EUROPEAN
COMMISSION

Brussels, 16.11.2018
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COMMISSION DECISION

of 16.11.2018

in accordance with 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") lifting reservations in Case HU/2018/2107: wholesale high quality access provided at a fixed location in Hungary

Only the Hungarian version is authentic

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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")[1] and in particular Article 7(5)(b) thereof,

Having called on interested parties to submit their observations pursuant to the provision cited above[2] and having regard to their observations,

Having regard to the opinion of the Body of European Regulators for Electronic Communication (BEREC)[3],

Whereas:

1. PROCEDURE

1. On 16 August 2018, the Commission registered a notification from the Hungarian national regulatory authority, National Media and Infocommunications Authority (NMHH)[4], concerning the market for wholesale high quality access provided at a fixed location[5] in Hungary. The national consultation[6] ran from 29 June 2018 for 20 days.

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[1] 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] Notice published at: https://circabc.europa.eu/sd/a/1374460e-47d6-4618-9118-b75fa6b86e01/Notice%20to%203rd%20%20parties_HU_2107.pdf

[3] Opinion of BEREC of 15 October 2018, BoR (18)199.

[4] 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.

[5] Corresponding to market 4 in Commission Recommendation 2014/710/EU of 9 October 2014 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

2. On 27 August 2018, a request for information[7] was sent to NMHH and a response was received on 29 August 2018. On 4 September 2018 a supplementary request for information was sent to NMHH and a reply was received on 5 September 2018.

3. On 17 September 2018, the Commission, pursuant to Article 7 and 7a(1) of the Framework Directive, informed NMHH of the reasons as to why it believed that the draft measure would create a barrier to the internal market and why it had serious doubts as to the compatibility of the draft measure with EU law (the "Serious doubts letter").

4. On the same day BEREC was informed about the issuing of the serious doubts letter.

5. The Commission did not receive any third party observations.

6. On 10 October 2018 the Commission sent a request for information to NMHH and a response was received on 15 October 2018.

   On 15 October 2018, BEREC delivered its opinion with regard to the assessment of the Commission's serious doubts concerning the designation of an operator with significant market power (SMP).[8] The Commission's serious doubts related to the proposed remedies will be subject to a separate BEREC opinion.

2. DESCRIPTION OF THE ORIGINALLY NOTIFIED DRAFT MEASURE

7. The market for wholesale high quality access at a fixed location in Hungary was previously notified to and assessed by the Commission in 2011 under case number HU/2011/1269[9]. At that time, NMHH proposed to split the market into two separate submarkets for analogue and TDM leased lines, according to bandwidth (up to 2 Mbit/s, and above 2 Mbit/s, respectively). Ethernet leased lines were excluded from the relevant market. With regard to higher bandwidth leased lines, NMHH considered that the structural barriers to entry were transitory, due to high potential returns as well as expected significant growth in that market. Even if the market share of alternative providers did not increase, NMHH considered that this market was evolving towards effective competition, hence proposed its deregulation. NMHH designated Magyar Telekom (MT) as having SMP in the market for low bandwidth leased lines, and imposed on it a full range of remedies[10], with the exception of price control.

8. In the draft measure currently under investigation, notified on 16 August 2018, NMHH significantly redefined the scope of the relevant market. The defined market, besides the analogue and TDM leased lines, also included Ethernet leased lines[11]. The product market excluded the terminating segments of leased lines used to provide mobile backhaul. Moreover, the leased lines provided by operators MVM NET and NISZ to the government and to the owner of the electricity grid were excluded from the relevant market. Since 2012, the two operators are obliged by law to provide leased lines services to the above-mentioned customers, which in turn can

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on Relevant Markets), OJ L 295, 11.10.2014, p. 79.

6 In accordance with Article 6 of the Framework Directive.

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

8 In accordance with Article 7(5) of the Framework Directive.

9 C(2011)9502.

10 Access, transparency, non-discrimination and accounting separation.

11 Due to technological developments and the evidence that customers are replacing analogue and TDM leased lines with Ethernet leased lines.

only purchase leased lines services from the two operators. Therefore, this exclusive right effectively grants MVM NET and NISZ a legal monopoly in this part of the market.

9. Further, unlike in its previous market review, NMHH considered that the relevant wholesale market should not be divided according to bandwidths. NMHH considered that the increasing use of higher bandwidth products, as well as the overlap between prices for leased lines in adjacent capacity classes justified the definition of a single market encompassing all capacities. This conclusion was further supported by evidence of ease of switching to higher capacities, and more generally the migration from analogue or TDM lines to Ethernet leased lines.

10. NMHH proposed to designate MT as the SMP operator. NMHH highlighted structural changes on the market (in particular the merger between MT and one of its competitors, GTS), high and stable market shares exceeding 50%, as well as other factors (absolute and relative size, control over infrastructure not easy to duplicate, absence of countervailing buyer power, access to capital, economies of scale and scope, potential competition, entry and expansion barriers).

11. NMHH proposed to impose on MT the following remedies: access[12]; transparency; non-discrimination; price control[13] and cost accounting; access to and use of specific network facilities; and accounting separation.

3. SERIOUS DOUBTS EXPRESSED BY THE COMMISSION WHEN INITIATING THE SECOND PHASE UNDER ARTICLE 7 OF THE FRAMEWORK DIRECTIVE

12. The Commission expressed serious doubts as to the compatibility with EU law of NMHH's draft measure concerning the designation of an operator with SMP.

3.1. Compliance with Articles 14 and 16(2) of the Framework Directive

13. The Commission noted that large parts of the relevant market, on which NMHH designated MT with SMP, did not to meet the three criteria at the occasion of the previous market review. The Commission observed that NMHH did not carry out a three criteria assessment and did not sufficiently explain the changes in market circumstances that led NMHH to reach a different conclusion.

The Commission observed that the evidence presented by NMHH with regard to the SMP assessment was inconclusive. In particular, the Commission pointed to noticeably lower market shares held by MT in the upper-bandwidth segment of the market. The Commission also noted significant price decreases over the years, a development which is generally not indicative of the exercise of SMP. Finally, the Commission considered that NMHH did not sufficiently take into account the effects on the market exerted by services that were excluded from the relevant market, on the basis of the legal provisions granting special and exclusive rights to MVM NET and NISZ. The Commission recognised that, because of the legal limitations, the leased line services provided by MVM NET and NISZ to public institutions could

12 Only with regard to Ethernet leased lines, as access to other interfaces (analogue and TDM) is no longer relevant in view of technological progress.

13 NMHH proposes to allow MT to recover only costs directly related to the provision of wholesale terminating segments of leased lines. During the Phase I investigation it remained unclear whether and to what extent MT would be allowed to recover through the regulated fees a share of joint and common costs, as well as the costs of its passive infrastructure.

not be included in the relevant market. The regulator argued that, due to the special nature of the relationship between customer and supplier, there was no demand-side substitution. Nevertheless, the Commission argued that the effects of substitution and migration of the governmental entities away from the commercial suppliers should have been considered in the assessment of the competitive constraints faced by market players, even if such constraints stem from outside the relevant market. The Commission's view was that the consideration of the economic consequences of the legal monopoly concerning the services provided to the governmental entities was likely to decrease the alleged market power held by MT.

14. In light of the above considerations, the Commission considered that the draft measure was not compatible with Articles 14 and 16(2) of the Framework Directive.

4. OPINION OF BEREC

15. On 15 October 2018, BEREC issued an opinion[14] on the Commission's letter of serious doubts pursuant to Article 7(3) of the Framework Directive, related to the designation of SMP.

16. BEREC considered that the Commission's serious doubts regarding assessment of SMP are not justified.

17. Firstly, BEREC is of the opinion that NMHH has sufficiently addressed the change in the market circumstances that has led to find SMP in a segment of the market that did not meet the three criteria test in the previous market review. BEREC, therefore, considers that the Commission's concerns regarding NMHH's insufficient explanation on the changes in market circumstances are not justified.

18. Further, BEREC expressed the view that in order to assess whether SMP exists, only market shares based on the defined relevant market (on which the Commission did not raise 'serious doubts') should be considered. As NMHH defined the relevant product market as including all leased lines, irrespective of technology and bandwidth, any consideration as to the market shares on a specific segment of the market (for example, higher bandwidth ranges only) is irrelevant.

19. Moreover, BEREC does not agree with the Commission's finding that MT's low market shares on the wholesale merchant market (i.e. wholesale leased lines which were not self-supplied by operators) is a sign of effective competition in the market. The total number of non-self-supplied wholesale leased lines represents only 11% of the retail market for leased lines and the size of the wholesale merchant market fell by 19% in the period 2012 - 2016. This context leads to the following conclusions: barriers to enter the wholesale market are high; the merchant wholesale offer does not serve a big proportion of the retail demand; and operators mostly rely on their own networks to provide retail leased lines. BEREC argues that only data including self-supply should be taken into account for the analysis. MT's market share including self-supply is high and has remained fairly stable during the period 2012 – 2016. Therefore, BEREC is of the opinion that the Commission's doubts on this point are not justified.

20. With regard to pricing, BEREC points out that it is rather difficult to obtain reliable data on retail leased lines markets. This is due to the nature of the market itself, where customers are mainly high-end businesses (or public administrations) who

[14] BoR (18) 199.

receive tailored integrated offers satisfying most of their telecommunications needs (including advanced data services, fixed telephony and broadband, mobile communications, etc.). Other factors further complicate the comparability of price data (contract duration, QoS/SLAs). BEREC notes that NMHH has supplied no detailed information regarding the operators’ costs.

21. Given the above, BEREC agrees with NMHH that determining excessive pricing or comparing price levels between operators can prove very difficult.

22. BEREC agrees with the Commission on its view that a significant price decrease over the past years, *a priori*, is not indicative of SMP. However, the decrease in price levels coincided with the migration from analogue/TDM leased lines to the less costly and better performing Ethernet platform. NMHH argues that the effect of passing on cost reductions to end-users could have contributed to the decrease in price levels. At the same time, MT is able to charge a higher prices compared to its main competitors, while maintaining its market share at a high level. This could indicate the presence of SMP, NMHH says. BEREC agrees with NMHH’s statement that the year-to-year decline in average prices does not exclude (in itself) excessive pricing. Considering the explanations above, BEREC does not support the Commission’s doubts on the finding of SMP due to MT’s observed pricing behaviour.

23. BEREC notes that the assessment of the Commission’s comment on the legitimacy to grant exclusive rights to NISZ and MVM NET for the provision of leased lines is outside of the scope of this BEREC opinion. However, BEREC considers it to a degree that is necessary for the assessment of the compliance with Articles 14 and 16(2) of the Framework Directive.

24. BEREC agrees with the Commission that the excluded services should not be disregarded in the assessment of the market. BEREC states it is important to understand whether and to what extent NISZ or MVM NET are capable of constraining MT's behaviour.

25. Moreover, NMHH has not assessed to what extent the infrastructure used to provide leased lines to the public sector, could be technically used to provide leased lines to other customers or if the existing infrastructure could provide a competitive advantage for network extension.

26. Therefore, BEREC shares the Commission’s opinion that NMHH has not sufficiently analysed the consequences of the exclusion of this market segment in terms of the impact it had on the alleged market power of MT and overall competitive dynamics. Despite the marginal effect of such an additional analysis, BEREC considers the Commission’s doubts justified on this count. However, given the relatively low volume of leased lines provided commercially to customers other than the public sector, BEREC questions whether the inclusion of such an analysis would affect materially the SMP assessment.

27. Concerning the Commission’s view that the transition from analogue/TDM leased lines to the more efficient Ethernet technology implies fewer advantages for MT resulting from its legacy network, BEREC considers that the investment in Ethernet equipment is not an investment in supplementary services *per se*, but rather the natural replacement of analogue/TDM lines. The advantages of analogue/TDM networks are passed on to Ethernet networks, due to the relatively low investments

required and the continuity of service. Therefore, according to BEREC, the ownership of a legacy network remains an advantage for MT.

28. In conclusion, BEREC is of the opinion that the Commission's serious doubts regarding the insufficient explanation by NMHH on the important changes to the relevant market are not justified. BEREC also concludes that the Commission's doubts stemming from the analysis of market shares on specific segments of the market, as well as the alleged diminished advantages deriving from the ownership of a legacy networks, are not justified. In addition, BEREC concludes that MT's pricing behaviour does not justify the Commission's serious doubts regarding NMHH's SMP assessment.

29. On the other hand, BEREC agrees with the Commission that NMHH has not sufficiently taken into account the effects on the market exerted by the leased lines provided by MVM NET and NISZ, which were excluded from the relevant market. That notwithstanding, BEREC believes that the inclusion of such an analysis would not have led to a different conclusion in the SMP assessment. Therefore, the overall conclusion is that BEREC considers that the Commission's serious doubts on the SMP assessment are not justified.

6. ASSESSMENT

30. Article 7(5) of the Framework Directive entitles the Commission, after taking utmost account of the opinion of BEREC (if any), to either issue a decision requiring the NRA concerned to withdraw the draft measure, or to take a decision to lift its reservations indicated in accordance with Article 7(4) of the Framework Directive. The Commission may consider, on the basis of further information, developments, or analysis during the second phase of the notification procedure, that its reservations are no longer justified.

31. The Commission has taken utmost account of BEREC's opinion, as well as of additional evidence gathered and assessed during the Phase 2 investigation, and no longer has reservations concerning the analysis concerning the designation of an operator as having SMP included in the notified draft measure. This conclusion is based on the following reasons:

MT has high market shares in the provision of all leased lines types and bandwidth ranges

32. In its letter opening the Phase 2 investigation, the Commission highlighted that MT's market share in the provision of retail leased lines of higher capacity (analogue, TDM and Ethernet leased lines above 2 Mbit/s) decreased from 42.3% to 36.8% between 2012 and 2015, before increasing to 49.7% in 2016 (following the acquisition of GTS). The data provided by NMHH at the time also showed that MT was only the second largest operator on the wholesale merchant market (i.e. excluding the self-provision of leased lines), with a market share in the range of 28-33.7% over the same time period. MT's decreasing market shares (below the 40% threshold) in the important 2Mbit/s+ bandwidth category and the fact that the data presented by NMHH showed that MT was not the leader on the merchant market led the Commission to question NMHH's SMP finding.

33. During the Phase 2 investigation, NMHH provided additional data to BEREC and the Commission that was more convincing in terms of existence of MT's SMP. In particular, if only the 'future-proof' Ethernet leased lines are considered, MT's market shares ranged from 55.2% and 48.9% in the 2012-2015 period, before rising

to 53.4% in 2016. These high market shares in the market for Ethernet leased lines support NMHH's finding of SMP.

34. Additionally, NMHH showed that MT's market shares in Ethernet lines in 2016 would have been higher than 50% even without the acquisition of GTS.

35. Finally, NMHH explained that the data it provided in its notification regarding MT's shares in the wholesale merchant market for leased lines was incorrect. Indeed, the new data provided by NMHH in the course of the Phase 2 investigation shows that MT is the market leader also on the wholesale merchant market for leased lines (52% of market shares in 2016).

36. Nevertheless, while not questioning the geographic scope of the relevant market, which is defined as national, the Commission notes that the extent and reach of networks of different operators in Hungary is not uniform throughout the country. This is mainly due to historic boundaries of the three non-overlapping concession areas. In that regard, the Commission notes that MT, while enjoying a strong position when its market power is assessed at nation-wide level, faces stronger competitive pressure outside its historic concession area. This fact is also reflected in the share of the retail customers served by MT outside its traditional concession area (between 33% and 43%). Additionally, even within MT's traditional concession area the competitive conditions seem to differ between major urban areas and semi-urban or rural areas. In particular, the Commission notes that there are at least 5 major providers of leased lines active in Budapest, while other major urban areas are served by multiple parallel infrastructures (e.g. Debrecen and Pécs). The Commission considers that, while the differences in MT's market power in different areas is not sufficient to delineate stable sub-national geographic markets, NMHH should consider addressing these differences in market power through varying intensity of regulatory remedies.[15]

37. In conclusion, the Commission agrees that the new data on MT's market shares provided by NMHH in the course of the Phase 2 investigation are consistent with the finding of SMP. However, the Commission invites NMHH to consider in its final measure whether the geographical differences in network competition intensity could justify the application of different remedies in certain geographical areas.

The prices charged by MT remain generally higher than its competitors', despite benefitting from lower underlying costs

38. In its letter opening the Phase 2 investigation, the Commission noted that, despite all leased lines above 2Mbit/s being unregulated, NMHH reported a trend of price decreases in all bandwidth ranges (except for leased lines above 500 Mbit/s, for which prices increased, albeit from very low levels). The Commission noted that such pricing behaviour is generally not indicative of significant market power.

39. During the Phase 2 investigation, NMHH provided further evidence that the decreasing prices charged by MT are not indicative of the lack of SMP, since its margins remained well above those of its main competitors. According to NMHH, this is due to the fact that:

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15 The geographical differences in the intensity of infrastructure competition is also acknowledged by NMHH in its notification (see paragraphs 223-224 and following). Furthermore, the Commission notes that NMHH adopted a regional approach while defining a related market for wholesale local access provided at a fixed location (i.e. market 3a, HU/2017/2021).

(a) MT is in possession of the most extensive electronic communications network in Hungary, which allows the roll-out of terminating segments of leased lines at lower average costs (due to its extensive backbone and access network, typically it has to construct shorter terminating segments than its competitors); and

(b) although declining, MT's prices remain higher than the prices charged by competitors in all but one[16] bandwidth ranges.

40. According to NMHH, the fact that MT has lower average costs and is charging higher average prices compared to its competitors, is consistent with the conclusion that MT enjoys SMP.

41. In conclusion, the Commission agrees that MT's pricing behaviour is not inconsistent with the existence of SMP.

Limited effects on competitive conditions from the services excluded from the market definition

42. In its letter opening the Phase 2 investigation, the Commission noted that NMHH had not sufficiently analysed the effects exerted on the market by the leased lines that were excluded from the scope of the relevant market, i.e. the lines provided to the government entities and to the operator of national electrical grid by operators NISZ and MVM NET, respectively. In the past, these services were provided on commercial terms, while from 2012 their provision is reserved by law to NISZ and MVM NET.

43. The Commission is aware that, due to their very nature of leased lines (they are rolled-out to the specific geographic location where the customer is based), these services cannot easily be transferred to a new customer when the user decides to discontinue the service.

44. However, the Commission suggested that the entry into force of the legal requirements regarding the provision of leased lines to government entities could have created spare capacity in the networks of the operators (including MT) that were previously supplying commercially these customers. The Commission argued that NMHH had not sufficiently assessed the impact of the transfer of these services from the commercial providers to MVM NET and NISZ and that the resulting spare capacity in MT's network, among others, was likely to decrease the alleged market power held by MT itself.

45. During the Phase 2 investigation, NMHH provided further information that can indicate the limited impact on the SMP analysis of excluding the services provided by NISZ and MVM NET from the relevant market.

46. Firstly, NMHH reiterated that there is no demand-side substitution, as the government entities and the owner of the electricity grid have a legal obligation to purchase leased lines services from these providers.

47. Secondly, NMHH argues that there is very limited supply-side substitution. On one hand, NISZ does not own a leased lines terminating segments network (it uses MVM NET's infrastructure) and is therefore unable to provide commercial services; on the

[16] In the 5-10 Mbit/s range, the price charged by MT are lower than those charged by some of its competitors.

other hand, MVM NET's commercially sold leased lines only represent 0.8% of all leased lines active in 2016.

48. Thirdly, NMHH clarified that the services provided by MVM NET to the owner of the electricity grid had never been provided by MT in the past; therefore MT did not have to deal with spare capacity when MVM NET started to supply its customer.

49. In conclusion, the Commission agrees that the exclusion of the services provided by MVM NET and NISZ from the relevant market does not significantly affect the finding that MT has SMP on the relevant market.

HAS ADOPTED THIS DECISION:

Article 1

The Commission lifts its reservations indicated in the letter of serious doubts *C(2018) 6084* as regards the designation of the SMP operator in relation to the draft measure notified to the Commission on 16 August 2018 and registered under case number HU/2018/2107.

Article 2

This Decision is addressed to the National Media and Infocommunications Authority (NMHH).

Done at Brussels, 16.11.2018

For the Commission
Mariya GABRIEL
Member of the Commission