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Post- och telestyrelsen (PTS)
Box 5398-Valhallavägen 117
102 49 Stockholm
Sweden

For the attention of:
Ms Catarina Wretman
Acting Director-General

Subject: Case SE/2019/2216: Wholesale local access to fibre networks provided at a fixed location in Sweden

Commission's serious doubts - Opening of Phase II investigation pursuant to Article 7 (4) of Directive 2002/21/EC

Case SE/2019/2217: Wholesale local access to copper networks provided at a fixed location in Sweden

Commission's comments pursuant to Article 7(3) of Directive 2002/21/EC

Case SE/2019/2218: Wholesale central access provided at a fixed location in Sweden

No comments pursuant to Article 7(3) of Directive 2002/21/EC

Dear Ms Wretman,

1. PROCEDURE

On 8 November, the Commission registered a notification from the Swedish national regulatory authority, *Post- och telestyrelsen* (PTS)¹, concerning the Swedish markets for wholesale local access to fibre networks, wholesale local access to copper networks and wholesale central access provided at a fixed location.²

The national consultations³ regarding the markets for wholesale local access to fibre networks and wholesale local access to copper networks ran first from 18 June 2018 to 7 September 2018 and later from 22 May 2019 to 19 June 2019. As regards the market for wholesale central access, the consultation ran from 22 May 2019 to 19 June 2019.

On 15 November 2019, the Commission sent a request for information⁴ (RFI) to PTS and a received a reply on 20 November 2019. A second RFI was sent on 21 November and a response was received on the same day.

Under 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.

Pursuant to Article 7(4) of the Framework Directive, 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 EU law.

2. DESCRIPTION OF THE DRAFT MEASURE

2.1. Background

The markets for wholesale local and wholesale central access provided at a fixed location in Sweden were previously notified to and assessed by the Commission under cases SE/2015/1687-1688⁵.

As regards the wholesale local access market, PTS defined the relevant product market to include physical access to copper and fibre-based local loops, as well as virtual access over copper or fibre-based local loops with handover points in/or

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 to 3a (SE/2019/2216 and SE/2019/2217) and 3b (SE/2019/2218) in 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 on a common regulatory framework for electronic communications networks and services (Recommendation on Relevant Markets), OJ L 295, 11.10.2014, p. 79.

³ In accordance with Article 6 of the Framework Directive.

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

⁵ C(2015) 757.

adjacent to the exchange. The geographic scope of the market was found to be national. Regional variations of competitive conditions were identified but ultimately PTS did not consider these to be sufficiently significant and stable to identify subnational markets.

The market for wholesale central access was defined as comprising non-physical or virtual access to copper-based, fibre-based and cable TV networks in the form of two-way transfer from the fixed termination point of an end user to an access point in the provider's network that is regional or national. The market was found to be national.

PTS designated TeliaSonera AB⁶ (Telia) as the only operator with significant market power (SMP) in the wholesale local access market. It reached this finding on the basis of Telia's market share, overall size of the undertaking, control of infrastructure that is not easily duplicated, economies of scale and scope, and vertical integration.

The market for wholesale central access was considered not susceptible to *ex ante* regulation. This conclusion was mainly based on the findings that (i) barriers to market entry were no longer major and lasting, (ii) regulation of market 3a was sufficient to resolve competition problems in the retail market and (iii) the market tended towards effective competition.

In the wholesale market for local access, PTS imposed a full set of remedies on Telia, including physical and virtual access to copper and physical access to fibre. As regards price control for copper access, PTS mandated price caps calculated based on PTS' LRIC model. As regards fibre access, PTS set price caps until November 2016. As of November 2016 price control for fibre access was limited to ensuring economic replicability based on PTS' economic replicability test (ERT).

The Commission invited PTS, as it monitored the market during the following review period, to take into consideration the dynamics of competition at a detailed level in all market segments and to gather data per geographic area on a granular scale. In the view of the Commission, This would enable PTS to consider the effect of competitive safeguards imposed on market 3a to guarantee competition in a specific geographic area or market segment in the light of the more locally varied competitive constraint from other next generation access infrastructures.

2.2. Market definition

2.2.1. Market for retail fixed broadband

The Swedish retail broadband market is characterised by a high demand for high-speed broadband connections. By 2022, PTS projects that 80% of households will have broadband subscriptions with speeds above 100Mbit/s. Already by October 2018, 77% of households and 73% of businesses were connected to broadband via fibre. Only 80% of

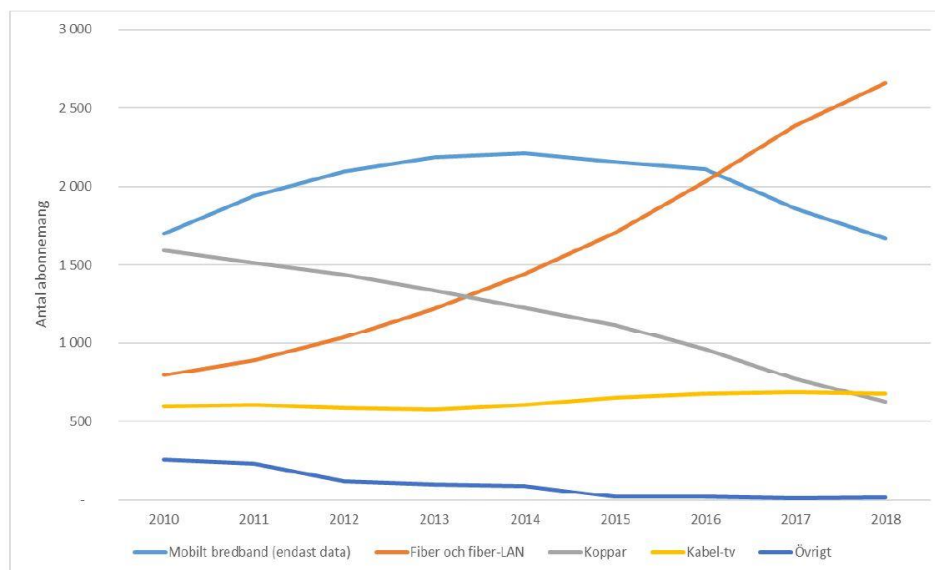
⁶ In 2016 the Group was renamed 'Telia Company AB', hereinafter referred to as Telia.

households were connected to copper⁷ given that the decommissioning of the copper network has already started and new buildings are being connected with fibre.

Approximately 60% of end-users connected with copper are also connected to fibre, and approximately 29% of those end-users connected with copper are also connected to cable. Cable networks are mostly present in multi-dwelling units (MDUs) in urban areas, with only limited presence in rural areas.

The number of fibre subscriptions has increased significantly over the last years, while the number of copper subscriptions has significantly declined. Fibre is currently by far the most widely used type of broadband subscriptions in Sweden.

Number of subscriptions (in thousands) per type of network (source PTS)



PTS finds that broadband via copper is not in the same market as broadband via fibre or cable.⁸ PTS attributes this finding mainly to the fact that copper subscriptions are generally more expensive than fibre subscriptions and to a lack of competitive pressure that copper is able to exercise on fibre and cable, due to the limited importance of upgraded copper. Only copper subscriptions with speeds between 30 and 99 Mbit/s are found to potentially constrain products provided via fibre or cable. However only 7% of broadband subscriptions fall into that speed bracket, which is found to be insufficient to effectively constrain products of higher speeds. Therefore, PTS concludes that there is a break in the chain of substitution. On the other hand, PTS observes a clear substitutability between cable and fibre subscriptions.

Moreover, PTS finds that there is no substitutability between contracts of single dwelling units (SDUs) and multiple dwelling units (MDUs), mainly due to the availability of group contracts for MDUs, which lead to lower price levels for MDUs than for SDUs.

⁷ On the Swedish market, broadband services via copper are mainly offered at download speeds of 2, 8, 24, 30 and 60 Mbit/s. The availability of upgraded copper is limited with only around 20% of copper subscriptions delivering speeds higher than 30Mbit/s.

⁸ Given the importance of fibre subscriptions, the focal product of the substitution analysis is fibre.

Mobile broadband is not considered to sufficiently constrain broadband over copper, even though it offers comparable speeds and comparable price levels. However, despite price increases for copper, the subscriptions to mobile broadband have decreased considerably between 2014 and 2018.

PTS therefore concludes that the retail market for fixed broadband is composed of three separate product markets, namely:

- A market for fixed broadband services delivered over fibre and cable TV networks to MDUs;
- A market for fixed broadband services delivered over fibre and cable TV networks to SDUs, and
- A market for fixed broadband services delivered over copper.

Mobile broadband services and services delivered over fixed wireless networks are not included in the market.

According to PTS, the retail markets do not display geographic differences that would justify a regional segmentation. Therefore, they are found to be national.

In the market for broadband services delivered over fibre and cable to MDUs the largest operator has a market share of approximately 35 % of subscriptions. Telia is the third largest operator with shares higher than 20%. As regards the market serving SDUs, Telia is the largest operator with approximately 35 % of subscriptions.⁹ In the market for broadband services delivered over copper, the market share of Telia is 75%.¹⁰

2.2.2. Wholesale local access to fibre networks

PTS defines the relevant product market to include local access to fibre networks (Fibre to the Home “FttH” and Fibre to the Building “FttB”), including both physical¹¹ and virtual¹² access. Cable is not considered to be part of the market.¹³

At wholesale level, PTS does not consider local access to SDUs and MDUs to be in separate markets. From a purely technical point of view, differences are not

⁹ The second, third and fourth largest operators have a market share of approximately 10%, and there is a high number of small operators with a market share of less than 1%.

¹⁰ The second largest operator in the market has a market share of 12%, the third largest of 5%. The market share of Telia has increased, while the size of the market significantly decreased. This trend is expected to continue as more and more customers will switch to broadband subscriptions offering higher speeds.

¹¹ Physical access is provided at the network owner’s connection point for active transmission equipment, at the next node, or the corresponding access point.

¹² Virtual fibre access is provided in, or in immediate proximity to, the access node to which the end-user is connected.

¹³ Both, physical and virtual local access to cable are not feasible given that cable is a shared transmission medium.

significant. As regards prices, PTS does not find clear and substantial differences in price levels or price developments between the two segments.¹⁴

As regards the geographic dimension of the market, PTS analysed municipalities as the smallest relevant geographical unit. PTS assessed if competitive conditions are different across Sweden. Many municipalities decided to invest in fibre networks in the end of the 1990s/the beginning of 2000s, partly due to regional subsidies launched by the Swedish government. There are around 180 local fibre operators, which are municipalities owned and as such, in addition to revenues, may have access to public means.

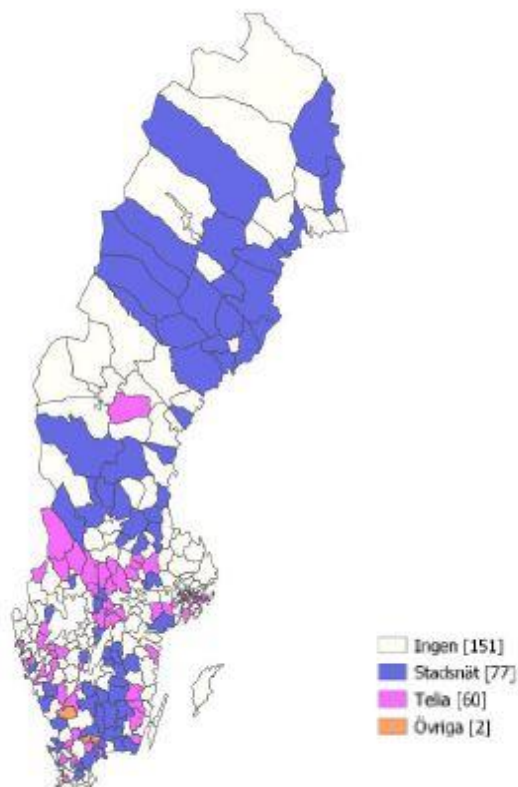
As a consequence, the Swedish fibre access market is fragmented and displays a multitude of fibre network operators. Telia has the largest fibre network with a presence in all municipalities in Sweden.¹⁵ In 139 of Sweden's 290 municipalities, there is a network owner with over 80% of the number of connections. Telia provides more than 80% of connections in 60 municipalities, while municipal networks provide more than 80% of connections in 77 municipalities.¹⁶

The following map indicates the municipalities where a single network owner has over 80% of the number of connections:

¹⁴ Existing price differences can be explained by different underlying costs.

¹⁵ In its response to the RFI, PTS clarified that there is typically (with the exception of 10% of MDUs) no parallel FttH deployment between Telia and alternative operators. Typically, Telia is, besides its connected households, present at the Optical Distribution Frame (ODF).

¹⁶ In municipalities, in which alternative operators have a market share of higher than 80%, Telia would typically have few own connections to customer premises, but mainly provide retail services based on access to the municipal network.



Källa: PTS Byggnadsdatabas 2018.

Source: PTS, chapter 3.6.4.3 of the notification

Telia's prices for local access to MDUs are based on three price categories, which most of the time correspond to the population density in that area.¹⁷ However, PTS does not find indications that the price level corresponds to different levels of regional competition. The FttH product is uniformly priced throughout the country. Therefore, PTS does not find sufficient indications proving different levels of competitive constraints exercised by competing networks. As regards municipal networks, PTS does not find evidence that their pricing level depends on the level of competition in their respective network area¹⁸.

PTS finds that the market is national, as variations of competition across the country are insufficient to conclude otherwise.

¹⁷ In its reply to the Commission's RFI, PTS explained: For MDU, Telia has chosen to apply three national pricelists: Red, Green and Yellow. The Red pricelist is the lowest of the three and is only applied in central Stockholm and parts of the neighbouring Solna municipality. The Green pricelist is mainly applied in urban areas and the Yellow pricelist in rural areas. In general, it is expected that the cost per building/household of building a fibre network should be lower in areas with a high population density compared with less densely populated areas. In other words, Telia's application of the three-tiered pricelist thereby indicates that the price levels in general reflect differences in the rollout cost.

¹⁸ PTS explains that municipal networks have to set prices based on costs according to national law.

2.2.3. *Wholesale local access to copper networks*

The wholesale market for local access to copper networks has considerably declined in the last years as more and more customers have switched to more performant networks. Nonetheless, PTS argues that the market for access to copper remains relevant at least for the upcoming regulatory period.

PTS defines the market to include physical (full and shared) access to copper networks as well as virtual access over copper networks between the end-user and a handover point, in or in connection with a handover point in or adjacent to the exchange.

The geographic dimension of the market is national.

2.2.4. *Wholesale central access*

PTS proposes to define the product market to include access to fibre or cable television networks that provide access to a virtual transmission service. These are services that can be used for the production of broadband services and allow for the two-way transfer of data between the end user's fixed location and a transmission point at regional or national level in the wholesale network of the wholesale provider (central access to the grid). PTS considers the geographic dimension of the market to be national.

2.3. Finding of significant market power

2.3.1. *Wholesale local access to fibre networks*

After concluding that the market meets the three criteria test, PTS analyses the presence of SMP.

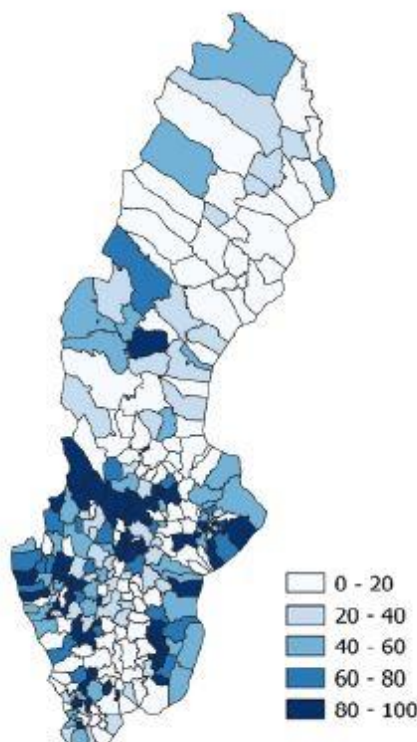
There are currently more than 180 fibre operators present in Sweden, many of which are small local municipal networks¹⁹. Telia is the largest operator and has the highest market share of approximately 37 % nationally. There is a significant gap between Telia and its closest competitor²⁰. According to PTS, Telia's market share will likely remain stable, as new fibre investments are expected to slow down in the coming years.

The market share of Telia differs however significantly across the territory of Sweden.

¹⁹ PTS explains that, based on the Swedish Local Government Act, municipalities may not charge higher fees than the costs of the services and goods provided by the municipality. Municipal actors with fibre networks in several municipalities normally apply uniform prices for local access to fibre networks.

²⁰ If the market share is determined at national level.

Telia's market shares



Source: PTS

In particular in municipal areas where municipal networks have a very high market share, Telia typically provides retail services as an access seeker to the municipal network (central access) or acts as the communications operator, rather than self-providing the FttH/B connectivity.²¹

Because of the control of the largest fibre infrastructure, its vertical integration and its ability to, in many cases, self-provide wholesale and retail fibre services, Telia is found to be able to behave independently of its competitors. Moreover, PTS argues that Telia enjoys some advantages over its competitors through its ability to re-use existing passive infrastructure.²²

²¹ PTS explained in its response to the Commission's RFI that parallel deployment of fibre would be rarely commercially feasible and that it would be less costly for Telia to buy access than to deploy its own network.

²² In its response to the Commission's RFI, PTS explained that it has no current data on the extent to which re-using of existing ducts for fibre deployment is possible. It would depend on the condition of the ducts, the precise geolocation of ducts, available capacity etc. According to PTS, the quality of the ducts is likely to be questionable.

2.3.2. Wholesale local access to copper networks

Despite the fact that the market is shrinking significantly²³, Telia is found to have SMP based on its market share of almost 100%.²⁴ In addition, Telia is a vertically integrated undertaking which is active on the wholesale access market for copper and fibre, which controls infrastructure at different levels of the network, including transport and backbone infrastructure and is active on the retail market²⁵.

2.3.3. Wholesale central access

Based on the three criteria test in the market for central network access, PTS concludes again that barriers to entry are unlikely to be high enough to discourage, to a greater extent, market entries for new operators or the expansion of existing operators. Furthermore, PTS considers that the market is characterised by positive market dynamics in a forward-looking perspective. Finally, PTS considers that general competition rules should be sufficient to address any competition concerns that exist or may arise in the market.

In conclusion, PTS considers that the characteristics of the market for central network access do not justify the imposition of *ex ante* regulation, and therefore considers that the market for central network access should remain unregulated.

2.4. Regulatory remedies

2.4.1. Wholesale local access to fibre

PTS proposes to impose a set of obligations on Telia, including (i) access, (ii) non-discrimination, (iii) transparency, (iv) accounting separation and (v) price control.

As regards access, PTS intends to impose physical access to fibre at and between the following access points: the optical distribution frame (ODF) and the Fibre distribution point (FOS). Telia's fibre rollout topology is "point to point" (P2P), and thus it is possible to physically unbundle its fibre access lines.²⁶ For this reason, PTS does not consider it necessary and proportionate to impose a local virtual access obligation over Telia's fibre network. Telia is also obliged to roll out a connection cable to reach an end customer that has not yet been connected, provided the distance is no more than minor. PTS does not intend to impose access to ducts as it considers access possibilities to passive infrastructure provided through national law to be sufficient. Moreover, PTS proposes to impose access to backhaul, covering a connection between an operator's co-

²³ In June 2018, there were only 776.771 subscriptions of xDSL products in Sweden. Only between 2016 and 2018 the number of subscriptions has dropped by 40%. On average, the market has been losing 135.000 subscribers per year since 2013. The market is expected to be residual by 2025.

²⁴ 60,8% of copper subscriber have access to fibre and 28,9% have access to cable. In its response to the Commission's RFI, PTS provided an estimate that out of the current 541.603 subscribers on copper approx. 160.672 do not have the possibility to switch to an alternative fixed network.

²⁵ Telia has a retail market share of approximately 75%.

²⁶ The access obligation allows access seekers to supply those households that are connected to Telia (37%).

located equipment and a point no more than 50km away, provided as dark fibre or digital connection capacity or optical wavelength.

The non-discrimination obligation is based on the equivalence of input (EoI) principle.

The price control remedy is based on the principle of economic replicability. Telia's main retail offers have to be replicable on the basis of wholesale access products, which are not themselves subject to price regulation. The details of the economic replicability test (ERT) are provided in the draft measure.²⁷

2.4.2. Wholesale local access to copper

PTS imposes a set of obligations on Telia, including (i) access, (ii) non-discrimination, (iii) transparency, (iv) accounting separation and (v) price control.

As regards access, PTS intends to impose local and sub-loop unbundling (LLU and SLU) of the copper network. There is no longer an obligation on Telia, to provide access to ducts. Moreover, there is no obligation to provide virtual access over copper. PTS considers that virtual access is not necessary, as vectoring technology is not present in the Swedish market and as there is no demand. The access obligation includes access to backhaul, covering a connection between an operator's co-located equipment and a point no more than 50km distance, to be provided as dark fibre or digital connection capacity or optical wavelength.

The non-discrimination obligation is based on the equivalence of output (EoO) principle.²⁸

Prices for copper access will be calculated based on PTS's BU-LRIC+ cost model.

3. ASSESSMENT

3.1. Market for wholesale local access to fibre – serious doubts as regards the finding of a national market

The Commission has examined the notification and the additional information provided by PTS and considers that the proposed measure concerning the market for wholesale local access to fibre falls within Article 7(4)(a) of the Framework Directive as it defines a relevant market which differs from those defined in the Recommendation on Relevant Markets, foreseen in Article 15(1) of the Framework Directive.

Compliance with 15(3) and 16(1) of the Framework Directive in conjunction with Article 8 of the Framework Directive

²⁷ The key parameters of this test are as follows: downstream costs will be determined on the basis of an "Equally Efficient Operator" (EEO) standard and calculated in accordance with a Bottom-Up Long Run Incremental Cost Plus (BU-LRIC+) methodology. The reference period within which downstream costs must be covered by retail revenues on the basis of the relevant wholesale inputs is 12 months.

²⁸ PTS considers that the costs associated with implementing the EoI standard would be disproportionate.

In accordance with Articles 15(3) and 16(1) of the Framework Directive, NRAs shall, taking utmost account of the Recommendation on Relevant Markets and the Commission's Guidelines on Market Analysis²⁹, define and analyse relevant markets in accordance with the principles of competition law. In addition, pursuant to Article 8(2) of the Framework Directive, NRAs shall promote competition in the provision of electronic communications services by ensuring that there is no distortion or restriction of competition in the electronic communications sector and by encouraging efficient investment in infrastructure and promoting innovation. Article 8(5)(e) of the Framework Directive specifically states that NRAs shall take due account of the variety of conditions relating to competition and consumers that exist in the various geographic areas within a Member State.

At the current stage of the procedure and based on the information available, the Commission has serious doubts as to the compatibility with EU law of the draft measure envisaging a national geographic market for the wholesale local access to fibre and, as a consequence of this finding, establishing SMP of Telia on that market, according to Articles 15(3) and 16(1) of the Framework Directive. As a result, the Commission has serious doubts as to the compatibility of the draft measure with the specific objectives set out in Articles 8(2) and 8(5)(e) of the Framework Directive.

According to established case law, the relevant geographic market comprises an area in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are significantly different. Areas in which the conditions of competition are heterogeneous do not constitute a uniform market.³⁰

In addition, “[w]hen delineating the exact geographic boundaries of a relevant market, account has to be taken of the scope of the potential SMP operator's network and whether that potential SMP operator 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.”³¹ Ultimately, it has to be established whether services in different areas do indeed constitute a real alternative source of supply.³²

While PTS presents some evidence that Telia acts uniformly within the areas in which it is present with its fibre network³³, the analysis does not sufficiently take into account the actual boundaries of Telia's network. While, traditionally, in the Union, the (copper) network footprint of the incumbent operator was national, this

²⁹ Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications and services (OJ C 165, 11.07.2002).

³⁰ See Point 48 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.

³¹ Commission staff working document accompanying the SMP guidelines, SWD(2018)124 final of 27.4.2018, page 19

³² Point 29 of Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372/5 of 9.12.97.

³³ PTS did not find a link between the application of different price levels and the competitive situation.

appears to be no longer the case when looking at a self-standing fibre access market in Sweden.

Based on the information provided by PTS, it appears that a multitude of fibre networks developed, in many cases at municipal level. As shown, there is a specific model of development based on many municipalities investing in fibre networks which resulted in the presence of around 180 local fibre operators, which are municipality-owned. At the same time, the network reach of Telia and its actual presence and market position differs significantly across the territory of Sweden. Indeed, Telia has a strong presence, accounting for 80% of connections in 60 municipalities. At the same time, municipal networks have a strong presence, accounting for more than 80% of connections in 77 municipalities. In addition, in those municipalities where municipal networks enjoy a strong position, Telia's fibre presence is limited to a presence at ODF/exchange level and few individual connections, and there is typically no parallel deployment of fibre access networks of municipalities and Telia in a given area. The majority of municipal networks are operated by wholesale-only operators.³⁴ In those areas, Telia typically provides retail services as an access seeker to the municipal network based on central access³⁵ or acts as the communications operator³⁶, rather than self-providing the FTTH/B connectivity.

The Commission considers that further network expansion of municipal operators into neighbouring municipalities with a very high presence of Telia is highly unlikely, while Telia at least has the ability to utilize its fibre presence at the local exchanges to incrementally add FttH connections to new customers.

Contrary to traditional copper access markets, where access to incumbent operator's nationwide network would enable access-seekers to supply services throughout the geographic boundaries of that market, in the present case, regulating access to Telia's fibre network would only enable access seekers to provide retail services based on wholesale local access within the footprint of Telia's FttH/B network (37% of national-wide connections)³⁷.

Therefore, the Commission has serious doubts that given the extreme variations of shares of connections in different municipalities, the described variations of the actual capillarity of Telia's fibre access network and the limitation of access seekers to municipal networks to central access, it can be concluded that the market is national. While at national level the market conditions appear to be very heterogeneous, the situation appears different when looking at municipal areas (or aggregated areas with similar conditions). In many cases, the conditions of competition within municipalities appear to be sufficiently homogeneous and are often clearly distinguishable from neighbouring areas. Moreover, the municipalities

³⁴ Less than 20% of municipal networks also provide retail services to end users.

³⁵ No network owner, other than Telia, has to date offered local access to fibre networks to SDUs on the market.

³⁶ It is common among municipal urban networks that the operation of active equipment is outsourced to a communications operator. The communications operator provides central access.

³⁷ Unbundled local access to SDUs is not available on municipal networks. They generally offer bitstream products.

appear to be “*of an appropriate size, i.e. small enough to avoid significant variations of competitive conditions within each unit but big enough to avoid a resource-intensive and burdensome micro-analysis that could lead to market fragmentation, (b) are able to reflect the network structure of all relevant operators, and (c) have clear and stable boundaries over time.*”³⁸

An incorrect definition of the geographic boundaries of the market naturally has an effect on the finding of SMP, which therefore needs to be reassessed in the light of the correct market definition³⁹. While the average market share of Telia of 37% nationally suggests some level of competition in the given market, a more granular analysis clearly shows that the averaging derives, in many areas, from either very high or very low market share and therefore does not properly reflect the relative strength of the operator in any given municipality.

Therefore, the Commission considers the need to open an in-depth investigation to assess the geographic dimension of the market. Given the specific market situation in Sweden, a more granular approach as to the geographic market definition is needed in order to properly reflect the competitive conditions in a given area and consequently to properly assess the presence of SMP and the proportionality of SMP-based access remedies in a given geographic market.

Conclusion

Based on the above, the Commission has serious doubts as to the compatibility of the notified draft measure with EU law.

3.2. Market for wholesale local access to copper - comment

As regards the market for wholesale local access to the copper network provided at a fixed location in Sweden, the Commission has examined the notifications and the additional information provided by PTS and has the following comment:⁴⁰

Need to closely monitor market developments

The Commission takes note of PTS’ finding of SMP on the market for wholesale local access to copper, mainly based on the monopoly position of Telia in that market, its vertical integration and its strong presence in adjacent markets. On the other hand, the market has been shrinking over the past years at a fast rate, as customers are moving towards more performant products that cannot be served based on a copper infrastructure.

³⁸ See point 49 of SMP guidelines.

³⁹ The SMP analysis has to assess to ability of the operator to behave independently of competitors and consumers. Relevant factors might by i.a. if there are constraints stemming from law or statutory requirements, or if competitive constraints from outside the geographic market would be strong enough to constrain the adjacent geographic markets. In this respect, the municipalities might not be in the position to freely set their prices as they are required to obey to statutory obligations, which generally require to set prices no higher than costs. This might be a sufficient constraint, subject to a detailed analysis.

⁴⁰ In accordance with Article 7(3) of the Framework Directive.

The Commission further notes that only a relatively low number of households do not have the ability to switch to other fixed infrastructures and that generally, prices for copper subscriptions are higher than for fibre subscriptions.

In this market environment, it is not obvious that Telia, despite its monopoly position, is able to continue to behave independently of its competitors and ultimately consumers. The consumers show a strong preference for higher performing products and have to a large extent the ability to switch. Moreover, where no fixed alternative is available, consumers may in the future be able to substitute a copper broadband subscription with mobile broadband.

At this point, the Commission does not object to PTS' conclusion that Telia has SMP on the market. However, the Commission urges PTS to further strengthen, in the final measure, its arguments as to Telia's ability to behave independently of its competitors and ultimately consumers and to closely monitor developments on the market. Should the market continue to shrink at the past rates, the Commission urges PTS to revisit its finding of SMP, also taking into account, if relevant, mobile broadband, and to deregulate the market ahead of the end of the standard review period.

The Commission points out that, in view of its serious doubts on the notified draft measure concerning the market for wholesale local access to fibre networks provided at a fixed location in Sweden, that notified draft measure shall not be adopted for a further two months, in accordance with Article 7(4) of the Framework Directive.

The Commission further points out that, in view of its comments on the notified draft measure concerning the market for wholesale local access to the copper network provided at a fixed location, PTS shall, pursuant to Article 7(7) of the Framework Directive, take the utmost account of its comments as well as those of other NRAs and BEREC. PTS may adopt the notified draft measure thereafter and when it does so, shall communicate it to the Commission.

Finally, as regards the wholesale central access provided at a fixed location in Sweden, after examining the notification, the Commission has no comments.⁴¹ Under Article 7(7) of the Framework Directive, PTS may adopt the draft measure concerning wholesale central access provided at a fixed location and, where it does so, shall communicate it to the Commission.

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

Pursuant to point 15 of Recommendation 2008/850/EC⁴², the Commission will publish this document on its website. In case PTS considers that, in accordance with EU and/or national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to publication, please inform the

⁴¹ In accordance with Article 7(3) of the Framework Directive.

⁴² 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.

Commission⁴³ within three working days following receipt and give reasons for any such request.⁴⁴

Pursuant to recital 17 of Recommendation 2008/850/EC, 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

⁴³ By email to CNECT-ARTICLE7@ec.europa.eu .

⁴⁴ The Commission may inform the public of the result of its assessment before the end of this three-day period.