



EUROPEAN COMMISSION

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Box 5398-Valhallavägen 117
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Sweden

For the attention of:
Mr Göran Marby
Director-General

Fax: +46 8 678 55 05

Dear Mr Marby,

Subject: Commission Decision concerning Case SE/2013/1438: Wholesale market for free TV via the terrestrial network and wholesale market for national analogue broadcasting radio via terrestrial networks in Sweden

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

I. PROCEDURE

On 20 March 2013, the Commission registered a notification from the Swedish national regulatory authority, Post- och telestyrelsen (PTS)¹, concerning the wholesale market for free TV via terrestrial network and the wholesale market for national analogue broadcasting radio via terrestrial networks² in Sweden.

The national consultation³ concerning the wholesale market for free TV via terrestrial network ran from 24 February 2012 to 2 April 2012 and from 20 June 2012 to 27 August 2012. The national consultation concerning the wholesale market for national analogue broadcasting radio via terrestrial networks ran from 10 September 2012 to 10 October 2012.

On 2 April 2013, a request for information⁴ was sent to PTS and a response was received on 5 April 2013.

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 market 18 in 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.

³ In accordance with Article 6 of the Framework Directive.

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

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), the Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on notified draft measures to the NRA concerned.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

Wholesale market for free TV over the terrestrial platform

The market for wholesale broadcasting transmission services to deliver broadcast content to end-users in Sweden was previously notified to and assessed by the Commission under case SE/2009/0975. In this second review, PTS identified four markets: (i) a national market for free TV over the terrestrial platform; (ii) a national market for pay TV over the terrestrial platform; (iii) a national market for pay IP-TV over xDSL; and (iv) a market for pay TV via satellite. PTS applied the three criteria test and concluded that only the wholesale market for national broadcasting transmission of free TV via the terrestrial network in Sweden requires ex ante regulatory intervention. Teracom was found to hold significant market power (SMP), and the following obligations were imposed: access for the distribution of free TV broadcasts, cost-oriented prices and accounting separation. The Commission had no comments.

Wholesale market for national analogue broadcasting radio

PTS defined a market for national analogue terrestrial radio, after concluding that products offered through other radio transmission platforms (including web radio and digital terrestrial radio) cannot be considered as substitutes. The three criteria test shows that the market warrants ex ante regulation, namely due to significant barriers to entry as Teracom owns and operates the only nationwide terrestrial network which satisfies the licencing requirements (99.8% coverage) imposed on the two entities providing public service radio. PTS imposed on Teracom, the SMP operator, the following obligations: provision of a wholesale product for distribution, cost-oriented prices and accounting separation. The Commission commented on the need to monitor market developments, in particular with regard to the possibilities of alternative operators to compete on the terrestrial platform and the level of competition between transmission platforms.

II.2. Market definition

National market for free TV over the terrestrial platform

In Sweden, both pay and free TV⁵ are broadcasted via the terrestrial platform. PTS concludes that free TV and pay TV are not substitutable from an end user perspective, as the only costs associated with free TV are an antenna and a simple version of a digital TV box. Despite admitting that free TV does exercise some competitive pressure on the pay TV market, PTS concludes that this is not sufficient to consider the products interchangeable, and that retail customers using free TV would most likely have no interest to switch to pay TV. In its reply to the RFI, PTS clarifies that the mobility between free and pay TV is very low, and amounted to 6% according to a small scale survey carried out by PTS in 2011⁶. In relation to pay TV, PTS reports that since 2009, the number of TV subscriptions via fibre and fibre LAN has increased by 60%.

⁵ PTS defines free TV as broadcasts which are received unencrypted, free of charge and without the need for a subscription by the customer.

⁶ PTS, however, explains that the survey should not be regarded as significant due to a small number of participants.

At the wholesale level, PTS concludes that broadcasting of free TV constitutes a separate product market. Looking at the supply-side substitutability, PTS explains that there are significant difficulties and risks in switching from providing free to pay TV. The companies that currently offer free TV in Sweden are the public broadcaster SVT and commercial providers TV4 Group and MTG. SVT's broadcasting licence requires it to reach at least 99.8% of the Swedish population⁷. Further on, PTS explains that TV4 Group and MTG could, theoretically, change their business model to pay TV, but are not likely to do so as they will lose a significant number of viewers, which will substantially reduce their advertising revenue.

The relevant geographic market is national.

National market for analogue broadcasting radio

In Sweden, there are currently three types of operators providing radio content to end users: public service operators⁸, community radio broadcasters and commercial broadcasters. Moreover, audio signals can be distributed in a number of ways: analogue and digital radio via terrestrial networks, internet radio, radio via cable television, etc. In light of the significant differences in terms of price, features and intended use, PTS observes that end-user mobility between the different platforms is limited. PTS therefore concludes that analogue broadcasting radio via terrestrial networks constitutes a separate retail market.

At the wholesale level, PTS finds that analogue broadcasting commercial radio and community radio via terrestrial networks could not be considered as a substitute to national analogue radio broadcasts⁹. SR's broadcasting licence requires it to reach at least 99.8% of the Swedish population. On the other hand, commercial and community radio operators can broadcast only in limited areas, as they are operating on the basis of regional licences. For these reasons, PTS defines the relevant wholesale market as the market for national analogue broadcasting radio via terrestrial networks.

Regarding the transition to digital radio, PTS explains that the network was extended to cover 85% of the resident population, although the current transmission reaches around 35% of the population. No commercial channels have a licence to broadcast digital radio yet. A legislative proposal in this regard is expected in spring 2013¹⁰. The relevant geographic market is national.

II.3. The three criteria test

As the market for broadcasting transmission services is no longer listed in the

⁷ PTS informs that SVT has recently started to upload its entire content on its webpage, but as this is a new phenomenon, an analysis regarding the impact on the market cannot be made at this stage. However, PTS notices major differences between terrestrial free TV and channels on the web.

⁸ These are Sveriges Radio (SV) and the Swedish Educational Broadcasting Company (UR).

⁹ In its reply to the RFI, PTS explains that it would not be possible to replicate Teracom's network by concluding agreements with a number of community or commercial radios. The issue is not only the coverage, which in PTS's view would never attain the needed 99.8% of the population, but there are also requirements regarding security and level of preparedness that need to be fulfilled. Finally, such agreements would have an impact on planning and allocation of radio spectrum.

¹⁰ The current proposal of the Swedish Public Service Committee is that new licences are issued for SR and UR as of 1 January 2014. Also, the Committee would like to rise the funding to SR and UR to make it possible to build up a digital network for radio, parallel to the analogue one. The Committee further proposes a coverage that would reach 95% of the population at the end of the licensing period (end of 2019). The proposal also invites the Swedish Parliament to decide on the analogue radio switch off.

Recommendation on Relevant Markets¹¹, PTS carries out the three criteria test¹² with regard to the notified market.

Wholesale market for free TV over the terrestrial platform

First of all, PTS concludes that there are significant barriers to entry in the wholesale market for free TV. A network of a scope similar to Teracom's is difficult to replicate, namely because of the significant investment costs, difficulties in obtaining building permits and the fact that the direction of current receiver antennas would need to be adjusted. Secondly, PTS concludes that there is no tendency towards effective competition, having in mind the stable monopoly position of Teracom. Finally, PTS finds that competition law would not suffice in remedying the identified market failures.

Wholesale market for national analogue broadcasting radio

Regarding the first criterion, PTS finds it difficult for an alternative operator to build a network of a scope similar to Teracom's. Moreover, PTS has not observed that the market is dynamic and finally concludes that competition law is not sufficient to remedy the identified market failures.

II.4. Finding of significant market power

Wholesale market for free TV over the terrestrial platform

PTS designates Teracom with SMP based on the following criteria: (i) stable 100% market share, (ii) absence of potential competition, (iii) low degree of countervailing buyer power, (iv) economies of scale and scope which lead to high barriers to entry, and (v) possibility to leverage its position in order to gain competitive advantage on other markets.

As for the low degree of countervailing buyer power, PTS explains that SVT has no other choice than to broadcast over the terrestrial network due to the requirements of its broadcasting licence. The licence requires SVT to (i) reach at least 99.8% of the Swedish population, (ii) demonstrate a certain level of reliability and preparedness, and (iii) ensure that broadcasts targeted to Sweden are received by the public without conditions for separate payment. Moreover, despite the fact that similar licencing constraints are not imposed on TV4 Group and MTG, PTS finds their switching to another business model (terrestrial pay TV) unlikely, as they would risk losing a large part of their advertising revenue which forms a substantial part of their income. This leads PTS to conclude that TV4 Group and MTG are in practice, similarly to SVT, not in a position to leave the terrestrial free TV platform and therefore do not exercise significant buyer power.

Wholesale market for national analogue broadcasting radio

PTS designates Teracom with SMP based on the following criteria: (i) stable 100% market share, (ii) absence of potential competition, (iii) low degree of countervailing buyer power by SR, and (iv) economies of scale and scope which lead to high barriers to

¹¹ Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (Recommendation on Relevant Markets), OJ L 344, 28.12.2007, p. 65.

¹² In accordance with Point 2 in conjunction with Recital 5 of the Recommendation on Relevant Markets, when identifying markets other than those mentioned in the Annex, national regulatory authorities should ensure that the following three criteria are cumulatively met: (1) there must be high and non-transitory entry barriers, (2) the structure of the market must 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.

entry.

II.5. Regulatory remedies

Wholesale market for free TV over the terrestrial platform

PTS proposes to maintain the following regulatory remedies on Teracom:

- (i) obligation to provide wholesale access for distribution of free TV;
- (ii) cost-oriented pricing based on a Fully Distributed Cost (FDC) model¹³;
- (iii) accounting separation.

Wholesale market for national analogue broadcasting radio

PTS proposes to maintain the following regulatory remedies on Teracom:

- (i) obligation to provide a wholesale product in order to distribute national analogue radio;
- (ii) cost-oriented pricing based on the Fully Distributed Cost (FDC) model;
- (iii) accounting separation.

III. COMMENTS

The Commission has examined the notification and the additional information provided by the PTS and has the following comment:¹⁴

Need to monitor market developments

The market for broadcasting transmission services is no longer listed in the Recommendation on relevant markets due to evidence of greater platform competition in the majority of Member States and fewer capacity constraints which can be attributed to the transition from analogue to digital transmission platforms. These changes have led to a situation where despite the possible existence of market entry barriers, the market dynamics are such that the second criterion of the three criteria test is not satisfied.

The Commission however recognises the specificities of the Swedish market in which the described market dynamics have not yet materialised. More specifically, the current broadcasting licences of public broadcasters SVT and UR as well as the fact that digital radio broadcasting is still underdeveloped, make it impossible for them to use any other broadcasting platform than the terrestrial one or to switch to another business model in order to ensure nationwide coverage of services. Nevertheless, the Commission invites PTS to closely monitor market developments, particularly with regard to the below described trends.

The Commission notes that a series of trends in Sweden might lead in the future to adjustments to the market definition. In particular, the Commission notes that since 2009 the number of TV subscriptions via fibre and fibre LAN has increased by 60%. The majority of those new subscriptions are assignable to apartment blocks but about 11% of them belong to single family houses, which according to PTS' previous analysis were the main retail customers of free terrestrial TV. In

¹³ The cost-oriented price shall include a reasonable return on the capital invested, calculated according to the WACC method (Weighted Average Cost of Capital). The latter shall be based on the Capital Asset Pricing Model (CAPM). The same method is proposed to be imposed for analogue radio broadcasting.

¹⁴ In accordance with Article 7(3) of the Framework Directive.

that context, TV services are increasingly being offered as a part of a bundle with broadband services, making the monthly amount paid for the TV service alone less evident for the consumer. These developments might put into question the current (narrow) retail market definition, and the second criterion of the three criteria test (absence of tendency towards effective competition). The Commission therefore invites PTS to closely monitor these developments, and, if needed, adjust the current retail market definition which distinguishes between pay and free TV.

National analogue broadcasting radio

The Commission takes note of the fact that the transition from analogue to digital radio has not yet occurred in Sweden, although a legislative act in this regard is expected soon. The act would, at least according to the current proposal, establish the licencing requirements for digital radio transmission as of 1 January 2014 and possibly also set a date for the analogue radio switch off. In light of the fact that this proposal could have a substantial impact on the market, the Commission invites PTS to carry out a new market analysis or update the current one as soon as possible after the expected legislative act comes into force.

Pursuant to Article 7(7) of the Framework Directive, PTS 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/EC¹⁵ 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 Commission¹⁶ 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.¹⁷ You should give reasons for any such request.

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

¹⁵ 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.

¹⁶ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

¹⁷ The Commission may inform the public of the result of its assessment before the end of this three-day period.