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Estonian Consumer Protection and  
Technical Regulatory Authority  
(ECTRA)

Sõle 23A  
10614 Tallinn  
Estonia

For the attention of:  
Mr. Kaur Kajak  
Director General

**Subject: Cases EE/2021/2310 and EE/2021/2311: Markets for wholesale local access provided at a fixed location and for wholesale central access provided at a fixed location in Estonia**

**Opening of Phase II investigation pursuant to Article 32 of Directive (EU) 2018/1972**

Dear Mr Kajak,

## **1. PROCEDURE**

On 17 March 2021, the Commission registered a notification from the Estonian national regulatory authority (NRA), Estonian Consumer Protection and Technical Regulatory Authority (ECTRA)<sup>1</sup>, concerning the markets for wholesale local access provided at a fixed location (hereinafter referred to as “market 1/2020”) and for wholesale central access provided at a fixed location in Estonia (hereinafter referred to as “market 3b/2014”)<sup>2</sup>.

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<sup>1</sup> Under Article 32 of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (the Code) (OJ L 321, 17.12.2018, p. 36).

<sup>2</sup> Corresponding respectively to Market 1 in the Commission Recommendation (EU) 2020/2245 of 18

The national consultation<sup>3</sup> ran from 12 June to 26 August 2020 for market 1/2020, and from 07 April to 15 May 2020 for market 3b/2014.

The Commission sent a request for information<sup>4</sup> to ECTRA on 26 March 2021, and received a reply on 29 March 2021. The Commission sent a supplementary RFI on 30 March 2021 and received a reply on 1 April 2021.

Pursuant to Article 32(4) of the Code, the Commission may notify the national regulatory authority (NRA) and the Body of European Regulators for Electronic Communications (BEREC) of its reasons that the draft measure would create a barrier to the internal market or its serious doubts as to its compatibility with Union law.

## **2. DESCRIPTION OF THE DRAFT MEASURE**

### **2.1. Background**

The markets for wholesale local access provided at a fixed location and for wholesale central access provided at a fixed location in Estonia were previously notified to and assessed by the Commission under cases EE/2017/1980 and EE/2017/1981<sup>5</sup>.

#### *2.1.1. Wholesale local access provided at a fixed location*

The relevant product market was defined by ECTRA as comprising both fibre-optic and copper-pair access services. Supporting services (including collocation, shared use of cable ducting and buildings) were also considered to be part of the relevant market provided that they are necessary for the use of the relevant wholesale services. The relevant geographic market was found to be national in scope.

ECTRA found Telia to hold significant market power on the market and imposed on this operator the following obligations: (i) access to copper and fibre; (ii) non-discrimination; (iii) transparency; (iv) cost accounting separation; and (v) cost-oriented prices, based on a top-down fully distributed historical costs (TD HC FDC).

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December 2020 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with the Code (2020 Recommendation on Relevant Markets) (OJ L 439, 29.12.2020, p. 23-31), and to Market 3b in the Commission Recommendation 2014/710/EU of 9 October 2014 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 of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (2014 Recommendation on Relevant Markets) (OJ L 295, 11.10.2014, p. 79). The latter market has been removed from the list of the relevant markets that may warrant ex ante regulation which is contained in the currently applicable 2020 Recommendation on Relevant Markets.

<sup>3</sup> In accordance with Article 23 of the Code.

<sup>4</sup> In accordance with Article 20(2) of the Code.

<sup>5</sup> C(2017) 3763 final.

### *2.1.2. Wholesale central access provided at a fixed location*

The relevant product market was defined by ECTRA as comprising bitstream services provided over copper, fibre and cable, together with access support services. The relevant geographic market was found to be national in scope.

ECTRA found Telia to hold significant market power on the market and imposed on this operator the following obligations: (i) access; (ii) non-discrimination; (iii) transparency; (iv) cost accounting separation; and (v) cost-oriented prices based on the same cost methodology.

In its comments on both markets, the Commission reiterated its reservations on the TD HC FDC cost methodology used by ECTRA, given in particular that it cannot ensure the stability of copper price – which can have negative effects on investments in existing and next generation infrastructure – and that copper access prices may become unsustainably low for the maintenance of the network infrastructure.

The Commission also noted that the same cost methodology was used to set the cost oriented access price to Telia's fibre lines and asked ECTRA to consider a more flexible approach regarding the regulation of fibre prices, in line with the Recommendation on Non-discrimination and Costing Methodology. The Commission observed that pricing flexibility for fibre based broadband access products could allow Telia to set the appropriate price points and potentially improve Estonia's relatively low ultrafast broadband household penetration.

Finally, the Commission noted the increasing level of infrastructure competition in larger cities as a result of the deployment of cable networks in particular, and invited ECTRA at the occasion of the next market review to collect data at a more granular level with a view to assess whether the definition of geographic sub-markets or the geographic differentiation of remedies would be more appropriate

## **2.2. Market definition**

### *2.2.1 Wholesale local access provided at a fixed location for mass-market products (market 1/2020)*

The relevant product market is defined by ECTRA as including fibre and copper pair access services<sup>6</sup>. The notified draft measure indicates that the wholesale market also include duct access and support services necessary for the use of wholesale fixed access services or for the construction of their own communications network. However, the draft measure does not contain any substitutability analysis between the access to these facilities and passive access to the copper and fibre network; moreover, in its reply to the RFI, ECTRA indicated that access to these facilities is not part of the wholesale local access product market definition.

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<sup>6</sup> Mobile broadband access is considered not to be substitutable with fixed access due to lack of demand-side and supply-side substitutability; in particular, regarding the former, ECTRA indicates that the mobile internet services provide a lower quality in particular in certain weather circumstances and do not ensure the quality of service. ECTRA further indicates that mobile internet services are often limited in volume.

ECTRA indicates that Telia is progressively upgrading its copper network by implementing the vectoring and G.fast technologies. According to the notified draft measure, the entire transition process should concern between 80% and 85% of copper lines over a three-year horizon. ECTRA further indicates that, after the switch to vectoring technology, the unbundling of the local loop is no longer possible and therefore the corresponding copper lines cease to be part of the relevant market<sup>7</sup>. This evolution is contributing to a further decline of copper unbundling, although ECTRA observes that the decrease in the number of copper lines had already started before the implementation of vectoring and already now the number of the unbundled copper lines is negligible<sup>8</sup>.

Regarding the geographic scope of the market, ECTRA indicates in its draft measure that it carried out a competitive analysis for the five major cities (Tallinn, Tartu, Narva, Pärnu and Kohtla-Järve) in order to determine whether the competitive situation in larger cities in the retail broadband market is significantly different from the rest of the Estonian territory<sup>9</sup>.

The relevant geographic market is found to be the entire territory of Estonia, with the exception of two cities (Narva and Kohtla-Järve), where the incumbent (Telia) has a retail market share (in terms of active connections) below [REDACTED]. Outside of these two cities, ECTRA considers that the competitive conditions are homogeneous.

### *2.2.2 Wholesale central access provided at a fixed location for mass-market products (market 3b/2014)*

The relevant product market is defined by ECTRA as comprising bitstream services provided over copper, fibre and cable<sup>10</sup>, together with access support services.

According to ECTRA, the market covers the following wholesale services:

<sup>7</sup> ECTRA considers that virtual access (e.g. VULA) is included in the wholesale local access product market definition but is part of the wholesale central access market (see below).

<sup>8</sup> The number of unbundled copper lines provided by Telia decreased from [REDACTED].

<sup>9</sup> This analysis is not provided in the draft analysis for market 1/2020 but is contained in the draft analysis for market 3b/2014 (see below).

<sup>10</sup> In the table below the number of lines according to technology:

| Access network technology | 2015         | 2016         | 2017         | 2018         | 1 <sup>st</sup> half of 2019 |
|---------------------------|--------------|--------------|--------------|--------------|------------------------------|
| xDSL (copper pair)        | 37 %         | 36 %         | 35 %         | 33 %         | 24 %                         |
| VDSL <i>vectoring</i>     |              |              |              |              | 8 %                          |
| Fibre                     | 34 %         | 36 %         | 38 %         | 41 %         | 43 %                         |
| Cable network             | 23 %         | 24 %         | 25 %         | 25 %         | 23 %                         |
| FWA                       | 5 %          | 5 %          | 1 %          | 1 %          | 1 %                          |
| Other solutions           | 1 %          | 2 %          | 1 %          | 1 %          | 1 %                          |
| <b>TOTAL</b>              | <b>100 %</b> | <b>100 %</b> | <b>100 %</b> | <b>100 %</b> | <b>100 %</b>                 |

- “access service to the access point” i.e. the establishment, management and provision of an access point to a communication network for the provision of communications services to another communications undertaking;
- “broadband access service” means the creation, management and provision of broadband access to a communications network termination point from an access point to another communications undertaking for the provision of communications services (including virtual local access - *VULA*);
- support services necessary for the functioning of the access point and broadband access services.

In its reply to the request for information ECTRA explained that Telia provide currently wholesale broadband access at two levels: national and local. According to the NRA, there is no demand for Telia's local product. The only service in use is a national level wholesale broadband access service.

As regards the geographic market, ECTRA focused its analysis on the retail market shares in the five major cities (Tallinn, Tartu, Narva, Pärnu and Kohtla-Järve).

| Operator            | KOHTLA<br>JÄRVE |      |      | NARVA |      |      | PÄRNU |      |      | TALLIN |      |      | TARTUMAA |      |      |
|---------------------|-----------------|------|------|-------|------|------|-------|------|------|--------|------|------|----------|------|------|
|                     | 2016            | 2017 | 2018 | 2016  | 2017 | 2018 | 2016  | 2017 | 2018 | 2016   | 2017 | 2018 | 2016     | 2017 | 2018 |
| Telia               |                 |      |      |       |      |      |       |      |      |        |      |      |          |      |      |
| Television services |                 |      |      |       |      |      |       |      |      |        |      |      |          |      |      |
| STV                 |                 |      |      |       |      |      |       |      |      |        |      |      |          |      |      |
| Telset              |                 |      |      |       |      |      |       |      |      |        |      |      |          |      |      |
| Fill Networks       |                 |      |      |       |      |      |       |      |      |        |      |      |          |      |      |
| New programme       |                 |      |      |       |      |      |       |      |      |        |      |      |          |      |      |
| Interframe          |                 |      |      |       |      |      |       |      |      |        |      |      |          |      |      |
| ELISA               |                 |      |      |       |      |      |       |      |      |        |      |      |          |      |      |
| <b>Total</b>        | 100%            | 100% | 100% | 100%  | 100% | 100% | 100%  | 100% | 100% | 100%   | 100% | 100% | 100%     | 100% | 100% |

As for market 1/2020 ECTRA concludes on that basis that the Estonian broadband markets are geographically homogeneous with the exception of 2 cities: Kohtla-Järve and Narva. The market is therefore found to be the entire territory of Estonia, with the exception of these two cities.

### The three criteria test for the wholesale central access market

As the market for central access is no longer listed in the Recommendation on Relevant Markets<sup>11</sup> ECTRA, in its response to the request for information submitted its analysis of the three criteria test<sup>12</sup> with regard to the notified market.

<sup>11</sup> Commission Recommendation (EU) 2020/2245 of 18 December 2020 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with the Code (2020 Recommendation on Relevant Markets) (OJ L 439, 29.12.2020, p. 23-31).

<sup>12</sup> In accordance with Article 67(1) of the Code and Recital 22 of the Recommendation on Relevant Markets, National regulatory authorities should also analyse markets that are not contained in this

### *2.2.1. The first criterion: high and non-transitory barriers to entry*

ECTRA observes that although regulatory barriers do not constitute such high barriers to entry, market entrants have to take into account the existence of high structural barriers to entry in relation to the sunk costs associated with the investments needed to provide the wholesale services in the market.

Furthermore, access to financial resources or lack or small economies of scale may be an important barrier to entry for new providers of electronic communications infrastructure.

Finally, the SMP operator at wholesale level is in a position to leverage its market power to the retail market or vice versa which may result in a price squeeze that may prevent new operators from entering the market.

### *2.2.2. The second criterion: no tendency towards effective competition*

As regards this criterion, ECTRA underlines that Telia owns the largest, nationwide network infrastructure<sup>13</sup>. This gives Telia the greatest opportunities to provide wholesale broadband access services, which also gives Telia a clear advantage over competitors in the respective market.

ECTRA considers that Telia's advantages in the provision of wholesale broadband access services, due to its largest infrastructure and a broad customer base, will be maintained for the next three to five years. Moreover, it is unlikely that any alternative operator would be able to successfully duplicate a significant part of the incumbent's network or to make the necessary large-scale investments in order to provide wholesale broadband access services.

### *2.2.3. The third criterion: insufficiency of competition law alone*

ECTRA also considers that the third criterion is met<sup>14</sup>.

On the basis of the above, ECTRA considers that the continuation of sector-specific regulation on the central wholesale broadband access market is justified.

## **2.3. Finding of significant market power**

ECTRA finds Telia to hold significant market power (SMP) on both market 1/2020 and 3b/2014. This conclusion is based in particular on the following elements: the analysis of market shares on the retail broadband market and both wholesale markets, the control of

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Recommendation, but that are regulated within the territory of their jurisdiction on the basis of previous market analyses, or other markets, if they have sufficient grounds to consider that the three criteria test is met. Hence, the national regulatory authorities can also define other relevant product and service markets, not listed in this Recommendation, if they can prove that in their national context, the markets meet the three criteria test.

<sup>13</sup> E.g. Telia owns [REDACTED] of active local loops enabling the provision of broadband services and [REDACTED] of the ducts constructed through which wholesale broadband access services can be provided.

<sup>14</sup> ECTRA states that although all operators that control fixed networks covered by the market definition are in a position to provide services in the wholesale broadband access market, however only two operators provide those services i.e. Telia and Elisa. The vast majority ([REDACTED]) of wholesale services is provided by Telia.



an extensive infrastructure difficult to duplicate, vertical integration, high barriers to entry on the market and absence of countervailing buying power.

With regard to the retail market shares, Telia's retail market share (in number of end users) has been relatively stable since the last market review in 2017 (around [REDACTED]) although no data is available for 2020. The largest competitors, Elisa Teleteenused and STV, which have deployed a coaxial and fibre networks in particular in the main cities, have a market share of respectively [REDACTED] and [REDACTED], again relatively stable in the period 2017-2019. In revenues, Telia's market share was [REDACTED] in 2018 (more recent data is not available).

On the wholesale markets, ECTRA indicates that the market share of Telia is [REDACTED] on the central access market and [REDACTED] on the local access market (in number of connections). However, based on the information provided by ECTRA, the wholesale markets (excluding self-supply) is very limited, with both regulated offers and commercial wholesale offers having a very low take up<sup>15</sup>.

With regard to the control of an extensive infrastructure difficult to duplicate, ECTRA points out in particular that Telia owns the largest network infrastructure, as well as the vast majority of the available duct capacity. In particular, ECTRA indicates that Telia owns [REDACTED] of active local loops enabling the provision of broadband services and [REDACTED] of the ducts constructed through which wholesale broadband access services can be provided.

#### **2.4. Regulatory remedies**

ECTRA proposes the following obligations on Telia:

- Access obligations: regarding the wholesale local access market, obligations to provide passive access to its copper and fibre networks, and to associated facilities, in particular Telia's ducts in the entire territory of Estonia; regarding the wholesale central access market, obligations to provide active and virtual access to its copper and fibre networks.

In particular, regarding duct access, ECTRA has identified competition problems that could limit the effectiveness of this remedy and considered possible changes to the obligations imposed on Telia in that regard. In particular, ECTRA proposes to impose to Telia an obligation to repair ducts at the request of alternative operators and to allocate the repair costs to the common monthly fee for access to ducts. Moreover, ECTRA had considered the possibility to impose on Telia the obligation to provide access to a digital database of the duct network in order to enable alternative operators to have access to accurate information on the presence and availability of ducts. During the public consultation, Telia had objected to this obligation, arguing in particular that its digital database is incomplete and contains business secrets. As a result, ECTRA indicates in the draft measure that while it

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<sup>15</sup> According to the data provided by ECTRA in its reply to the RFI, on market 3b/2014, less than 166 bitstream connections were provided (over copper lines) in 2020, of which [REDACTED] were provided by Telia. On market 1/2020, the number of unbundled copper lines has significantly decreased over the past 5 years (from 3570 lines in 2015 to 25 lines in 2020). Out of the 25 unbundled lines provided in 2020, [REDACTED] were provided by Telia and [REDACTED] by Elisa. Only [REDACTED] fibre lines were provided by Telia on the wholesale market.

considers such obligation to be reasonable and technically feasible, there is a need to further analyse how such an obligation can be implemented in a way that is not detrimental to Telia's business secrets. This would be subject to a separate decision.

The notified draft measures also extend from 6 to 8 months the notice period applicable in case of termination or change in the technical conditions of each available broadband, including in case copper unbundling is phased out due to the implementation of vectoring or G.Fast. ECTRA explains in the draft measure that the 6 months notice is insufficient for the access seeker to be able to offer services to the retail customers based on another regulated input.

With regard to the active access provided by Telia to its fibre network, ECTRA explains in its analysis of the public consultation for the market 3b/2014, and in its replies to the RFI, that it considers that the in-house wiring is not part of the public communication network<sup>16</sup> and is therefore not subject to an access obligation under the notified draft measure. This implies that access seekers would have to reach an agreement with the owner of the in-house wiring (often the owner of the building), or to deploy their own wiring. ECTRA further indicates that it has not issued decisions in the past to impose the sharing of the in-house wiring based on the provisions of Article 12(3) of the Framework Directive as there has been no formal request to that effect, but that it would be ready to apply Article 61(3) once the provision is transposed in Estonia, upon request of an access seeker.

- obligation of transparency;
- obligation of non-discrimination;

The obligation aims to ensure, in particular, that the undertaking applies equivalent conditions in equivalent circumstances to other providers of equivalent services, and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners.

- price control and cost accounting obligation.

ECTRA proposes to continue applying cost-oriented prices for both copper and fibre based on the TD HC FDC cost methodology. ECTRA considers this approach to be the most appropriate in the context of the Estonian market as it ensures that the efficient costs incurred by the SMP operator are covered and guarantees Telia's incentives to invest in new ultra fast broadband networks; and it is easy and cost effective to implement for the NRA and the SMP operator.

During the public consultation of the draft analysis for market 1/2020, the national competition authority has expressed reservations regarding the effectiveness of the price control obligation imposed by ECTRA in the absence of a detailed verification of the costs incurred by the SMP operator. Moreover, during the public consultation of the draft analysis for market 3b/2014, an alternative operator has expressed concerns about the possible existence of a margin squeeze

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<sup>16</sup> ECTRA indicates that the network termination point is usually located in the technical room of the apartment building or on the border of a private house property.



between the price of Telia's wholesale active products and the price of its retail offers.

According to ECTRA, the proposed price control obligations guarantee that an alternative operator as efficient as Telia can compete on the retail market. However, ECTRA indicates in its analysis of the public consultation on market 3b/2014, and in its replies to the RFI, that where Telia, due to the competitive pressure on the retail market, is forced to lower its retail prices close to (the wholesale and retail) costs, or below those costs, the SMP operator should not have to ensure a reasonable margin between the wholesale and retail prices as this could imply that it would have to incur losses in the provision of wholesale services.

### 3. ASSESSMENT

Following the examination of the notification and the additional information provided by ECTRA, the Commission considers that the draft measures concerning both wholesale broadband markets in Estonia fall within the scope of Article 32(4) of the Code. The Commission has serious doubts as to the compatibility of ECTRA's draft measures with EU law and considers that they create barriers to the internal market.

#### **Serious doubts pursuant to Article 32(4) of the Code as regards the relevant market definition**

##### *Lack of sufficient evidence supporting the definition of the relevant product markets*

In carrying out the market analysis, NRAs have to base their assessment on a substitutability analysis and conduct a forward looking evaluation of the relevant market over the next review period<sup>17</sup>. The maximum duration of the review period has been extended to five years by the Code (Article 67(5)), against three years previously.

ECTRA considers that the market for wholesale local access market consists of passive access to copper and fibre lines, while the market for wholesale central access would include active and virtual access to those networks.

The Commission observes that alternative operators have already now almost entirely ceased to use copper unbundling. Moreover, ECTRA indicates that Telia has started to implement a large scale upgrade of its copper network – through the implementation of the vectoring and G.fast technologies – that should concern 80 to 85 % of its copper network within the period of the market analysis. As copper unbundling is no longer available on the parts of the network that are upgraded, the NRA indicates that the corresponding copper lines cease to be part of the relevant product market once vectoring is applied. ECTRA recognises in the draft market analysis that a large-scale switch to vectoring technology could fundamentally change the situation of the relevant market and could give rise to deregulation of that market.

In that regard, the Commission questions whether the inclusion of passive access to the copper network in the product market definition for the wholesale local access market is

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<sup>17</sup> Point 14 of the Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services (2018/C 159/01).

sufficiently justified by ECTRA on the basis of the current situation (very limited take up) and *a fortiori* in a forward looking perspective.

Moreover, ECTRA considers that, in cases where copper unbundling is phased out due to vectoring, the passive access to fibre, the access to ducts or the bitstream services can be suitable substitutes for copper pair access. According to the draft measure for market 3b/2014, access seekers could also request the provision of VULA products but ECTRA indicates in its reply to the RFI that no access seeker has expressed interest for such products and that the characteristics of this product are not defined.

In that respect, the Commission notices that ECTRA has not analysed in its notified measures the substitutability between wholesale passive products included in market 1/2020, and wholesale active and virtual products included in market 3b/2014. ECTRA analysed such substitutability neither under current circumstances nor in a prospective manner. In addition, the Commission notices that, despite the replies from ECTRA to the RFI, the notified draft measure for market 1/2020 is unclear regarding whether the access to duct is part of the relevant product market.

The Commission stresses that, in order to define the boundaries of the relevant product markets in accordance with competition law, ECTRA should provide such substitutability analysis, including by assessing the willingness and ability of alternative operators to switch from a wholesale products to another. The outcome of such an analysis might be that the boundaries of both notified markets would have to be revised (e.g. by defining a single broadband market where all access products are perceived as substitutes from demand side perspective and/or physical infrastructure access market should be defined as the only bottleneck which may exist in some areas). This, of course, would have an impact on the regulatory outcome.

#### *Lack of sufficient evidence supporting the definition of a national geographic market*

According to Article 64(3) of the Code, NRAs shall define the relevant geographic markets within their territory by taking into account, inter alia, the degree of infrastructure competition in those areas, in accordance with the principles of competition law.

The Commission Guidelines on market analysis and the assessment of significant market power<sup>18</sup> (“the SMP guidelines”) indicate that a relevant geographic market comprises an area (i) in which undertakings concerned are involved in the supply and demand of the relevant products or services (as identified in the product market definition), (ii) in which the conditions of competition are similar or sufficiently homogeneous and (iii) which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different or heterogeneous.

The 2020 Recommendation on relevant markets indicates that when defining relevant markets in accordance with Article 64(3) of the Code, national regulatory authorities should identify geographic areas where the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different, having particular regard to

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<sup>18</sup> Commission guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services (SMP guidelines), OJ C 159/1 of 7.5.2018

the question whether the potential operator having significant market power acts uniformly across its network area or whether it faces appreciably different conditions of competition to a degree that its activities are constrained in some areas but not in others<sup>19</sup>.

The Recommendation on relevant markets further indicates that, for the purpose of the geographic market definition, national regulatory authorities should define a basic geographic unit as a starting point for assessing competitive conditions and, on this basis, NRAs should establish a first definition of the scope of the geographic markets by aggregating units that exhibit similar competitive conditions. National regulatory authorities should then assess competitive conditions in a forward-looking manner, by looking at structural and behavioural indicators, taking into account in particular, in line with Article 64(3) of the Code, the importance of infrastructure-based competition. Such indicators can be *inter alia* the networks footprint, the number of competing networks, their respective market shares, trends in market shares, localized or uniform pricing behaviour, characteristics of demands and customer switching and churn. The resulting definition of geographic markets should be checked against an analysis of demand and supply side substitutability. Significant variations of competitive conditions should be taken into account on a forward-looking basis at the stage of market definition. Segmentation of remedies may be used to address less significant or less stable variations in competitive conditions, including by adjusting remedies periodically or punctually, without thereby undermining regulatory predictability<sup>20</sup>.

ECTRA proposes, in both notified market analysis, to exclude from the market two municipalities (Narva and Kohtla-Järve) and to define a single wholesale geographic markets covering the remaining territory of Estonia.

However, the Commission observes that, in the notified draft measure, the geographic market definition seems to be mainly based on analysis of the retail market shares. In particular, ECTRA seems to rely solely on the circumstance that Telia's retail market shares are above 40% in all areas of the country (with the exception of the two excluded municipalities) to reach the conclusion that competitive conditions are homogeneous.

Based on the information provided by ECTRA, the Commission observes important variations in the retail market shares between, large cities (Tallinn, Pärnu, Tartu), where Telia's retail market share (in terms of number of broadband customers) was █ in 2018, and the rest of the country where its market share is around █<sup>1</sup>. Differences appear to be particularly important in the capital city of Tallinn. In that area, retail market shares of Telia are at the level of c.a. █ and two alternative operators gained significant market shares █. In a context where the take up for regulated products (with the possible exception of ducts access) is very low and decreasing, the strong presence of alternative operators in the largest city of Estonia indicates a developed infrastructure based competition.

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<sup>19</sup> Recital 35 of the Recommendation.

<sup>20</sup> Recital 38 and 39 of the Recommendation; see also the Commission Staff Working Document, Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services (C(2018) 2374 final)

<sup>21</sup> Table 9 of the draft market analysis for market 3b/2014. In contrast, in 2018 the market shares of the two largest competitors were respectively █ and █ in the larger cities, and █ and █ in the rest of the territory of Estonia.

In the light of these elements which show significant differences in the degree of infrastructure competition, the Commission considers that ECTRA has not sufficiently justified its finding that the markets are national (apart of the two municipalities); and that it cannot be excluded, based on the information available at this stage that multiple geographic markets exist in Estonia.

Taking into account the presence of strong regional competitors in particular in the area of Tallinn which have deployed their own coaxial and fibre networks, the Commission considers that ECTRA should provide more granular data to analyse possible differences between the degree of infrastructure competition between the different areas of the country, including potential differences between cities and rural areas, as well as inland territories and islands<sup>22</sup>.

At the current stage of the procedure and based on the information available, the Commission has therefore serious doubts as to the compatibility of the draft measure envisaging a national geographic market<sup>23</sup> for the wholesale local and central access markets with the objectives set out in Article 3(2) of the Code, in particular whether by way of the proposed measure ECTRA contributes to the development of the internal market by promoting competition in the provision of electronic communications networks and associated facilities, including efficient infrastructure-based competition, and in the provision of electronic communications services and associated services.

*Lack of sufficient evidence that the market for wholesale central access, as notified, justifies the imposition of regulatory obligation*

The Commission considers that, in light in particular of the insufficiency of the geographic market analysis, ECTRA has not provided sufficient evidence that the three criteria test is met in the entire territory of Estonia.

With regard to the first criterion (high and non-transitory entry barriers) ECTRA has 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. The Commission notes that, at least in Tallinn, there are 2 alternative operators who jointly control more than █ of the retail market and their services largely (if not exclusively) are provided on the basis of self-supply. Therefore, ECTRA's assertion regarding the existence of high barriers to entry and lack of duplicability of Telia's network does not appear to be sufficiently justified, at least on a regional scale.

With regard to the second criterion, i.e. tendency towards effective competition, the Commission stresses that the development towards effective competition does not necessarily require further or “new” entry. As indicated above, the presence of alternative operators in the market seems to suggest that not only entry barriers seem possible to overcome but also that alternative operators have been able to gain substantial market share therefore bringing dynamics in the market at least in the largest city.

The mere fact that Telia's market share in a broad market is above █ and in the area of Tallinn above █ is only indicative of potential dominance but does not per se indicate

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<sup>22</sup> In this regard, ECTRA indicates in its reply to the RFI that in the small islands, broadband services are provided by fixed wireless access.

<sup>23</sup> With the exceptions of the municipalities of Narva and Kohtla-Järve.

that the market is currently not competitive and that dynamics of the market would not have changed in the market review period.

Moreover, with regard to the third criterion, the Commission considers that ECTRA provides no relevant element supporting the conclusion that competition law alone is insufficient to adequately address the identified market failures.

*Lack of sufficient evidence supporting the finding of SMP in the defined market*

The finding of the SMP in the draft measure is mainly based on the market share held by Telia on the broadly defined central and local access markets. Under established case law, a market shares above 50% gives rise to a presumption of dominance in absence of evidence to the contrary. However, in line with SMP guidelines<sup>24</sup>, the market shares should be interpreted in the light of the relevant market conditions, and in particular of the dynamics of the market and of the extent to which products are differentiated.<sup>25</sup>

Even an undertaking with a high market share may not be able to act to an appreciable extent independently of customers with sufficient bargaining strength. In addition, the fact that an undertaking with a strong position in the market face developing infrastructure competition may well indicate that the market is becoming competitive over time. Significant fluctuation of market share over time may be indicative of a lack of market power in the relevant market. The ability of a new entrant to increase its market share quickly may also reflect that the relevant market in question is more competitive and that entry barriers can be overcome within a reasonable timeframe.

The Commission considers that, in light in particular of the insufficiency of the geographic market analysis and likely/potential different competitive conditions across the country, ECTRA has not provided sufficient evidence that Telia holds SMP in the wholesale local access and wholesale central access markets as defined by ECTRA (i.e. at national scope with exception of the two cities).

First, and as mentioned above, the information provided by ECTRA suggest that infrastructure competition is relatively developed, at least in some urban areas. In response to the RFI, ECTRA indicated that 75% of Estonian households are covered by at least two fixed networks; and 50 to 55% by three or more fixed networks. While ECTRA has not provided more granular data, it appears as noted above that it is in particular in the area of Tallinn that competitors have been able to acquire a relatively important and stable retail market shares. Such a structure of market shares, in a context where alternative operators are not relying, or relying to a very limited extent, on access to Telia's infrastructure, suggests the economic feasibility of the duplication of infrastructure at least in those areas where there is sufficient demand for broadband services (i.e. in the largest city of Estonia).

Moreover, ECTRA considers that the SMP finding on both the wholesale local access and central access markets is justified by the very high market shares that Telia holds on these wholesale market. However, in light of the very limited size of the wholesale

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<sup>24</sup> See Point 55 of the Commission guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services (SMP guidelines), OJ C 159/1 of 7.5.2018; and further references provided therein.

<sup>25</sup> Ibidem, Point 54

market and its rapid decrease, the Commission considers that these market shares should be analysed with caution. In particular, ECTRA indicates that, based on data from mid-2019, Telia held a market share of [REDACTED] (in terms of number of lines) on the wholesale local access. However, it appears that in 2020, only 25 unbundled copper lines were provided on the Estonian wholesale, out of which [REDACTED] were provided by Telia and [REDACTED] by Elisa. Moreover, access to Telia's fibre network is extremely limited at the moment ([REDACTED] lines in 2020). The state of competition which developed in Estonia to date, in the absence of the reliance on wholesale local and central access, cast doubts as to the finding that Telia holds SMP.

Based on the information available at this stage, the Commission does not exclude that the take-up for duct access is more important than for other regulated products. However, if ECTRA considers that the access to ducts represents in itself a competitive bottleneck for the existence and further development of alternative networks, the Commission points out that ECTRA should consider the possibility of defining and analysing a separate market for access to civil engineering.

Finally, the Commission observes that, according to ECTRA, imposing an economic replicability test, or a retail-minus price control obligation, to Telia would not be appropriate. ECTRA indicates in particular that in a situation where competitors would lower their retail prices below Telia's retail prices, Telia would be forced to lower its retail price in return, and therefore would not be in a position to ensure a reasonable margin between the wholesale and retail prices as this could imply that it would have to incur losses in the provision of wholesale services. If ECTRA considers that there is a real possibility that Telia would be forced to lower its retail prices and provide wholesale services at a loss under the competitive pressure of alternative operators which have deployed their own infrastructure, this could put into question the conclusion that Telia would be able to act independently of its competitors and customers.

Against this background, the Commission considers that ECTRA has not provided sufficient evidence at this stage to establish that, in particular in the area of Tallinn, Telia would be able to act independently of its competitors and customers.

### *Conclusion*

The Commission has serious doubts as to the compatibility of the notified draft measure/s with Union law and, in particular, the objectives in Article 3 of the Code and considers that they create barriers to the internal market.

## **4. COMMENTS**

Without prejudice to the serious doubts described above, the Commission has examined the notification and the additional information provided by ECTRA and has the following comments with regard to the regulatory remedies that ECTRA intends to impose:

### **Access and price-control obligations**

The Commission observes that, in the draft notified measures, ECTRA proposes continuing to impose on Telia the obligation of passive, virtual and active access to its copper and fibre networks despite the very low and decreasing take up for these products.



If, based on a detailed and granular analysis, ECTRA defines geographic market(s) and finds an operator to have significant market power in the relevant market(s), the Commission considers that it would be important to ensure both the proportionality and effectiveness of the remedies that would be imposed on the regulated operator, based on the competition problems identified in the market analysis.

The Commission takes note of the measures considered by ECTRA to further specify Telia's obligation with regard to access to ducts. The Commission considers that, in areas where the incumbent would be found to have SMP, ensuring an effective, non-discriminatory and transparent access to these facilities can play an important role in the further development of infrastructure competition in Estonia. This includes the obligation for the SMP operator to share all necessary information pertaining to infrastructure characteristics<sup>26</sup>.

With regard to price control obligations, ECTRA proposes continuing to impose on Telia the obligation to provide access to its network based on the TD HC FDC methodology developed by ECTRA.

In line with comments raised in the previous market analysis, the Commission considers that the choice of a TD HC FDC can have potential negative effects, in particular with regard to the promotion of competition and deployment of very high capacity networks<sup>27</sup>. Moreover, the Commission reiterates its comment that ECTRA should consider a more flexible approach regarding the regulation of fibre prices in (non-competitive) areas where Telia face a demonstrable retail price constraint from operators which have deployed their own networks. In line with the Recommendation on Non-discrimination and Costing Methodology, such approach would ensure, through the implementation of economic replicability test, that efficient access seekers are not excluded from the market, and could potentially improve Estonia's relatively low ultrafast broadband household penetration

### **Absence of access to in-house wiring**

With regard to the active access provided by Telia to its fibre network, the Commission considers that the absence of an obligation for that operator to provide access to the in-house wiring, including in cases where this segment of the network exists and is operated by Telia, can seriously undermine the effectiveness of the access obligation. The Commission therefore asks ECTRA to ensure that access seekers can easily obtain access to this segment of the network, either in the context of the obligations imposed to the SMP operator or through the application of the symmetric provisions (Article 61(3), previously Article 12(3) of the Framework Directive).

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<sup>26</sup> In that regard, the Commission points out to Annex II of the NGA recommendation which provides detailed guidance on the information and tools that should be provided to access seekers to ensure that access to civil engineering infrastructure is effective and non-discriminatory.

<sup>27</sup> The Commission observes that in its comments on the two market analysis, the national competition authority, while welcoming some improvements proposed by ECTRA regarding the role of the NRA in the implementation of the price control obligation, has expressed reservations regarding the effectiveness of the price control as imposed by ECTRA, in the absence of a detailed verification of the costs incurred by the SMP operator. The Estonian competition authority calls on ECTRA to ensure a more systematic control of the costs incurred by Telia, as well as to ensure the absence of margin squeeze.

The Commission points out that, in accordance with Article 32(4) of the Code, the notified draft measures concerning the markets for wholesale local access provided at a fixed location and for wholesale central access provided at a fixed location in Estonia shall not be adopted for a further two months.

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

Pursuant to Point 6 of Recommendation 2021/554<sup>28</sup> the Commission will publish this document on its website. If ECTRA considers that, in accordance with Union and national rules on business confidentiality, this document contains confidential information that you wish to have deleted prior to publication, please inform the Commission<sup>29</sup> within three working days of receipt<sup>30</sup>. Please give reasons for any such request.

The Commission will publish this document on its website, together with a notice inviting third parties to submit observations on this serious doubts letter within ten working days.

Yours sincerely,

For the Commission  
Thierry Breton  
Member of the Commission

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<sup>28</sup> Commission Recommendation (EU) 2021/554 of 30 March 2021 on the form, content, time limits and level of detail to be given in notifications under the procedures set in Article 32 of Directive (EU) 2018/1972 of the European Parliament and of the Council establishing the European Electronic Communications Code OJ L 112, 31.3.2021, p. 5

<sup>29</sup> By email: [CNECT-markets-notifications@ec.europa.eu](mailto:CNECT-markets-notifications@ec.europa.eu)

<sup>30</sup> The Commission may inform the public of the result of its assessment before the end of this three-day period.