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Case AT/2004/0090: Transit services in the fixed public telephone network in Austria

Dear Madams and Sirs,

The VAT, the Austrian Association of Alternative Telecommunication Providers, represents new entrants on the Austrian telecommunication markets. Our members offer a wide variety of communication services including mobile and fixed line services such as voice telephony as well as narrowband and broadband data services.

We strongly support the initiation of a second phase examination under Article 7(4) of the Framework Directive by the European Commission of the notified draft measure of Telekom-Control-Kommission ("TKK"), concerning the market for transit services in the fixed public telephone network in Austria. We therefore would like to summarise some key points of our statement made in the parallel consultation at national level in order to underline the necessity to modify the draft measure.

Effective competition requires the actual opportunity to immediately switch over to substitutes at no extra costs

VAT strongly encourages the commission's point of view that effective competition can only be assumed if

- there is an actual (and not hypothetical) opportunity for switching to substitutes,
- such switch can be realised promptly and with no (costly) delay and
- there are no extra costs compared to the previous situation.

Regarding direct interconnection these general preconditions do not apply. We therefore consider direct interconnection not to be a substitute for transit services and it should not be included in the relevant market.

Absence of regulation on the market for transit services would cause serious impact for alternative network operators („ANOs“)

VAT also shares the commission's approach that impact on business models and the actual supply of self-provided transit services must be proved before regulatory obligations are withdrawn. In fact the lifting of the current regulation would cause serious problems for ANOs since TA would no longer be obliged to offer transit services at all or at reasonable prices.

Market share strongly indicates SMP of Telekom Austria („TA“)

The actual market share of TA for transit services is nearly 90%. Even when direct and local interconnection were included as substitutes for transit services the market share of TA is still 45%. This is a strong indication of SMP, especially when taking into consideration the high barriers to market entry. However, both figures indicate that TA is still having SMP on the market for transit services.

In addition we would like to add a few points we stated in the national consultation.

No substitute for joining link transit

TKK includes joining link transit in the relevant market (and assigns it to ANOs). Since joining links are essential for interoperability between the networks, there is no substitute for this form of transit. The lifting of all regulations on the entire transit market would therefore cause unforeseeable impact on ANOs.

TKK did not consider the impact of the situation on the trunk segment market on the Market for transit services

TKK holds the opinion, that the transit services currently carried out by TA may be substituted by direct and/or local interconnection with third operators. Prerequisite for this kind of interconnection are leased lines to establish the joining links between networks. Such leased lines are included in the trunk segment market and the termination segment market.

Since TKK – despite of ANO's heavy objections – deemed the trunk segment market to be effectively competitive, there is neither evidence nor certainty for ANOs that leased lines belonging to the trunk segment market will be offered by TA at all or at reasonable prices. Therefore direct interconnection can not be considered as a substitute for transit services, as ANOs are depending on the goodwill of TA concerning the provision of this “substitute”.

Market entry barriers in market for transit services are undervaluated

Currently no operator but TA is interconnected with all ANOs. Consequently an alternative offer to convey traffic by interconnecting to the POI(s) of a single operator does not exist.

Direct or local interconnection with operators other than TA brings about high costs for new entrants and establishes market entry barriers. Upfront investments in network installation, hardware, network monitoring equipment, maintenance, contract management etc. must be made before the first customer is connected to the network. Time to market is longer and costs are higher than under the current regime where the price for TA's transit services is regulated.

Under the condition that substitutes must not lead to extra costs, direct or local interconnection cannot be deemed to be an equivalent substitute for the transit services currently carried out by TA. On the other hand, the absence of regulation on the market for

transit services would enable TA to charge all other operators some "extra" costs for transit services as long as wholesale transit services are not offered by a third operator.

TKK ignores penalty payments in case the minimum traffic-load requirements of joining links are not met

The current regime of interconnection imposed by the TTK provides for penalty payments in case the minimum traffic-load requirements for joining links are not met by ANOs. It is evident that, joining links will not have the same load factor while being used as a substitute for transit services. Costs will therefore again be increasing for ANOs.

Unjustified exclusion of self-supply of TA

Transit services produced by TA for its own services were never included into the market share calculation because "the consideration of on-net-traffic would put TA at a disadvantage compared to ANOs" (page 12, 34 of the consultation document) and "mere self-supply of TA would not have any influence on the exercise of market power" (page 32f of the consultation document). On the other hand ANO's self-supply (e.g. joining link transit) is included in the calculation.

The argumentation of TTK cannot be followed, because whether something would put TA at disadvantage or whether something could have influence on the exercise of market power is irrelevant when analysing the market. This may only be considered in terms of the SMP assessment.

Offering substitute transit services implies high economic risk

An operator offering transit services to operators other than TA in order to substitute TA's transit services faces economic risks due to the following reasons:

- nationwide investments into network infrastructure must be made (see i.e. our comments on the de-regulated the trunk segment market)
- market entry barriers (see above)
- technical implementation of direct routing for transit-calls of third operators implies high up-front-investment and high running costs
- traffic-load in lines provided for transit services can be below minimum limits (see above)
- all these investments turn to be stranded costs if TA decides to re-offer its transit services to third operators at current (or even lower) prices

It is therefore very unlikely that substitute transit services will be offered by a third party operator.

Also the mere fact of currently 30 direct interconnections between ANOs (page 31 of the consultation document) is no indication for future offers of national transit. Regarding fixed-line services these interconnections are almost entirely used for terminating international calls.

Pricing of transit services

In contrast to its previous findings, TTK considers its regulated price for transit services no longer as the price that would be settled by market players if competition was effective but rather expects that prices for transit services would increase (pages 16 and 40 of the consultation document).

We share the expectation of the TTK but find that the price for transit services must not increase when regulatory obligations (such as e.g. price control) are withdrawn. Moreover a price increase for transit services is a clear indicator for the SMP of Telekom Austria ("TA") and the lack of effective competition in the market.

The withdrawal of all regulatory obligations as suggested by the TTK would force ANOs (i) to accept increased prices when direct interconnection is not reasonable due to insufficient traffic volume or (ii) - if TA refuses to offer transit services at all – bear the costs of inefficient direct interconnection.

TA's transit services are an essential requirement for value added services

Due to a different billing regime for value added services (and all other service numbers as e.g. reversed charge), call-routing to these numbers cannot be executed without the use of TA's transit services. These transit services can therefore never be substituted.

Wrong findings in the draft measure

TKK finds inter alia, that one ANO offers unbundled transit services at lower prices than TA. But in fact the operator designated in the consultation document, a member of the VAT, is not offering unbundled transit services at all. This obviously wrong finding of TTK raises concerns about the overall accuracy of this analysis.

Considering the points mentioned above, VAT strongly recommends to reassess the market analysis for the market for transit services and suggests to impose the following obligations on TA:

- non-discrimination
- mandatory reference interconnect offer and mandatory contract negotiation
- access, interconnection and interoperability obligation
- ban of refusal of granted access
- cost based interconnection fees for transit services

We would kindly ask you to consider our concerns during the following procedures in accordance with Art. 7 of the Framework Directive and would be grateful for an opportunity to further develop this topic in a personal exchange of views.

For any additional question or information you might require please do not hesitate to contact us (Email office@vat.at).

Yours sincerely,

VAT – VERBAND ALTERNATIVER TELEKOM-NETZBETREIBER

Jan Engelberger