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Kommunikationsbehörde Austria  
(KommAustria)

Mariahilferstraße 77-79  
A-1060 Wien  
Austria

For the attention of:  
Ms Martina Bohdal and  
Mr Martin Stelzl

Fax: + 43 1 58 058 9191

Dear Ms Bohdal, dear Mr Stelzl,

**Subject: Commission Decision concerning Case AT/2013/1452: Wholesale markets for broadcasting transmission services in Austria**  
**Comments pursuant to Article 7(3) of Directive 2002/21/EC**

## **I. PROCEDURE**

On 13 May 2013, the Commission registered a notification from the Austrian national regulatory authority competent for broadcasting market regulation, Kommunikationsbehörde Austria (KommAustria)<sup>1</sup>, concerning a review of the market definition for broadcasting transmission services<sup>2</sup> in Austria.

The national consultation<sup>3</sup> ran from 5 April 2013 to 3 May 2013.

On 24 May 2013, a request for information<sup>4</sup> was sent to KommAustria and a response was received on 29 May 2013. Additional information was provided on 4 June 2013.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities

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<sup>1</sup> 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.

<sup>2</sup> Corresponding to market 18 in the previous Commission Recommendation 2003/311/EC of 11 February 2003 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, OJ L 114, 8.5.2003, p. 45.

<sup>3</sup> In accordance with Article 6 of the Framework Directive.

<sup>4</sup> In accordance with Article 5(2) of the Framework Directive.

(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 first review of the Austrian market definitions for broadcasting transmission services was conducted in 2003.<sup>5</sup> At that time, KommAustria identified two markets being relevant for ex ante regulation: the market for terrestrial television broadcasting and the market for terrestrial FM radio broadcasting. In 2006, KommAustria designated the incumbent provider of terrestrial broadcasting transmission services, Österreichische Rundfunksender GmbH & Co KG (ORS) as having significant market power (SMP) on both markets. KommAustria imposed access, non-discrimination, accounting separation, price control and reference offer obligations on it.<sup>6</sup>

At the time, the Commission had no specific comments with regard to the market definition or the SMP analysis.

The second review of the wholesale market for broadcasting transmission services in Austria was previously notified to and assessed by the Commission in 2009.<sup>7</sup> KommAustria designated the following broadcasting transmission markets as being susceptible to ex ante regulation:

- i. The market for the multiplexing of broadcasting signals via the multiplex platforms MUX A and MUX B and the transmission of digital terrestrial TV broadcasting signals to end users;
- ii. The market for analogue terrestrial FM radio broadcasting;
- iii. The market for access to broadcasting facilities and digital terrestrial transmission of television signals to end-customers.

In its comments the Commission took note of the fact that KommAustria had notified only the market definition inviting KommAustria to notify the subsequent full market analysis and, if applicable, the imposition of regulatory obligations without undue delay.

### **II.2. Market definition**

In line with the previous review the product/service markets identified by the present measures are the following:

1. wholesale market for “the multiplexing of broadcasting signals via the platforms MUX A and MUX B and the transmission of digital terrestrial TV broadcasting signals to end users”<sup>8</sup>.
2. wholesale market for the “transmission of analogue terrestrial (FM) radio broadcasting signals to end users”.

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<sup>5</sup> Case AT/2003/0018.

<sup>6</sup> Case AT/2006/0360.

<sup>7</sup> Case AT/2009/0896.

<sup>8</sup> The service is requested by TV broadcasting companies who are demanding the signal transmission of TV programmes produced by them to end-users by means of digital terrestrial transmission technology.

3. wholesale market for “the transmission of digital terrestrial TV broadcasting signals to end users” (including the transmission of digital terrestrial TV broadcasting signals in the meaning of a “point to multipoint transmission”)<sup>9</sup>.

The relevant geographic market is national.

In the reply to the request for information KommAustria indicated that analogue terrestrial television has been switched off in 2011.

As regards the switch-over to digital transmission of FM radio broadcasting signals KommAustria informed that a public consultation showed that the vast majority of radio broadcasters do not intend to commit to the potential financial risks of the switch-over yet.

### **II.3. The three criteria test**

In the context of its SMP assessment of the markets for the transmission of analogue terrestrial (FM) radio broadcasting signals to end users and for the transmission of digital terrestrial TV broadcasting signals to end users, KommAustria has analysed the elements related to the three criteria test<sup>10</sup> and identified the following indicators: high and stable market shares, the existence of high barriers to market entry, control of infrastructure not easily duplicated, countervailing buyer power, vertical integration and leveraging, pricing. With regard to the multiplexing market KommAustria carries out only the SMP assessment, and finds no SMP.

With regard to the third criterion, in its answer to the request for information, the regulator states that general competition law is not sufficient to solve the identified competition problems. One threat for competition is that ORS has the incentive to charge prices above a competitive level. It is not guaranteed that competition law is sufficient to target specific competition problems in these markets. Sector-specific regulation provides tailor made remedies and avoids competition problems effectively on an ex-ante basis.

### **II.4. Finding of significant market power**

With regard to the market for the multiplexing of broadcasting signals via the platforms MUX A and MUX B and the transmission of digital terrestrial TV broadcasting signals to end users, KommAustria concludes that no undertaking has significant market power on the relevant market and effective competition is ensured due to sufficient countervailing buyer power<sup>11</sup>.

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<sup>9</sup> Suppliers on this market are the network operators that provide access to transmitter sites for digital terrestrial broadcasting and the transmission of TV signals to end-users. The service is required by multiplex platform operators without an own broadcasting transmission network who demand the transmission of TV programs to end-users bundled by them into digital data streams by means of digital terrestrial transmission technology.

<sup>10</sup> Pursuant to the Recommendation on relevant markets a market is susceptible to ex ante regulation, if it meets the three-criteria test, i.e., (1) there must be high and non-transitory entry barriers, (2) the structure of the market does not tend towards effective competition within the relevant time horizon and (3) the application of competition law alone would not adequately address the market failure(s) concerned.

<sup>11</sup> Terrestrial TV licensees faced with a price increase could exercise countervailing buyer power by threatening ORS to switch from terrestrial transmission altogether, and to transmit their programmes via other platforms exclusively. Such a threat is serious, since the share of TV households that receive digital-terrestrial TV programmes has been steady at approximately 4% since December 2009, while the potential share of digital terrestrial television cannot exceed 7%. In this market, access seekers managed to get discounts of up to 50% from the original prices of ORS during the negotiations.

On the other hand, KommAustria concluded that Österreichische Rundfunksender GmbH & Co KG (ORF)<sup>12</sup> together with ORS has SMP on the (i) wholesale market for the transmission of analogue terrestrial (FM) radio broadcasting signals to end users and (ii) the transmission of digital terrestrial TV broadcasting signals to end users.

KommAustria indicates, in particular, that ORF/ORS have a market share of 100%. Barriers to market entry are very high. There is no sufficient countervailing buyer power to restrict ORS' market power, as the access seekers in this market are MUX operators who do not have the option to change to alternative platforms like satellite or cable as their business case is based on terrestrial distribution of TV programmes. ORF and ORS are vertically integrated, for which reason KommAustria also finds that there is an incentive to discriminate (margin squeeze).

## **II.5. Regulatory remedies**

In order to counter the identified competition problems on the (i) wholesale market for the transmission of analogue terrestrial (FM) radio broadcasting signals to end users and (ii) the transmission of digital terrestrial TV broadcasting signals to end users, KommAustria envisages imposing the following obligations on ORS:

- obligation to give unbundled access to broadcasting transmission services to deliver content to end users on request
- cost oriented prices (efficient costs based on ORS costing)
- price control
- non discrimination
- reference offer
- accounting separation

## **III. COMMENT**

The Commission has examined the notification and the additional information provided by the KommAustria and has the following comment:<sup>13</sup>

### **Need to monitor market developments**

The market for broadcasting transmission services is no longer recommended by the Commission for ex ante regulation, as greater platform competition and fewer capacity constraints, mainly due to the transition from analogue to digital transmission platforms, should render it effectively competitive.

The Commission notes, however, that the terrestrial broadcasting markets in Austria present strong features of lack of competitive conditions, with only one vertically integrated supplier so far, and therefore appear to warrant ex ante regulation.

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<sup>12</sup> ORF is the Austrian public service broadcaster who runs several subsidiaries. ORF owns 60 % of the shares of Österreichische Rundfunksender GmbH & Co KG. Österreichische Rundfunksender GmbH & Co KG on the other hand owns 100% of the shares of ORS comm GmbH & Co KG. Österreichische Rundfunksender GmbH & Co KG and ORS comm GmbH & Co KG are operating the network for digital terrestrial transmission of TV-signals as well as the network for analogue terrestrial transmission of FM radio signals in Austria.

<sup>13</sup> In accordance with Article 7(3) of the Framework Directive.

At the same time, the Commission invites KommAustria to closely monitor the developments in the market in terms of infrastructure and services competition.

Already today, most households (57.2%) use digital satellite as means for TV reception. Cable TV (analogue and digital) is used by 34.3%. On top of that the share of IP-TV was 2.6% in 2012. These developments might soon put into question the current market definition, and the second criterion of the three criteria test (absence of tendency towards effective competition).

In particular, the Commission asks KommAustria to assess whether broadcasting transmission services provided over different platforms develop to the extent that they become viable substitutes due to pricing constraints stemming from an effectively competitive retail market, and therefore the first and/or second criterion of the three-criteria test is no longer met.

Pursuant to Article 7(7) of the Framework Directive, KommAustria 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<sup>14</sup> 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<sup>15</sup> 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.<sup>16</sup> You should give reasons for any such request.

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

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<sup>14</sup> 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.

<sup>15</sup> Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

<sup>16</sup> The Commission may inform the public of the result of its assessment before the end of this three-day period.