Dear Mr Gungl,

Subject: Commission Decision concerning:

Case AT/2017/1987: Market for wholesale local access provided at a fixed location in Austria

Case AT/2017/1988: Market for wholesale central access provided at a fixed location for mass-market products in Austria

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

1. Procedure

On 31 May 2017, the Commission registered a notification from the Austrian national regulatory authority Telekom-Control-Kommission (TKK), concerning the market for wholesale local access provided at a fixed location and the market for wholesale central access at a fixed location for mass-market products in Austria.


The national consultation run from 6 February 2017 to 17 March 2017.

On 9 June 2017, a request for information was sent to TKK and a response was received on 14 June 2017.

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.

2. DESCRIPTION OF THE DRAFT MEASURE

2.1. Background

The last market review (4th round) of the currently notified markets in Austria was previously notified to and assessed by the Commission under case AT/2013/1475-1476.

In the draft measure for market 4, TKK defined the market including copper and fibre infrastructures as well as virtual access over copper and fibre, and proposed to impose the following obligations on the identified SMP operator, A1 Telekom Austria (A1TA):

(a) access to unbundled subscriber loops and unbundled optical fibre lines as well as virtual unbundling and backhaul services;
(b) obligations relating to information, planning and migration in relation to NGÂ;
(c) non-discrimination including proof of technical replicability;
(d) price control based on a Forward Looking Long Run Average Incremental Costs (FL-LRAIC) model in combination with a margin squeeze test;
(e) transparency; and
(f) accounting separation.

Regarding the price control obligation, TKK set out that, in addition to cost-orientation, a margin squeeze test was needed. TKK explained that the prices in the retail residential market are set below cost due to the fierce competition coming from mobile and cable platforms. The FL-LRAIC model calculated an average LLU price of €15.34 but TKK proposed to impose the price resulting from the margin

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3 In accordance with Article 6 of the Framework Directive.
4 In accordance with Article 5(2) of the Framework Directive.
6 C(2013)8132.
7 As a substitute to physical unbundling where this is not possible.
squeeze test, i.e. €5.87, and only kept the cost-oriented price as a safety cap. The proposed average price resulting from the margin squeeze test for the virtual unbundling was €14.36 also below the cost-oriented rate. For both markets, a combined margin squeeze test\(^8\) was used and also the margin between the two wholesale markets was monitored.

In the draft measure for market 5, TKK defined the market including bitstream based on xDSL and optical fibre, proposed to continue regulating only the non-residential market and imposed the following obligations on A1TA:

(a) access with regional and national handover and backhaul;
(b) traffic transport including different traffic classes for Voice over Broadband (VoB);
(c) retail-minus price control;
(d) non-discrimination including a reference offer;
(e) obligations for switching and migration;
(f) transparency and Key Performance Indicators (KPIs);
(g) accounting separation.

In market 5, TKK did not impose cost-orientation since it found that the potential problem of excessive pricing in the market was limited, but identified the risk that A1TA might squeeze the margin of access seekers and therefore proposed retail-minus price regulation.

The Commission expressed serious doubts as to the compatibility of the draft measures with EU law, initiated a second phase of the Article 7a procedure and concluded the investigation by issuing the Commission Recommendation of 22 November 2013. The Commission recommended that (i) TKK should not impose a price regulation which does not allow the SMP operator a reasonable rate of return on investment and (ii) in particular, with regards to market 4 TKK should assess both whether the competitive constraints are equally strong concerning both residential and non-residential products and whether the competitive constraints coming from mobile and cable operators make it appropriate to differentiate remedies between the residential and non-residential market segments, in particular by not imposing a price control remedy in the residential segment. Regarding the non-residential segment of both markets 4 and 5, the Commission recommended that TKK should reassess whether a cost-oriented rate based on an amended cost model should be imposed as the most appropriate price control remedy.

\(^8\) The test first checks that all costs are covered for all broadband products over the period of one year. Moreover, regarding certain products (mainly promotions and products with especially low margins), the test makes sure that at least the avoidable costs are covered. The test is based on an Equally Efficient operator (EEO)-approach, apart from the costs of DSLAM management in the context of virtual unbundling, where it was deemed more appropriate to use a Reasonably Efficient Operator (REO)-approach.
2.2. Market definition

2.2.1. Retail broadband markets

In the current draft market review (5th round), TKK defines separate retail broadband markets for residential and non-residential customers.

The market for residential customers encompasses DSL\textsuperscript{9}, cable\textsuperscript{10}, FTTH/B (although currently with very limited availability)\textsuperscript{11} and mobile broadband (MBB)\textsuperscript{12}. TKK found that by 2015 approx. 1/3 of customers used MBB, in 60\% of the cases as a "stand alone" solution. TKK observed switching between fixed and mobile broadband. TKK found a high percentage of customer satisfaction with MBB and could not find significant differences in terms of prices, product characteristics or usage between fixed and mobile broadband. However, in its response to the RFI, TKK further explained that the customer satisfaction level with MBB has declined from 93.5\% in 2011 to 85.4 \% in 2015 which can be explained by a trend towards higher data consumption due to video streaming services etc. TKK also points out that MBB connections have in fact declined by 13\% over the period Q4/12 - Q4/14 and that the complementary usage of MBB has increased from 3/10 (in 2011) of the customers to 4/10 customers (in 2015), indicating that competitive pressure from MBB had decreased and may decrease further over the next years.

The market for non-residential customers encompasses only DSL and FTTH (although currently with very limited availability). According to TKK's analysis, cable and MBB are not included in the non-residential retail broadband market as customers would not perceive these products as substitutes and hence these platforms would not exercise sufficient competitive pressure to be included in the market.\textsuperscript{13}

TKK finds that these retail markets are not susceptible to ex ante regulation, as the three criteria test is not fulfilled.

\textsuperscript{9} Approx. 98 \% of households could be provided with broadband via xDSL

\textsuperscript{10} In Austria, there are currently more than 150 cable operators, the main one being UPC, 100 of which offer broadband internet. Broadband via cable networks could be provided to approx. 50 \% of households. Further deployment of cable cannot be observed.

\textsuperscript{11} FTTH/B coverage was limited to 2\% of households by the end of 2014.

\textsuperscript{12} MBB via UMTS, HSPA and LTE is offered by all three MNO's (A1, T-Mobile, Hutchinson 3 Austria), some MVNO's and some resellers. MBB is used for mobile applications (Smartphone) as well as for fixed services ("Cubes").

\textsuperscript{13} Cable is excluded from the market as the share of cable broadband connections in this segment is constantly below 10 \% and almost no changes from DSL to cable broadband could be observed in the past. MBB is not part of the market because the growth of MBB in this segment has been low, practically no companies with currently exclusive fixed broadband plan to switch to MBB and there are currently no genuine business customer products. Also even significant price increases by A1TA in fixed business customer combination products in 2012 did not result in a decline of uptake or switching.
2.2.2. Market for wholesale local access

The wholesale local access market is comprised of copper loops (LLU) including sub-loops (SLU), fibre loops (FTTH) including sub-loops, virtual local access (VULA) over copper- and fibre-(sub-)loops and self-supply over copper- and fibre- (sub-) loops.

Bitstream access products, access via cable and MBB \(^{14}\) are not included in the market mainly due to high sunk costs associated with switching wholesale platforms for alternative operators currently using LLU/SLU. Furthermore, while LLU/SLU allows access seekers to connect to customers on a national level, the reach of cable networks in Austria is merely 50% of households.

The relevant geographic market is national.

2.2.3. Market for wholesale central access

The wholesale central access market encompasses all wholesale bitstream access products on DSL and fibre basis, all Layer 2 wholesale access products on DSL and fibre basis that are handed over at regional handover points, as well as the internal sales of such products. TKK observes a decreased competitive pressure from mobile broadband services and local loop unbundling \(^{15}\). In particular TKK concludes that it can no longer be assumed that on a forward looking basis the competitive pressure exercised by other infrastructures (mobile and unbundling) would be strong enough to ensure sustainable competition absent regulation \(^{16}\). TKK explains that due to increasing demand for higher data volumes (most notably for video-streaming services), the number of MBB connections as well as unbundled connections has declined, even though price increases for fixed connections have been observed. Therefore, the market includes wholesale services for the use of residential and non-residential customer products.

The relevant geographic market is national.

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\(^{14}\) In its response to the RFI, TKK explains that a mobile only operator would - in the absence of fixed wholesale access products - face significant competitive disadvantages towards A1TA (which is the only fully integrated mobile and fixed operator), as their mobile networks would face difficulties to cope with growing data consumption needs. The growing data consumption would require the possibility to route traffic via a fixed network. Otherwise, the mobile operators' ability to compete would likely be inhibited.

\(^{15}\) In its response to the RFI, TKK indicated that A1TA's market share of private customers for DSL has increased from 37.7% in Q1/2014 to 39.8% in Q4/2016, the number of fixed lines (DSL/CATV/FTTH) has in the same time increased from 2.025,736 to 2.263,423. In the mobile segment, Hutchinson 3's market share remained stable (14.6% in Q4/2014 – 14.4% Q4 2016), A1TA's market share declined (14.0% Q1/2014 – 8.6% Q4/2016) and T-Mobile's market share increased (6.5% Q1/2014 – 8.2 Q4/2016, while the overall number of MBB connections for private customers slightly declined in that time from 1,098,338 – 1,070,532. The market share of cable increased marginally from Q1/2014- Q4/2016 (Kabelplus 1.9% - 2.0%, LIWEST Kabelmedien 1.9% - 2.2%, Salzburg AG 2.0% - 2.3% and UPC Austria 15.8% – 16.0%).

\(^{16}\) In the previous market review, the regulated market was limited to the non-residential segment, while the residential segment was considered competitive.
2.3. Finding of significant market power

2.3.1. Market for wholesale local access

TKK concludes that A1TA has SMP on the market for wholesale local access. As the de facto sole provider of metallic and fibre loops, A1TA has a market share of > 99%. TKK finds that due to economies of scale and sunk costs, barriers to entry are high. As the sole operator with a ubiquitous network of metallic LLU and SLU in Austria, A1TA controls infrastructure that cannot easily be duplicated. TKK also finds a lack of countervailing buying power of other operators due to a lack of alternatives. If considering also cable and MBB as part of the market, the market share of A1TA remains high. According to TKK the inclusion or exclusion of cable and MBB would not change the outcome of the SMP finding.

2.3.2. Market for wholesale central access

TKK concludes that A1TA has SMP on the market for wholesale central access. A1TA's market share increased from 88% in Q1/2011 to 92% in Q4/2014. TKK finds barriers to entry to be high and persisting due to economies of scale and sunk costs. A1TA is the sole provider for 30% of all households and thus has control over infrastructure that cannot be easily duplicated. Internet service providers (ISPs) demanding wholesale products do not have sufficient countervailing buyer power to prevent the exertion of market power. TKK justifies the SMP finding on a now broader wholesale market for both residential and non-residential customers with a weakening of competitive pressure stemming from both MBB connections and physical unbundling. In the latter case market entry barriers have increased since physical unbundling will not allow the provision of higher bandwidths and access to physical unbundling is increasingly limited due to the deployment of FTTC/B (vectoring) by A1TA. This is also reflected by the increasing retail market share of A1TA's DSL lines in the residential customer segment, from 37.7% in Q1/14 to 39.8% in Q4/16.

TKK further considers that even if cable and MBB are included in the market, the market share of A1TA remains high and the market structure remains asymmetric. The conclusion that A1TA holds SMP would therefore not change if broadband services delivered via coaxial cable networks or mobile networks were also taken into account.

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17 Under the assumption that the market encompasses xDSL, FTTH, cable and MBB, the market share of A1TA would remain at 57 % (excluding prepaid) / 50 % (including prepaid) (Data Q4/2014).

18 See section 2.2.1 above

19 Under the assumption that the market encompasses xDSL, FTTH, cable and MBB, the market share of A1TA would remain at 53 % (excluding prepaid) / 46 % (including prepaid) (Data Q4/2014). A1TA's market share remained stable over the years 2011-2014. No alternative operator holds a market share of >20%.
2.4. Regulatory remedies

2.4.1. Market for wholesale local access

In the draft measure, TKK imposes the following obligations on A1TA:

(i) Access, including access to LLU/SLU\(^{20}\), detailed conditions to foster VDSL2-Vectoring-deployment, collocation, offering of a VULA product over FTTC/B/H and an obligation to negotiate with competitors reasonable requests on frequency unbundling of FTTH connections.

(ii) Non-discrimination, including the obligation to publish reference offers for access to LLU/SLU (including FTTx-rollout conditions) and for local virtual unbundling (over FTTC/B/H)\(^{21}\), the requirement of proof of technical replicability and SLAs/SLGs/KPIs\(^{22}\).

(iii) Price control.

(iv) Accounting separation.

As regards the access remedy, TKK allows A1TA to deploy vectoring and G.fast technology and to deny access to LLU/SLU in cases where unbundling would interfere with the use of these technologies.\(^{23}\) If A1TA intends to use vectoring, it has to give notice to the affected alternative operators and TKK and make a public announcement of such plan. TKK proposes a differentiated approach for alternative operators using LLU/SLU collocated at an affected switching point and alternative operators who are not collocated at that point at the time of the announcement. For those already collocated, A1TA has to provide an adequate VULA product without additional charges for DSLAM management or transfer of traffic. The VULA product must be offered on request for the entire contract term at the current price of physical unbundling. Further, this type of "forced migration" from a VDSL2 service to a VULA type product must be offered by A1TA free of charge. For alternative operators that are not collocated at an affected switching point at the time of the announcement, A1TA has to provide an adequate VULA product without additional charges for DSLAM management or transfer of traffic. As of the time when VDSL2-vectoring or G.fast is used, the prices for the relevant VULA product will apply.

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\(^{20}\) TKK expects that in the long run all physical unbundling will be migrated to virtual wholesale products. Currently there is little demand for virtual unbundling and physical unbundling remains more important for the time being. In Q2/2015, there have been 232,000 unbundled lines and 800 partially unbundled lines.

\(^{21}\) TKK claims that the current non-discrimination obligation for virtual unbundling equals the EoO standard. A migration to EoI is seen as disproportionate as the implementing costs would be very high and would clearly outweigh marginal gains for alternative operators.

\(^{22}\) Service Level Agreements (SLAs), Service Level Guarantees (SLGs) and Key Performance Indicators (KPIs).

\(^{23}\) TKK explains in its response to the RFI that only the frequency range above 2.2 MHz can be vectored. Access to products that use a frequency range below (i.e. ADSL2+) cannot be denied.
As regards the price control remedy, for LLU/SLU TKK proposes to impose the minimum price of cost-orientation (Bottom-Up FL-LRAIC\(^{24}\)) (€8.16 per line/month) and a margin-squeeze-free price\(^{25}\). The model price of €8.16 considers only those areas of Austria where there is actual take up of LLU/SLU.\(^{26}\) The increase of the regulated wholesale price should only be relevant for new connections.\(^{27}\) Prices for VULA should be set according to an economic replicability test (ERT) with economies of scale adjustments. The ERT should be applied to the cheapest of the identified retail flagship products of A1TA ((i) pure fixed broadband internet and (ii) fixed broadband internet – fixed telephony bundle) and consider the relevant retail price minus fixed values of bandwidth dependent reductions.\(^{28}\)

### 2.4.2. Market for wholesale central access

On market 3b, TKK proposes to impose the following obligations:

(i) Access, including access to IP (layer 3) bitstream products for business customers\(^{29}\), access to a new layer 2 wholesale access product (L2WAP) with regional and central handover and free of charge migration of unbundled POTS/ISDN lines to either a POTS/ISDN wholesale product or to VULA depending on the demand of the alternative operator concerned. This so called "vLLU-regional" was designed to be as close as possible to the market 3a VULA product in

\(^{24}\) The FL-LRAIC model models a hypothetically efficient operator. It is a bottom up model based on replacement costs. Depreciation is adjusted to the actual life cycle of assets.

\(^{25}\) TKK does not expect a lower margin-squeeze-free price for the foreseeable future. The currently highest margin-squeeze-free rate would be € 9.14.

\(^{26}\) The Bottom-Up-FL-LRAIC price considering the whole of Austria would result in a modelled price of € 13.05.

\(^{27}\) With regard to LLU, the old rates will remain relevant, also in case of forced migration to a VULA product of equal bandwidth. If the access seeker asks for higher bandwidths, the new regulated prices apply. The majority of LLU only delivers 8 Mbits (50%), while there are about 43% between 10-30 Mbits and 7% with more than 30 Mbit connections on the basis of LLU (all data as of Q1/2017). RTR expects the majority of current local loop unbundlers’ customers to move to higher bandwidths in the medium term so that the unbundlers would lose the right to keep the old price. RTR also explains that if the new rates would apply in current wholesale contracts, they expect this to be detrimental to local loop unbundlers, as they would encounter either a margin squeeze or would need to pass on the price increase to retail customers, which would lead to an extraordinary right to terminate the contract and subsequently retail customers to switch.

\(^{28}\) An increase of wholesale prices should only be possible for new contracts after the draft measure enters into force.

\(^{29}\) TKK expects that in the long run demand will shift from the layer3 business product to the available layer 2 products.

<table>
<thead>
<tr>
<th>Bandwidth (if appl retail / wholesale)</th>
<th>12 Mbp</th>
<th>20 Mbp</th>
<th>40 Mbp</th>
<th>80 Mbp</th>
<th>150 Mbp</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minimum discount in €</td>
<td>9.74</td>
<td>12.34</td>
<td>14.27</td>
<td>19.04</td>
<td>21.79</td>
</tr>
</tbody>
</table>

An increase of wholesale prices should only be possible for new contracts after the draft measure enters into force.
terms of Quality of Service (QoS) and technical characteristics. This product will have 11 handover points. The availability of virtual unbundling will be extended to the whole territory of Austria and will therefore allow national offers of alternative operators. TKK further imposes the obligation to negotiate requests for multicast to replicate among other things TV bundles in good faith.

(ii) Non-discrimination, including the obligation to publish reference offers for bitstream products (including "vLLU regional").

(iii) Accounting separation.

(iv) Price control.

As regards the price control obligation, TKK considers that the vLLU regional should be economically aligned with the local VULA product, as both products have very similar characteristics and should therefore also be subject to the ERT. TKK proposes to reduce the minimum discount applied to the local VULA by €1.90 in order to cover A1TA costs for forwarding the traffic to the 11 central handover points.

For non-NGA symmetrical bandwidth up to 16/16 Mbits, TKK proposes to set a cost-based price, on the basis of the model price for LLU considering the entire territory of Austria.

As regards the IP (layer 3) bitstream product for business customers, TKK expects this product to be gradually replaced by the vLLU regional (layer 2). For the transition period, TKK proposes to continue to set a margin squeeze free price based on a retail-minus methodology, which cannot exceed the prices listed in the bitstream reference offer of 3 April 2017.

TKK claims that the current non-discrimination obligation for virtual unbundling equals the EoO standard. A migration to EoI is seen as disproportionate as the implementing costs would be very high and would clearly outweigh marginal gains for alternative operators.

<table>
<thead>
<tr>
<th>Retail bandwidths</th>
<th>10 Mbps</th>
<th>20 Mbps</th>
<th>40 Mbps</th>
<th>80 Mbps</th>
<th>150 Mbps</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wholesale bandwidths</td>
<td>12 Mbps</td>
<td>20 Mbps</td>
<td>40 Mbps</td>
<td>80 Mbps</td>
<td>150 Mbps</td>
</tr>
<tr>
<td>Minimum reduction of vLLU local in €</td>
<td>9.74</td>
<td>12.34</td>
<td>14.27</td>
<td>19.04</td>
<td>21.79</td>
</tr>
<tr>
<td>Etherlink costs</td>
<td>1.90</td>
<td>1.90</td>
<td>1.90</td>
<td>1.90</td>
<td>1.90</td>
</tr>
<tr>
<td>Minimum reduction of vLLU regional in €</td>
<td>7.84</td>
<td>10.44</td>
<td>12.37</td>
<td>17.14</td>
<td>19.89</td>
</tr>
</tbody>
</table>

In its response to the RFI, TKK explains that this methodology was chosen in order to prevent any disruptive effects on the market compared to the last price control obligation.
3. **COMMENTS**

The Commission has examined the notification and the additional information provided by the TKK and has the following comments:

3.1. **Scope of the wholesale local and central access markets**

The Commission reminds TKK that with regard to the scope of the relevant wholesale local and central access markets, TKK should normally assess all direct and indirect constraints stemming from cable TV and mobile LTE networks, in particular since services and bundles provided over these infrastructures have been found substitutable at retail level.

The Commission takes note of TKK's argument that the inclusion of said infrastructures in the relevant wholesale markets would not change the outcome of its SMP analysis, and the Commission will not, therefore, question the narrow wholesale market definitions as proposed by TKK, as regards the networks taken into account.

However, the Commission also notes that TKK is in fact broadening the scope of the wholesale central access market subject to regulation, to include wholesale central access for the purpose of serving residential customers, which was previously excluded from the scope of the broadband access market for non-residential customers subject to the current access regulation. The Commission further notes that TKK's finding with regard to indirect constraints emanating from alternative platforms, most notably cable TV, has not been carried out to a sufficient extent.

In this respect, the Commission notes that the changes cited to justify a tightening of regulation are relatively modest in character relative to the previous market review. Neither cable nor mobile broadband providers independent of A1TA have lost market share and alternative providers including MNOs do not currently seem to rely on fixed central access to maintain their market share.

At the same time the Commission recognizes that TKK relies on a forward-looking analysis which suggests that both MBB connections as well as broadband connections relying on physical unbundling may not be able to provide final customers with the necessary capacity and/or performance to compete against FTTC/B (vectoring) based broadband connections. The Commission further recognizes that central access based layer 2 access products offered in market 3b may be increasingly relevant to sustain competition on both the residential and non-residential parts of the retail broadband market.

Yet, in view of the data provided in the notification, which are rather inconclusive with regard to future markets developments, the prospective case for increased reliance on wholesale central access is still fragile. While the Commission does not, in this instance, challenge the SMP finding on a broader wholesale central access market, such extension of regulation on the basis of scarce supporting data, in

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33 In accordance with Article 7(3) of the Framework Directive.
particular on a forward looking basis, can only exceptionally be accepted in the light of A1TA’s demonstrably strong position in both wholesale markets.

However, in view of the importance of alternative platforms for serving specifically the residential segment of the retail broadband access market and the broadening of the related wholesale market subject to regulation to include service of residential customers, the Commission urges TKK to monitor market developments closely and to carry out a fully-fledged direct and indirect constraint analysis at the latest at the occasion of the next market review, and re-analyse the relevant wholesale local and central access markets at an earlier stage, if the predicted increased reliance of alternative platform operators, in particular mobile network operators, on fixed-line wholesale central access inputs does not materialise. In that respect, the Commission asks TKK to monitor the developments in the MBB segment in particular in light of technical developments and data consumption needs to ensure the robustness of the retail market definition in the next market review.

Further the Commission invites TKK 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 more appropriately reflect the actual level of infrastructure competition.

3.2. Need for updated data

The Commission notes that the market data presented in the draft measure are relatively outdated (in many instances Q4/2014). The Commission is of the view that in both the retail and wholesale market analyses these data may not accurately reflect more recent market developments, specifically with regard to competition emerging form alternative infrastructures such as cable and mobile broadband.

Therefore, the Commission urges TKK to strengthen the robustness of its analysis by updating the underlying market data in its final measure.

3.3. Some inconsistency in price setting methods

The Commission notes that TKK imposes different price setting methodologies, namely: (i) cost-based BU-FL-LRAIC prices for LLU/SLU and symmetric bandwidth; (ii) ERT for the layer 2 products "local VULA" and "vLLU regional"; and (iii) retail minus for layer 3 bitstream products. The Commission also notes that TKK expects in the long run that both alternative operators using LLU/SLU and those using layer 3 bitstream will migrate to layer 2 products which would make the ERT the dominant price setting methodology.

In principle, regulation of wholesale access prices should be consistent and predictable along the value chain. Failure to ensure consistency may be detrimental to sending the right build or buy signals and promoting infrastructure investments and competition, especially where retail-minus regulation of the lower rungs of the investment ladder (in combination with intense retail price competition) may discourage further network roll-out and the take-up of layer 2 products anticipated by TKK.

The Commission therefore urges TKK to closely monitor market developments and migration towards layer 2 access products and adjust the imposed price control, if appropriate.
Equally, the price differentiation between existing wholesale customers (benefiting from the legacy prices after margin squeeze correction) and new customers (according to FL-BU-LRAIC) creates uncertainty with regard to the economic sustainability of LLU access based competition over the medium term and may in practice lead to price fluctuation and lack of predictability over several regulatory periods. This, in view of the Commission services, is primarily a result of TKK’s proposed price setting method which sets prices at the minimum of either cost-oriented or margin squeeze free results, an approach which has already been criticised by the Commission in its Recommendation of 22 November 2013 issued in cases AT/2013/1475-1476. Moreover, as the cost-oriented (FL-BU-LRAIC) price for LLU/SLU is calculated solely on the basis of costs in areas where LLU/SLU has actually taken place, and currently appears to be below the lowest margin-squeeze-free price currently observable in the market, there does not appear to be any reason for existing customers in such areas to continue to avail of artificially lower rates which could distort technology choice and investment decisions.

While the Commission recognises that presently and for the foreseeable future the cost-oriented (FL-BU-LRAIC) price will apparently prevail at least for all new customers, the Commission further asks TKK to revisit its price setting method at the occasion of the next market review and to set the local access price in line with the result of the recommended\textsuperscript{34} cost model only.

The Commission recognises that the unequal treatment of existing wholesale customers (benefiting from old margin squeeze adjusted rates based on retail prices prevalent at the time of the last market review) and new customers (subject to FL-BU-LRAIC rates) is transitory and limited in scope given the expected transition from lower to higher bandwidths as well as the limited uptake of unbundling lines in Austria. However, the Commission asks TKK to justify this unequal treatment in its final measure in view of TKK’s obligation under Article 8(2) of the Framework Directive to ensure that there is no distortion or restriction of competition in the electronic communications sector, as well as Article 16(4) of the Framework Directive and Articles 8 and 10 of the Access Directive requiring national regulatory authorities to impose appropriate remedies in a non-discriminatory manner.

Pursuant to Article 7(7) of the Framework Directive, TKK 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 \textit{vis-à-vis} other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC\textsuperscript{35} the Commission will publish this document on its website. The Commission does not consider the information contained

\begin{itemize}
\item[34] See Commission Recommendation 2013/466/EU of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment.
\end{itemize}
herein to be confidential. You are invited to inform the Commission\(^\text{36}\) 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.\(^\text{37}\) You should give reasons for any such request.

Yours sincerely,

For the Commission,
Roberto Viola
Director-General

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\(^\text{36}\) Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

\(^\text{37}\) The Commission may inform the public of the result of its assessment before the end of this three-day period.