-10] %. The remainder of shares are fragmented (figures of 30 June 2011).

¹² Including an obligation to publish a reference offer related to both copper and fibre networks.

¹³ TÚSR does not provide a detailed description of its non-discrimination obligation but obliges Slovak Telekom, in general terms, to apply comparable conditions under comparable circumstances to other undertakings in the provision of broadband access via xDSL and FTTx technologies, and to provide other undertakings with information and services under equal conditions and in equal quality as if it used them for its own needs.

¹⁴ In its response to the RFI TÚSR states that the proposed BU-LRAIC methodology will use CCA (Current Cost Accounting) as an asset valuation method and that it will use a 'tilted annuity' method as a depreciation method.

III. COMMENTS

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

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

The Commission notes that the market for wholesale broadband access has been subject to price regulation for several years and that such regulation has not improved the level of competition on the relevant market in Slovakia. Hence, the Commission would like to underline that the proper enforcement of the non-discrimination remedies could be of great importance 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.

Need for a timely implementation of an appropriate costing methodology

The Commission notes that the TÚSR intends to notify the details of the proposed BU-LRAIC methodology some time in the future but does not specify any specific time. In view of the importance of an appropriate price control for wholesale broadband access services and the currently rather limited impact of regulation on competition, the Commission invites the TÚSR to finalise and notify the BU-LRAIC methodology for access services and for collocation services as soon as possible.

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/EC¹⁶ 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 Commission¹⁷ 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.

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

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: CNECT-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.

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