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Vienna, 7th January 2013

ISPA CONTRIBUTION ON THE PUBLIC CONSULTATION ON THE REVISION OF THE RECOMMENDATION ON RELEVANT MARKETS

Dear Sir / Madam,

ISPA (Internet Service Providers Austria; Identification Number: 56028372438-43) is pleased that the Commission has issued this consultation on the revision of the recommendation on relevant markets.

ISPA would like to emphasize that a healthy and competitive market is the foundation for the success of the digital agenda. It is also the prerequisite for European users to have access to high quality communication networks and services. At the moment there exists a current and long-lasting trend away from traditional leased lines towards Ethernet-based services. This demand is driven by the high data volumes and high cost-pressure. ISPA is of the opinion that both factors, high data volume and cost pressure, will remain relevant in the foreseeable future, while the demands made by business clients will continue to grow. For these reasons ISPA considers one factor to be crucial for the future of competition in this field in Austria: The affordable access to infrastructure.

ISPA points towards another lasting trend in Austria, the fact that the number of unbundled broadband lines of alternative providers is steadily on the decline and has been for years. This development points towards a re-monopolization of the fixed line broadband market, since only the incumbent has been able to increase its market share. Regulation in this regard has thus proven to be ineffective.

Given the need for greater capacity for transmission ISPA 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.

ISPA is of the opinion that access to dark fibre would guarantee a wide range of differentiated services for consumers, since the purchasers of dark fibre enjoy a high level of technical control and freedom.

Therefore ISPA would like to make the following comments on how a revised recommendation on relevant markets could improve the situation:

1. 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.

ISPA would like to add the dark fibre market to the list in the revised Recommendation, since such a regulation could help promote competition.

In Austria, as already mentioned, the number of broadband lines unbundled by alternative providers is steadily on the decline, while the incumbent is the only one experiencing growth in the fixed line broadband market. Regulation in this regard has been ineffective, since the National Regulatory Authority is of the opinion, that mobile broadband is an equal substitution and that the so called "virtual local loop unbundling" (vLLU) would reverse this trend.

However this is not the case, since the vLLU up to now is not working properly, because alternative providers are not given enough technical control to offer differentiated services to end users and remain competitive.

At the same time, providers both fixed line and mobile, have a fast growing demand for capacity for their own use in order to connect their own equipment.

With a view to the ever increasing demand for high data transfer rates and capacity driven by data intensive services, mobile broadband access could very well hit a barrier in the future. This demand could be satisfied by access to optical fibre. If the dark fibre market would remain unregulated the danger exists that those providers, which do not have access to fibre, will be driven out of the competition.

ISPA would like to point to the three criteria test, where the first criterion of the presence of high and non-transitory barriers to entry has been met:

The cost of building the necessary ducting to roll out fibre is also very high. The roll out of physical infrastructure is very costly, due to requiring machinery, the necessary permits and well-trained staff.

Therefore ISPA is convinced that the first criterion of the three criteria test has been met.

The second criterion, which consists of a market structure which does not tend towards effective competition within the relevant time horizon, is also fulfilled in the opinion of ISPA:

A supply that would cover the whole country could only be offered by the incumbent, yet there is little strategical interest for the incumbent to do so. This is further evidenced by the fact that the companies formerly offering dark fibre have been bought by the incumbent and dark fibre is no longer available from the incumbent.

Taking into account the above as well as the high cost of rolling out new physical infrastructure a change in market structure that would enable competition on the dark fibre market seems to be highly unlikely. ISPA therefore considers the second criterion met.

The insufficiency of competition law alone to adequately address the market failure(s) concerned is the third criterion. This is also met in ISPA's opinion, since all national regulation attempts, such as the infrastructure atlas, have not been successful.

The remedies offered by competition law alone would not be sufficient, since that would require the National Regulatory Authority (NRA) to step in, every time the location of a dark fibre needs to be known. This would mean a costly and time intensive procedure that also requires significant know-how, since the NRA only considers very well prepared and documented cases. Since a lot of alternative providers consist of small and mid-sized companies many do not have the necessary resources to do so and as a result would therefore hesitate to contact the National Regulatory Authority about a dark fibre location.

For the reasons given above ISPA considers all three criteria met and calls for the inclusion of the dark fibre market in the revised Recommendation.

2. 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.

In ISPA's opinion the regulation of the dark fibre market and consequently defining the SMP operator on this market could help promote long lasting and sustainable competition between providers.

Especially since dark fibre offers a high level of control and freedom, which ensures that a wide range of differentiated services can be offered to end users. Especially since the need for band-width, speed and higher data transfer rates is ever increasing, it is very important to grant many providers access to dark fibre in order to ensure competition.

The Austrian Regulatory Authority has also recognized that a need for action on neighbouring markets exists; it is currently attempting to remedy the situation by including dark fibre into the wholesale terminating segments of leased lines market. If this attempt is fails, the incumbent will succeed for the foreseeable future in securing the monopoly in the dark fibre market and elsewhere.

In conclusion ISPA considers the inclusion of the dark fibre market in the revised Recommendation on relevant market and consequently defining the SMP operator on this market to be vital for sustainable and long-lasting competition. Furthermore competition in some neighbouring markets is decreasing; a dark fibre market regulation could remedy this development.

For further information or any questions please do not hesitate to contact us.

Sincerely,



Dr. Maximilian Schubert
General Secretary
ISPA Internet Service Providers Austria

About ISPA: ISPA is the Austrian association of Internet Service Providers (Identification Number: 56028372438-43), representing approximately 200 ISPs. ISPA is a major voice of the Austrian Internet industry. Our goal is to shape the economic and legal framework supporting optimal growth of the Internet and Internet services. We regard the use of the Internet as an important cultural skill and acknowledge the resulting socio-political responsibilities.