

**BEREC Opinion on
Phase II investigation
pursuant to Article 7 of Directive 2002/21/EC as amended by
Directive 2009/140/EC:**

Case SE/2019/2216

**Wholesale local access to fibre networks provided at a fixed
location in Sweden**

10 January 2020

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1. Executive summary

On 8 November 2019, the European Commission (Commission) registered a notification from the Swedish Regulatory Authority, *Post-och telestyrelsen* (PTS), concerning the market for wholesale local access to fibre networks provided at a fixed location in Sweden.

PTS defines the market for wholesale local access to fibre networks as a national market and designated Telia Company AB (Telia) as a significant market power (SMP) operator on that market.

On the market for wholesale local access to fibre networks PTS proposes to impose a set of obligations on Telia, including (i) access, (ii) non-discrimination, (iii) transparency, (iv) accounting separation and (v) price control.

On 6 December 2019 the Commission sent PTS a serious doubts letter, opening a Phase II investigation pursuant to Article 7 of Directive 2002/21/EC as amended by Directive 2009/140/EC. The Commission's serious doubts concern the national geographic dimension of the market for wholesale local access to fibre networks.

Based on the economic analysis set out in this Opinion, BEREC considers that the Commission's serious doubts are partially justified.

2. Introduction

On 8 November 2019, the Commission registered a notification by the Swedish Regulatory Authority, *Post-och telestyrelsen* (PTS), concerning the market for wholesale local access to fibre networks provided at a fixed location in Sweden¹. On 15 and 21 November 2019, requests for information (RFI) were sent by the Commission to PTS, and responses were received, respectively, on 20 and 21 November 2019.

The Commission initiated a Phase II investigation, pursuant to Article 7 of Directive 2002/21/EC as amended by Directive 2009/140/EC (Framework Directive), with a serious doubts letter on 6 December 2019. In accordance with the BEREC Board of Regulators rules of procedure, the Working Group (WG) was established immediately after that date with the mandate to prepare an independent BEREC opinion on the justification of the Commission's serious doubts on the case.

On 18 December 2019 the WG sent a list of questions to PTS. Answers from PTS were received on 19 December 2019.

The WG met on 19 December 2019 in Brussels. During this meeting the WG spoke with PTS (by video-conference) to gather further information and to seek clarification in relation to answers given to the questions sent the day before. During this video-conference call, some

¹ Copper constitutes a separate market - "Wholesale local access to copper networks provided at a fixed location in Sweden" and cable is not considered part of either market. It is the first time that Sweden notifies separate market decision for wholesale local access to fibre networks and wholesale local access to copper networks. This separation within the market 3a is a specificity in Europe.

additional questions were posed to PTS by WG. The objective of the WG was to reach clear conclusions on whether or not the Commission's serious doubts are justified.

On 19 December 2019 the WG also had a video-conference call with the Commission upon the latter's request. The Commission explained to the WG the reasons behind its serious doubts. This gave the WG a more complete understanding of the case.

A draft opinion was finalized on 9 January 2020 and a final opinion was presented and adopted by a majority of the BEREC Board of Regulators on 10 January 2020. This opinion is now issued by BEREC in accordance with Article 7 of the Framework Directive².

3. Background

Previous notification

The market for wholesale local access provided at a fixed location (market 3a of the 2014 EC Recommendation³) in Sweden was previously notified to and assessed by the Commission under case SE/2015/1687.

PTS defined the relevant product market to include physical access to copper and fibre-based local loops, as well as virtual access over copper or fibre-based local loops with handover points in/or adjacent to the exchange. The geographic scope of the market was found to be national. Regional variations of competitive conditions were identified but ultimately PTS did not consider these sufficiently significant and stable to identify subnational markets.⁴

Current notification and the Commission's serious doubts

As regards the wholesale local access to fibre networks, PTS defines the relevant product market to include local access to fibre networks (Fibre to the Home "FttH" and Fibre to the Building "FttB"), including both physical and virtual access. Cable is not considered to be part of the wholesale market.

PTS finds that the market is national, as variations of competition across the country are insufficient to conclude otherwise.

² Directive 2002/21/EC as amended by Directive 2009/140/EC.

³ European Commission Recommendation of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation (the '**2014 Recommendation**'). The European Commission issued a public consultation on updating the list of recommended markets in February 2019, and intends to adopt an updated list of recommended markets by no later than 21 December 2020. However, this process does not impinge on the assessment of markets set out in this Consultation.

⁴ PTS designated Telia as the only operator with significant market power (SMP) in the wholesale local access market (market 3a). It reached this finding on the basis of Telia's market share, overall size of the undertaking, control of infrastructure that is not easily duplicated, economies of scale and scope, and vertical integration. In this wholesale market, PTS imposed a full set of remedies on Telia, including physical and virtual access to copper and physical access to fibre. As regards price control for copper access, PTS mandated price caps calculated based on PTS' LRIC model. As regards fibre access, PTS set price caps until November 2016. From November 2016 price control for fibre access was limited to ensuring economic replicability based on PTS' economic replicability test (ERT).

PTS found that many municipalities had invested in fibre networks at the end of the 1990s/the beginning of the 2000s, partly due to regional subsidies launched by the Swedish government. PTS found that, as a consequence, the Swedish fibre access market is fragmented and displays a multitude of fibre network operators: there are around 180 local fibre operators, which are owned by municipalities and as such, in addition to revenues, may have access to public means. However, Telia remains the operator with the largest fibre network with a presence in all municipalities in Sweden.

For the geographic dimension of the market, PTS found municipalities to be the smallest relevant geographic unit and analysed whether competitive conditions differed sufficiently between municipalities. In 139 of Sweden's 290 municipalities, there is a network owner with over an 80% share of connections. Telia provides more than 80% of connections in 60 municipalities, while municipal networks provide more than 80% of connections in 77 municipalities, with 2 "other" operators in 2 municipalities. In 11 municipalities, Telia is the only present fibre network operator.

The Commission has expressed serious doubts that it can be concluded that the market is national given the extreme variations in the shares of connections between municipalities, the described variations in the footprint of Telia's fibre access network and the limitation of access seekers to municipal networks to central access. The Commission also said that, while at a national level the market conditions appear to be very heterogeneous, the situation appears different when looking at individual municipal areas (or aggregated areas with similar conditions). In many cases, the conditions of competition within municipalities appear to be sufficiently homogeneous and are often clearly distinguishable from neighbouring areas and, moreover, the municipalities appear to be of an appropriate size.

4. Assessment of the serious doubts

On 6 December 2019, the Commission sent a serious doubts letter opening a Phase II investigation pursuant to Article 7 of Directive 2002/21/EC as amended by Directive 2009/140/EC. The Commission's doubts concern compliance to Articles 15(3) and 16(1) of the Framework Directive and to the compatibility of the draft measure with the specific objectives set out in Articles 8(2) and 8(5)(e) of the Framework Directive, in particular: National geographic dimension of the market for wholesale local access to fibre networks.

Concerns of the Commission

At the current stage of the procedure and based on the information available, the Commission has serious doubts as to the compatibility with EU law of the draft measure envisaging a national geographic market for the wholesale local access to fibre networks and, as a consequence of this finding, establishing SMP of Telia on that market, according to Articles 15(3) and 16(1) of the Framework Directive. As a result, the Commission has serious doubts as to the compatibility of the draft measure with the specific objectives set out in Articles 8(2) and 8(5)(e) of the Framework Directive.

According to established case law, the relevant geographic market comprises an area in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are significantly

different. Areas in which the conditions of competition are heterogeneous do not constitute a uniform market.

Based on information provided by PTS, the Commission agreed that there is typically no parallel deployment of fibre access networks in a given area of Sweden. Also, contrary to traditional copper access markets where access to the incumbent operator's nationwide network would enable access-seekers to supply services throughout the geographic boundaries of that market, in the present case, regulating access to Telia's fibre network would enable access seekers to provide retail services based on wholesale local access only within the footprint of Telia's FttH/B network (i.e. nationwide to only 37% of premises).

The Commission stated that while Telia's national average market share of 37% suggests some level of competition in a given market, a more granular analysis clearly shows that the average derives, in many areas, from either very high or very low market shares and therefore does not properly reflect the relative strength of the operator (Telia) in any given municipality.

Therefore, the Commission considers the need to open an in-depth investigation to assess the geographic dimension of the relevant market. Given the specific market situation in Sweden, a more granular approach as to the geographic market definition may be appropriate in order to properly reflect the competitive conditions in a given area and consequently to properly assess the presence of SMP and the proportionality of SMP-based access remedies in a given geographic market.

Views of PTS

Apart from differences in Telia's market share in different areas in Sweden, PTS sees no evidence of differences in competition that would lead to a definition of sub-national markets. In PTS' view, market share, on a hypothetical market, is only one factor to be considered in delineating the geographical market and it is important to look also at other factors indicating differences in competitive conditions, including for example prices.

PTS has found, following the guidelines and recommendation, that municipalities constitute the appropriate geographic analysis unit. However, having analysed different competitive conditions, such as market shares, pricing, product differentiation, PTS has been unable to prove sufficiently clear and systematic differences in competitive pressure between the municipalities and concludes that the market is national and not municipal.

Regarding pricing, according to PTS, there is no correlation between high prices and high local market share nor the other way around. In fact, Telia's prices are set from a national perspective. Other national wholesale operators also apply national prices.

Telia, with its 37% market share of the relevant market, is by far the largest operator and most important wholesale supplier. Telia is also vertically and horizontally integrated. In the absence of regulation, all these factors imply a risk that Telia could abuse its market power, to the detriment of its wholesale customers and, ultimately, the end users.

PTS is convinced that the proposed draft measure is the solution that will give the best possible competitive outcome for the Swedish market.

BEREC's Assessment

For clarity, BEREC notes that the present geographic market assessment by PTS is limited to the presence of fibre networks, since cable and copper are not included in the Swedish market for wholesale local access to fibre, which is the subject of the Commission's serious doubts letter. Since the Commission does not have serious doubts with regard to the product market definition in Sweden, BEREC does not comment on that part of the market assessment.

BEREC's assessment is therefore limited to the geographical market definition as proposed by PTS.

PTS confirmed that parallel deployment of fibre in Sweden is limited to a small percentage of homes scattered across the country⁵ and that footprints of the (wholesale) operators' networks do not fully match with the municipal boundaries. This means that, for the great majority of homes passed, the access seeker (a retail operator) does not have the choice of the wholesale local access provider. As a consequence, in this very specific case of non-parallel deployment, with high and relatively uniform take-up and self-supply inclusion, the number of connections of an operator (market shares based on total number of connections) is close to the number of homes connected (coverage as a proportion of total homes). As this is a recurrent situation across the country, national or municipal market share of an operator has the same significance as the percentage of households covered at a national or municipal level.

In most municipalities (according to PTS), the footprints of the (wholesale) operators' networks do not fully match with the municipal boundaries, thus, from BEREC's point of view, competition at a municipal level, due to the heterogeneity within a municipality (meaning that different undertakings are active in a municipality), is of the same nature as at a national level.

PTS' view is that municipalities are the appropriate unit of analysis - because the situation differs from municipality to municipality (e.g. the extent of Telia's presence differs greatly between municipalities), but this analysis concludes that there is no variation in competitive market conditions between municipalities that would require a delineation of the market on this basis.

The Commission suggests segmentation on municipal basis⁶. Moreover, that a more granular assessment could easily lead to a microanalysis. In addition, BEREC understands that to conduct an extensive market analysis for each and every defined area might be very difficult to handle in practice for many NRAs; this even holds for the analysis of 290 municipalities like in Sweden.

Therefore, BEREC considers that there is a very limited level of direct competition between fibre network operators on the market for wholesale local access to fibre networks in Sweden. However, the market analysis of PTS does not sufficiently elaborate on this point.

⁵ There is parallel deployment of fibre in part of Multiple Dwelling Units (MDU, buildings with several apartments) without constituting homogeneous areas.

⁶ As noted above, the Commission states that '[w]hile at national level the market conditions appear to be very heterogeneous, the situation appears different when looking at municipal areas (or aggregated areas with similar conditions). In many cases, the conditions of competition within municipalities appear to be sufficiently homogeneous and are often clearly distinguishable from neighbouring areas.'

Different criteria could be used for the demonstration of homogeneous conditions of competition in a single national market. For instance, the BEREC Common Position on geographic aspects of market analysis (definition and remedies) mentions “indirect constraints that other technologies may exert at the wholesale level”⁷. Another possibility is the definition of a chain of substitution⁸. However, BEREC notes that the market analysis of PTS does not provide any evidence that such arguments could demonstrate that competition is homogeneous at a national level.

BEREC considers that there is insufficient evidence of direct constraints and no evidence of indirect constraints to define a market as national in scope.

Regarding PTS’s argument that Telia is acting uniformly – namely on prices – within the country is an indicator of a national market, BEREC states the following in relation to uniform pricing⁹, in its Common Position on geographic aspects of market analysis.

“If prices (of the incumbent and alternative operators) are geographically uniform, i.e. do not differ by geographical areas, this may be indicative of there being insufficient geographical variations in competitive conditions to justify the definition of local geographical markets. However, this is not necessarily the case. In particular, it has sometimes been argued that a national uniform price of the incumbent operator would imply a national market. Although this might be correct in some cases, there may be cases where, from a consumer perspective, significant differences exist between “competitive” and “non-competitive” areas despite a national uniform price of the incumbent operator”. The reasoning is further detailed in recital (114).

In light of this, BEREC considers that PTS’s argument regarding Telia acting uniformity (on prices) is insufficient to define the Swedish market for wholesale local access to fibre networks as a national market.

PTS also argues that Telia is the only fibre operator to be vertically integrated, but this argument appears to be more relevant to the SMP assessment than to the market definition stage of the analysis.

For these reasons, BEREC agrees with the Commission that, based on the available information and analysis, the national geographic aspect of the market is not sufficiently proven and that a more in-depth investigation is required to assess the geographic dimension of the market.

BEREC does not find sufficient information and evidence in PTS’s information to express a substantiated opinion on the potential results of such a more in-depth analysis: in particular, whether further analysis might result in PTS defining a market that is national in scope or in a delineation on a sub-geographic basis, reflecting competition market conditions in a given area. For the same reason, BEREC cannot provide, in the context of this assessment, PTS with guidance on the approach to be taken to the re-assessment of the relevant market.

⁷ See page 4, recital (7), of the BEREC Common Position on geographic aspects of market analysis, BoR (14) 73.

⁸ See page 11, recital (27), of the BEREC Common Position on geographic aspects of market analysis, BoR (14) 73

⁹ See page 27, recital (113), of the BEREC Common Position on geographic aspects of market analysis, BoR (14) 73.

5. Conclusions

On the basis of the economic analysis set out in section 4 above, BEREC considers that the Commission's serious doubts regarding the draft decision of the Swedish Regulatory Authority on the geographic dimension of the market for wholesale local access to fibre networks, as expressed in the Commission's letter to PTS of 6 December 2019, are partially justified.

BEREC is of the opinion that, based on the available information, the arguments developed by PTS to define a market for wholesale local access to fibre networks as national in scope are not sufficient and may not be appropriate to inform a detailed understanding of competitive market conditions across the country.

BEREC agrees with the Commission on the need for a more in-depth analysis of competitive market conditions in the determination of the relevant geographic market.

However, BEREC does not agree that further analysis would **necessarily** result in a more granular approach to the geographic market definition.

In the light of the Commission's serious doubts and the argumentation above, BEREC suggests that PTS could carry out a more in-depth assessment of competitive market conditions in the determination of the relevant geographic market in the provision of wholesale local access to fibre networks. BEREC also suggests that PTS could give further consideration to BEREC's Common Position on the geographic aspects of market analysis.

6. Annex

No annex