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Regulatory Coordination and Markets Unit (B3)
BU33 6/26

DG Communications Networks, Content and Technology
European Commission
B-1049 Brussels

- per Email: cnect-relevant-markets@ec.europa.eu

Vienna, 8th of January 2013

Public Consultation on the revision of the recommendation on relevant markets

Dear Sir or Madam,

This paper contains the response of Hutchison 3G Austria GmbH (3 Austria) to European Commission's consultation dated 16 October 2012.

3 Austria is the fastest growing mobile operator in Austria and part of Hutchison Whampoa Limited's telecommunications division.

Existing fibre infrastructure is the key for success

3 Austria believes that the ambitious goals set in the Digital Agenda for Europe, will not be met without the use/sharing of existing fibre infrastructure. Telecommunication operators, especially incumbents, have already deployed ducts and fibre across Europe, a fair amount of which is not being used at all. On the other hand there is a fast raising need for greater capacity for transmission, primarily in rural areas.

Given the need for greater capacity for transmission 3 Austria is of the opinion that the inclusion of the dark fibre market in the revised Recommendation on Relevant Markets and consequently defining the SMP operator in this market would promote competition and guarantee a wide range of differentiated services for consumers.

The dark fibre market in a revised Recommendation on relevant markets is necessary with a view to the three criteria test

Question 13: *On the basis of the three criteria test carried out at EU level, can any other markets be identified that should be added to the list in the revised Recommendation, from an ex ante perspective? If yes, please provide comprehensive reasoning thereof.*

As mentioned before, 3 Austria believes that the dark fibre market should be added to the list in the revised Recommendation. The inclusion would help mobile and fixed line operators to handle their backhaul and thus increase the quality of their networks.

Due to the ever increasing demand for higher data transfer rates and capacity, driven by data intensive services, mobile operators, need higher capacity to handle their traffic.

Only access to optical fibre can help operators conduct their traffic from their base stations. If the dark fibre market were to remain unregulated, there is a definite danger of foreclosure, putting providers without access to fibre, at a clear competitive disadvantage.

The Austrian Regulatory Authority RTR has also recognised the need for action and is currently attempting to remedy the situation by including dark fibre into the wholesale terminating segments of leased lines market.

Although this is a good first step, we believe that a generic "dark fibre market" would better address the competitive problems arising on this market and could also greatly improve competition on downstream markets.

3 Austria believes that the three criteria test for this market shows that regulation is necessary.

First criterion: *The presence of high and non-transitory barriers to entry*

There can be no doubt about the fact, that the cost of rolling out fibre is extremely high, as it proves to be one of the barriers for achieving the goals of the Digital Agenda. The Commission has realised this problem and even initiated a public consultation on reducing the cost of rolling out fibre.

As we believe, that the barriers to entry are undeniably high, due to the costs involved, the first criterion has been met.

Second criterion: *A market structure that does not tend towards effective competition within a relevant time horizon*

In our view only incumbents can offer a nationwide supply of dark fibre and of course there is little if no incentive to offer access to competitors. In Austria this is proven by the fact that many companies formerly offering dark fibre have been bought by A1 Telekom Austria and dark fibre is no longer available from the incumbent.

Taking into account a significant powerful position of the incumbent as well as the high cost of rolling out new physical infrastructure, a change in market structure (i.e. a new entrant rolling out an extensive network of fibre throughout the country) that would enable competition on the dark fibre market seems highly unlikely.

We therefore consider the second criterion to be met.

Third criterion: *Application of competition law alone does not adequately address the market failure*

As there is a definite danger of foreclosure, giving the owner of the infrastructure a competitive advantage, we believe ex post regulation will not be able to address the market failure in a timely manner.

Furthermore regulatory attempts in Austria, such as the infrastructure atlas, have not proven effective. Even if the location of a certain dark fibre or duct were known, the SMP operator would have an incentive not to grant access or only on the grounds of unacceptable conditions.

Thus the NRA would have to be addressed in every case, making the access to dark fibre a costly and time intensive procedure.

The presence of a reference offer and the obligation of access would simplify this procedure and thereby foster competition.

We have shown that in our view all three criteria have been met, making the dark fibre market an ideal adaption to the list of markets in the revised Recommendation.

The inclusion of the dark fibre market in a revised Recommendation on relevant markets will help guarantee long lasting and sustainable competition

Question 14: *If the answer to the previous question is yes, please specify the qualitative and quantitative impact of the relevant market(s) you propose to add on consumers (users), competition, and development of the internal market. Please provide separate reasoning on the impacts for each market you propose to add to the list.*

The regulation of the dark fibre market and the subsequent definition of an SMP operator will help promote sustainable competition between providers, as it will also affect competition on downstream markets.

It would also be an economical decision, as the parallel construction of fibre networks, while dark fibre is still available, would only use capital that could be invested elsewhere.

The high level of control and freedom that dark fibre offers to operators ensures that a wide range of differentiated services can be offered to end users. Thus the user experience would be improved, giving end users the choice between more operators.

We thank for the opportunity to give this statement and kindly ask to take our statement into account in the consultation procedure.

Yours faithfully,

Gerhard Horvath
Head of Regulatory Affairs & Carrier Relations