Dear Mr Andersen,

Subject: Case DK/2007/0618: Broadcasting Transmission Services in Denmark

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

I. PROCEDURE

On 30 March 2007 the Commission registered a notification by the Danish regulatory authority, IT – og Telestyrelsen (“NITA”), concerning the wholesale market for broadcasting transmission services to deliver broadcast content to end-users. The national consultation was held from 30 January 2007 to 7 March 2007.

On 16 April 2007, the Commission services sent a request for information to NITA. The reply of NITA was received on 19 April 2007. On 24 April 2007, on the Commission's request, NITA submitted further clarifications.

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


II. DESCRIPTION OF THE DRAFT MEASURE

This notification concerns the wholesale market for the provision of broadcasting transmission services to deliver broadcast content to end users in Denmark. According to the market analysis of NITA, the market for wholesale broadcasting transmission services defined in the Recommendation should - when taking into account market conditions prevalent in Denmark - be sub-divided into the following distinct wholesale markets:

1. terrestrial television broadcasting;
2. terrestrial radio broadcasting;
3. television broadcasting over cable TV, satellite and IP TV networks.

The market definitions of NITA are based on a series of substitution analyses indicating a lack of demand side and supply side substitution between transmission services offered on different platforms.

Substitutability between terrestrial transmission of radio and television services

NITA concludes that transmission services for terrestrial radio and television signals are not substitutable on the demand side, one of the main reasons being the importance of mobile reception of radio signals. On the supply side, substitutability is limited as well, since broadcasting equipment for television signals cannot be used to broadcast radio signals and vice versa (radio and television signals use different frequencies).

Substitutability between services of transmission over terrestrial networks, cable TV networks and satellite networks

NITA stresses that it took a preliminary view according to which transmission services via cable TV networks and IP TV networks, on one side, and transmission services via satellite broadcasting, on the other side constituted separate markets. However, after the national consultation, NITA reviewed its position.

At retail level, according to NITA, satellite operators cover 100% of the country's territory. In practice, there are however some limitations since clients in apartments can not obtain the permission to mount a satellite dish. As regards cable, NITA considers that the two biggest cable operators cover respectively 69% and 17% of the population. Moreover, the coverage of IP TV network is expanding rapidly. Consequently, most of end users in Denmark have access to at least two platforms. Therefore, NITA considers that at retail level, end users can switch from one platform to another relatively easily.

At wholesale level, NITA pointed out in its answer to the request for information from the Commission that many channels are available on one platform only. For instance, TV2 is available on cable TV, but not on satellite, whereas Viasat Sport 2 and 3 are only available on satellite. With regard to IP-TV, NITA considers inter alia that the switching cost do not prevent a content provider to switch between IP-TV platform and cable network following a small but significant non-transitory increase in prices. Under these circumstances, NITA considers that the broadcasting transmission services via cable, satellite and IP-TV

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platforms are in the same market. Since terrestrial broadcasting is subject to a licence which enables broadcasters to broadcast their content and since there are currently no further licences available the terrestrial platform is not considered by NITA as a substitute for content providers present in other platforms.

NITA considers that the market analysis at stake must be reviewed by the end of 2009 when analogue TV broadcasting will cease. In particular NITA will take into consideration the emergence of digital terrestrial broadcast transmission services which are still at an early stage in Denmark. The Danish Competition Authority does not object to the above conclusions reached by NITA.

II.1. Markets susceptible to ex ante regulation

When analysing whether the identified markets are susceptible for ex ante regulation, NITA considers the terrestrial platforms separately from the combined market for cable, satellite and IP-TV platforms.

Terrestrial television broadcasting

NITA is of the view that terrestrial transmission does not warrant ex ante regulation at this point in time for the following reasons. In Denmark, there are three analogue TV operators broadcasting in the entire territory of Denmark: DR and DR2, being non-commercially funded public channels and TV2, which is also a public TV operator. The programmes of these operators are transmitted both analogue and to a very limited extent digitally by BSD, a transmission network jointly owned by DR, DR2 and TV2. In addition, there are a number of non commercial local channels sharing spectrum with SBS TV, the latest being a commercial private operator. SBS TV is available through terrestrial broadcasting means in places where no local operator has been granted an authorisation. SBS TV owns its own broadcasting equipment. This operator also owns its masts or alternatively, it has the right to use existing transmission infrastructure of BSD according to the Danish legislation of access to masts4.

Since all Danish TV operators broadcast their programmes via their own equipment there is no immediate demand from existing operators for terrestrial television broadcasting in Denmark.

Furthermore, as explained above, Danish law requires broadcasters to get a licence which enables them to broadcast their content. There is currently no further broadcasting licence available in Denmark. Consequently there is no possibility for any demand for terrestrial analogue TV broadcasting services from a potential new entrant, either. On the basis of the above, since there is no demand prevailing on the market, ex-ante regulation cannot be justified.

However, as already mentioned the situation will change at the end of 2009 when analogue transmission will be switched off in Denmark. Currently the Danish government is making the necessary arrangement which will create additional broadcasting transmission capacity. NITA underlines that it will be necessary to undertake a new evaluation of the market by the end of 2009 when analogue TV broadcasting will cease.

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4 Law on Establishment and Common Use of Masts for Radio Communications
Terrestrial radio broadcasting

Today there are six analogue FM broadcasting networks in Denmark, four of which are national or nearly national. There is also one AM radio broadcasting network. DR has also started to establish digital broadcasting capacity.

Both the analogue and digital radio broadcasting networks can only be used by broadcasters who have been allocated the necessary frequencies and who have a programme licence allowing them to broadcast the content. The allocation of licences is based on media-political legislation and there is no scope for further licences. Consequently, NITA considers that the conditions for ex-ante regulation are not met.

Satellite, cable and IP TV broadcasting

NITA has carried out the so-called three criteria test in order to determine whether broadcasting transmission services over satellite, cable and IP TV platforms constitute a relevant market susceptible to ex ante regulation.5

There are considerable entry barriers in the market (first criteria) for cable television broadcasting, according to NITA. Similarly, the cost for building an IP TV network is also very high. Conversely, there are two satellite operators covering Denmark. NITA therefore considers that the cost for obtaining a commercial agreement for the provision of broadcasting services through satellite is relatively low.

In its assessment of the second criterion, NITA concludes that both cable TV operators and IP TV operators have rolled out their networks which increases the end user ability to switch from one cable operator to another. In addition, NITA stresses that in Denmark, cable, satellite and IP TV operators pay for the content from respective content providers. Consequently, NITA did not identify any absence of effective competition within a reasonable time horizon (second criteria) which could justify regulatory intervention.

II.2. Absence of significant market power (“SMP”) assessment and remedies

On the basis of the above, NITA considers that for all the relevant markets identified by NITA, the criteria for ex-ante regulation are not. Consequently, NITA considers unnecessary to carry out an SMP assessment and to impose remedies.

III. COMMENTS

The Commission has examined the notification and the additional information provided by NITA and has the following comments6:

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5 See recital 9 of the Commission Recommendation. The three criteria are; (1.) the presence of high and non-transitory entry barriers, (2.) the tendency towards effective competition within a relevant time horizon and (3.) the application of competition law alone does not suffice to address the identified market failures.

6 Pursuant to Article 7(3) of the Framework Directive.
(1) **Assessment of the notification and the additional information provided by NITA**

The additional information provided by NITA (relating to, *inter alia*, market conditions for the terrestrial broadcasting) has been crucial in the Commission’s assessment of NITA’s notification. Therefore, NITA should complement its final measure with the information supplied to the Commission during the notification period.

(2) **Market delineation for cable, satellite and IP TV broadcasting**

In its notification, NITA’s conclusion on the single market for cable satellite and IP-TV broadcasting is based on theoretical considerations on the substitutability of between different platforms. In its reply to the request for the information NITA indicated that it had no empirical information on the switching between platforms by content providers. Nor does NITA provide any information about the negotiation process between transmission providers and content providers. In the absence of further substantiation, the Commission services are not in a position to assess definitively whether the three platforms in Denmark constitute a single market. However, the Commission services are of the view that had NITA applied the three criteria test separately to each platform, it would have reached the same conclusion. Therefore, the market boundaries between cable satellite and terrestrial broadcasting in the present case can be left open.

Pursuant to Article 7(5) of the Framework Directive, NITA shall take the utmost account of comments of other NRAs and the Commission and may adopt the resulting draft measures and, 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.

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For the Commission,
Philip LOWE
Director General