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Ηλεκτρονικών Επικοινωνιών Και
Ταχυδρομείων (OCECPR)
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For the attention of:
Dr Polis Michaelides
Commissioner

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Dear Mr Michaelides,

Subject: Commission Decision concerning Case CY/2016/1882: Wholesale local access provided at a fixed location in Cyprus

Commission Decision concerning Case CY/2016/1883: Wholesale central access provided at a fixed location for mass-market products in Cyprus

Comments pursuant to Article 7(3) of Directive 2002/21/EC

1. PROCEDURE

On 29 June 2016, the Commission registered a notification from the Cyprus national regulatory authority, Γραφείο Επιτρόπου Ρυθμίσεως Ηλεκτρονικών Επικοινωνιών Και Ταχυδρομείων (OCECPR)¹, concerning markets for wholesale local access provided at a fixed location² and for wholesale central access provided at a fixed location for mass-

¹ 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.

² Corresponding to market 3a 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 on Relevant Markets), OJ L 295, 11.10.2014, p. 79.

market products³ in Cyprus.

The national consultations⁴ on the markets for wholesale local access and for wholesale central access ran, respectively, from 11 March to 15 April 2016 and from 6 April to 6 May 2016.

On 6 and 7 July 2016, two requests for information⁵ were sent to OCECPR and a response was received on 11 July 2016. An additional request was sent to OCECPR on 12 July 2016 and a response was received on 12 July 2016.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), the Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on notified draft measures to the NRA concerned.

2. DESCRIPTION OF THE DRAFT MEASURE

2.1. Background

The markets for wholesale local access provided at a fixed location and for wholesale central access provided at a fixed location for mass-market products were previously notified to and assessed by the Commission under cases CY/2012/1396 and CY/2012/1397⁶.

OCECPR defined the relevant product market for wholesale local access provided at a fixed location including offers of access via (a) copper cables using xDSL technologies⁷ and (b) fibre optic networks.⁸ The relevant geographic market was national in scope. CYTA, the incumbent operator, was designated as holding significant market power (SMP), and the following obligations were imposed: access to the local loop and sub-loop, including co-location and access to ducts;⁹ transparency and publication of a reference offer; non-discrimination; accounting separation and price control (cost orientation based on an LRIC model).

³ Corresponding to market 3b in the Recommendation on Relevant Markets.

⁴ In accordance with Article 6 of the Framework Directive.

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

⁶ C(2012) 9778.

⁷ CYTA introduced VDSL2 services as of 1 December 2012.

⁸ According to OCECPR, CYTA had so far deployed a small-scale pilot GPON fibre network. No wholesale offers were at the time available over fibre infrastructures.

⁹ CYTA has been obliged to provide unbundled access to fibre lines, along with access to dark fibre, collocation, backhaul and access to civil engineering infrastructure. OCECPR noted that the details of the access method and the implementation methodology would have to be defined at a later stage once CYTA's NGA topology had been known. However, OCECPR explained in the response to the RFI that CYTA had already announced that their intention was to invest in a GPON topology where all fibre lines would have been aggregated at a concentration point. Such a topology, in OCECPR's view, would have made unbundling feasible at that concentration point. Alternative operators would have been able to unbundle the fibre at that concentration point and depending on their business plan adopt a P2P or P2MP topology. Consequently, OCECPR explained that there was no need for the imposition of a virtual access obligation at that stage.

As far as the market for wholesale central access provided at a fixed location is concerned, OCECPR found that the relevant market included the supply (including self-supply) of wholesale broadband services via xDSL technologies¹⁰ and through FTTx technologies (where CYTA's copper lines would have been replaced by fibre optic). The relevant geographic market was national in scope. CYTA was designated as holding SMP, and the following obligations were imposed: wholesale broadband access and joint use of facilities (including naked DSL, collocation or other form of joint use of facilities, including ducts and buildings); transparency and publication of a reference offer; non-discrimination; accounting separation and price control (cost orientation based on a LRIC model).¹¹ OCECPR emphasized that the broadband services offered by CYTA had to allow the possibility for alternative operators to offer video services like IPTV and video on demand¹².

Regarding both notifications, the Commission commented on the need to monitor the effectiveness of the access to fibre obligation and invited OCECPR to adopt more detailed measures on the implementation of the access to fibre obligation as soon as possible and to monitor the market and ensure that the measure grants effective access to NGA networks as soon as these are deployed by the SMP operator. If effective unbundled access to the SMP operator's fibre network could not have been ensured by that time, the Commission asked OCECPR to impose a virtual access obligation in the interim until effective unbundled access could have been granted.

The Commission also commented on the multicast functionality and invited OCECPR to substantiate in more detail the need to impose a multicast functionality in order to ensure that alternative operators can effectively compete in the retail broadband market in the Republic of Cyprus.

Finally, the Commission invited OCECPR to review its analysis upon publication of the Recommendation on non-discrimination and costing methodologies.¹³

2.2. Market definition

Market 3a

OCECPR found that the relevant market for the provision of wholesale local access (WLA) at a fixed location includes the access products offered through (a) the metallic-access network and xDSL technology (including bonding and vectoring

¹⁰ According to OCECPR, until 2011 there were five alternative providers that used CYTA's WBA offer.

¹¹ OCECPR explained that the details of the WBA remedy concerning fibre technologies would have been defined when the NGA network topology of the SMP operator would have been known.

¹² OCECPR noted that it was technically possible to provide services such as television and video on demand, however there were restrictions with regard to the quality and the bandwidth supported by the service offered at the time. OCECPR also explained that consumers had a preference for bundles, with a trend to favour those which offer television.

¹³ Commission Recommendation 2013/466/EU of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment.

techniques to increase speed)¹⁴ and (b) the fibre optic network.¹⁵ The relevant market does not include the fixed wireless broadband access and the access through coaxial cable networks.¹⁶ In this regard, OCECPR explains that, with respect to retail broadband access at a fixed location, the cable service's features are considered practically equivalent to broadband access provided by xDSL technology and optical fibre technology. Nevertheless, at the wholesale level, cable services have not been included in the WLA market as OCECPR did not find sufficient constraints exerted by the cable network to justify such an inclusion.

The relevant geographic market is national in scope.

Market 3b

OCECPR found that the relevant market for the provision of wholesale central access at a fixed location includes the wholesale broadband access products offered through (a) the metallic-access network and xDSL¹⁷ and (b) the FTTx technologies (where CYTA's copper lines were replaced by fibre optics). The relevant market does not include the fixed wireless broadband access and the access through coaxial cable networks. Even if the cable services are considered as substitutes of broadband access services at retail level, OCECPR does not include cable services in the WCA market, as there are not sufficient direct¹⁸ and indirect¹⁹ constraints justifying the inclusion.

¹⁴ In Cyprus, WLA services are mainly offered through CYTA's copper network using ADSL2+ and VDSL2 technology. ADSL technologies are used both by CYTA (100% of its connections), as well as by the alternative providers (through LLU). CYTA can provide VDSL2 services for 60.2% of its connections. Although CYTA's equipment supports the vectoring technique, this technique cannot be implemented widely in the present phase.

¹⁵ CYTA stated to have the intention to deploy a GPON technology fiber optic network between the years 2017-2021. At the same time CYTA is investigating the use of vectoring technique by the end of 2017, in areas where it will not develop a fibre network. According to the development plan of CYTA, the fibre network development should cover 35% of local exchanges, namely approximately 95,000 households. Currently there are no retail broadband offers based solely (P2P, P2MP) on fibre networks.

¹⁶ Cablenet offers in Cyprus broadband access via a cable infrastructure which covers 56.3% of households. The operator stated to have the intention to cover 70% of the total number of households (urban areas). Further, Cablenet manages 20% of the total number of broadband connections.

¹⁷ According to OCECPR, there are currently five alternative providers that used CYTA's WBA offer.

¹⁸ In the response to the RFI, OCECPR clarified that there are neither any wholesale central access offers through the cable network, nor an intention by the cable network provider to offer central access within the timeframe of the current market review, as any such offering would be to the detriment of Cablenet's own services. According to Cablenet the realisation of a possible central access requires certain tests and trials between the network owner and interested parties (there is no formal demand by any operators) and an appreciable level of investment by the network owner, rendering the exercise futile in the sense of offering a 'practical substitute' to the incumbent's WBA offer.

¹⁹ Regarding indirect constraints arising from the cable network, OCECPR argues that the limited geographic footprint of the cable operator (vs the 100% coverage by alternative technologies such as xDSL) in conjunction with the geographical definition of the market as national, supports the conclusion that any constraints by the cable platform would not lead to a sufficient demand substitution at the retail level.

The relevant geographic market is national in scope.

2.3. Finding of significant market power

OCECPR analysed the market structure and market shares²⁰, control of infrastructure not easily duplicated, the existence of countervailing buying power, economies of scale, vertical integration, entry barriers and the absence of potential competition. As a result of the analysis, the incumbent operator CYTA is designated as having SMP in both markets 3a and 3b.

2.4. Regulatory remedies

Market 3a

OCECPR proposes to impose on CYTA the following obligations: i) access to the copper local loop and sub-loop, including co-location, to the fibre network (through a virtual unbundled access)²¹ and to ducts; ii) transparency and publication of a reference offer; iii) non-discrimination; iv) accounting separation and v) price control (cost orientation based on an LRIC model).²² Regarding the price control remedy, OCECPR clarifies that, as CYTA is proceeding with a pilot FTTH project (GPON) with all alternative operators in September 2016, it intends to review the current wholesale access prices by the end of 2016.²³

OCECPR intends also to set rules on the implementation of the vectoring technology by CYTA. In this regard, the notified measure provides that CYTA is not obliged to offer LLU where it implements the vectoring technique, provided that it offers a virtual access product with specific characteristics.²⁴ Moreover, in urban

²⁰ As for retail market shares (including cable), CYTA has 61.5%, Primetel 14.3%, Cablenet 20.7%. The remaining 3.5% of the market are shared by two operators. 78% of the subscribers are using xDSL and 20.2% use cable. In those areas where both Cyta's and Cablenet's networks are present, CYTA has a market share of 50% and Cablenet of 34%. Regarding wholesale markets, CYTA has 100% market share including and excluding self-supply in both markets 3a and 3b.

²¹ According to OCECPR, the defined virtual access product is characterized by features as outlined in the explanatory note of the Recommendation on relevant markets. Access will occur locally at the existing MDFs.

²² OCECPR notes that a BU-LRIC costing model will be submitted to a public consultation in September 2016. OCECPR expects that the model will be finalised and submitted to the Commission within 2016.

²³ OCECPR clarifies that it intends to review the wholesale access prices in order to take into account CYTA's investments in the FTTH network. It stresses that in the presence of remedies such as economic and technical replicability as well as equivalence of input, wholesale access prices can be determined with a certain level of flexibility depending on i) the level of investment of the incumbent, ii) the need to migrate from copper to fibre and iii) the presence of an alternative network (cable).

²⁴ OCECPR stated that the obligation of a virtual-access offer at the first concentration point of the optical fibre network, namely at the level of the today's local telephone exchanges, is imposed on CYTA with characteristics which will allow the beneficiaries to: i) use and regulate their own terminal equipment, ii) have the opportunity to control the speed of their services offered according to the bandwidth that the subscription may offer, iii) receive services with an uncontended bandwidth or a bandwidth with a determined QoS, iv) be able to configure the different levels of the traffic hierarchy (traffic prioritisation), v) receive multiple VLAN per end-user, vi) recognise their customers (Customer Identification - VLAN Identifier and/or Port identifier and DSLAM identifier, vii) be able to implement security measures in order to maintain the integrity and the availability of the networks and their services; viii) offer video services (multicast functionality) such as IPTV, Video On Demand, etc. and ix) have the possibility to trace and manage failures.

areas, CYTA may implement the vectoring technique only with the consent of the alternative providers (already present at the point of handover), whereas in rural areas CYTA will be able to use vectoring without the consent of alternative providers.²⁵ Furthermore, the notified measure provides that CYTA will inform OCECPR on the number of cable jumpers (CJs) where it intends to apply the vectoring technique within a period of nine months. During this period CYTA may refuse to offer LLU on the affected CJs and has to transfer subscribers to a virtual access product for free. In case the vectoring technique is not applied to CJs indicated within the nine months period, CYTA shall not proceed to its release for a period of 6 months.

Market 3b

On the wholesale central access market, OCECPR proposes to impose on CYTA the following obligations: wholesale broadband access to copper and fibre networks including collocation (bitstream access to parent-node level and IP level); transparency and publication of a reference offer; non-discrimination; accounting separation; and price control (cost orientation based on an LRIC model).²⁶

Furthermore, OCECPR confirmed that the broadband services offered by CYTA have to allow the possibility for alternative operators to offer video services like IPTV and video on demand.

3. COMMENTS

The Commission has examined the notification and the additional information provided by the OCECPR and has the following comments:²⁷

²⁵ OCECPR identifies urban and rural areas on the basis of the definition of the Statistical Service of Cyprus. The regulator explained that its proposal to differentiate remedies geographically is based on the difference in terms of investments (current and planned) in urban and rural areas. In urban areas the presence of the cable operator is forcing investments by CYTA in both optical networks and deployment of the vectoring technique. In the rural areas CYTA has stated that they are going to use the bonding technique to take advantage of the copper glut. The remedies adopted for the rural areas intend to address the possibility of a digital divide, and are meant to provide an incentive to (a) CYTA to introduce vectoring and (b) subsequently have the alternative operators seek access.

Furthermore, the obligation to provide access would also imply, among others, *i*) CYTA's obligation to inform alternative providers on the exact areas where the optical fibre network shall be developed with reference to affected cable jumpers (CJs) and the geographical location and coverage of CJs in which it intends to apply vectoring (after approval of the OCECPR); *ii*) the obligation not to revoke unduly the provision of access to facilities and to local loops/sub-loops already granted to alternative providers. The withdrawal of the physical access from the areas of development of CYTA's optical fibre network and the areas of implementation of the Vectoring technique involves the transfer of subscribers of alternative providers to virtual access products.

²⁶ Similarly to market 3a, OCECPR explained that it intends to review the current wholesale bitstream access prices by the end of 2016.

²⁷ In accordance with Article 7(3) of the Framework Directive.

Direct and indirect constraints from cable network

OCECPR defines the relevant markets by taking into consideration direct and indirect constraints stemming from the underlying retail market, concluding that self-supplied cable services are not included in the relevant wholesale markets.

The Commission notes that OCECPR's analysis could be more robust and include some elements that may not have been sufficiently considered by the regulator.

As far as direct constraints are concerned, the Commission, given the current coverage of the Cablenet network, its market share and the potential for cable to act as a competitive constraint on CYTA's access network, asks OCECPR to monitor developments on cable networks with a particular focus on whether developments lead to (virtual) cable unbundling and/or bitstream being both technologically and economically feasible.

Regarding the indirect constraints, the Commission highlights that if there is competitive pressure stemming from alternative platforms at retail level, such platforms should be included in the wholesale markets if the following conditions are met: (i) access seekers would be forced to pass a hypothetical wholesale price increase onto their consumers at the retail level based on the wholesale/retail price ratio; (ii) there would be sufficient demand substitution at the retail level based on indirect constraints such as to render the wholesale price increase unprofitable; and (iii) the customers of the access seekers would not switch to a significant extent to the retail arm of the integrated hypothetical monopolist, in particular if the latter does not raise its own retail prices. When the above-mentioned criteria are fulfilled, constraints should be deemed to be strong enough so that the platform concerned is included in the market, especially where OCECPR considered the definition of sub-national geographic markets.

When indirect constraints are found to exist but are not strong enough to constrain the price of other WLA or WBA products, they should be taken into account when assessing whether the incumbent operator has SMP on the relevant market, as well as alternatively in the assessment of the appropriate remedies.

In order to estimate the strength of indirect constraints, OCECPR should therefore have provided *inter alia* a qualitative and a quantitative assessment of factors including the effective pass-through from wholesale to retail prices (including an assessment of the wholesale/retail price ratio), the (in)capacity of operators to absorb wholesale price increases depending on competitive conditions at retail level, as well as the effective willingness of retail consumers to switch their operator in response to the price increase.

The inclusion of self-supplied cable based access could affect the SMP finding, if an operator was found not to hold SMP on such a broadly defined market. The Commission notes, however, that considering CYTA's market share and other market conditions, the inclusion of self-supplied products on the basis of the indirect constraints would make no difference to the outcome of this market review.

Nevertheless, the Commission invites OCECPR to further substantiate its definition of WLA and WBA markets in its final measure, with a particular reference to the factors mentioned above, i.e., pass through, absorption capacity, and retail consumers' switching behaviour.

Vectoring implementation and appropriateness of the substitute virtual access product

OCECPR indicates possible future plans by CYTA to deploy vectoring technology, and the possible removal of access obligations to the copper access loop in case of vectoring deployment, subject to conditions imposed on CYTA such as providing prior information of deployment and an obligation to provide a virtual wholesale access product which fulfils a predefined list of characteristics.

The Commission stresses that, in order to take any decision modifying the imposed access remedies because of the deployment of vectoring, OCECPR should consider carefully its implementation details, bearing in mind issues such as, without limitation, the take-up of the services that would be affected, the likelihood and feasibility of the vectoring plans of the SMP operator, the existence of an alternative and substitutable product for access seekers to rely on, and appropriate monitoring safeguards and treatment of potential stranded assets.

In light of the above the Commission would urge OCECPR to ensure that the SMP operator offers a virtual access product which allows access seekers to compete effectively on the relevant retail markets and especially the retail broadband market, and to ensure that vectoring will not be activated (and thus the loss of LLU will not occur) until the VULA product is readily available, and it has been established that it represents an effective and functional substitute for the loss of unbundled local access.

To that aim, the Commission calls on OCECPR to ensure that the features of the substitute access offer are the closest possible to a physical unbundling product. The Commission considers, in particular, that the future substitute should be local (i.e. interconnection should occur locally), service-agnostic (i.e. should be able to support a multitude of services), uncontended in practice (i.e. dedicated capacity should be available to the end-user) and allow for sufficient control of the access connection and sufficient control of the customer premises equipment (CPE) to enable access seekers to effectively differentiate their products at retail level. Only the provision of a virtual access product with such features allowing access seekers a sufficient degree of flexibility to differentiate adequately their offer from the SMP operator's would provide a real alternative to a physical unbundling product and would justify an exception to the general obligation of providing unbundled access.

As a possible alternative, the Commission would like to point to remedies proposed by national regulators in other Member States²⁸, which appear to support a solution allowing for multi-operator vectoring and which as a result could address the competitive restrictions allegedly inherent in the provision of vectoring.

The Commission invites OCECPR to carefully consider all available alternatives.

Need for coherence in the notification of remedies under the EU consultation procedure

The Commission notes that the BU-LRIC model which OCECPR intends to use to set price caps for the wholesale access services in Cyprus is not part of the present

²⁸ See, for example, Case IT/2015/1778; C(2015) 6884 final

notification. The Commission underlines in this respect that it can fully assess the appropriateness of the proposed regulatory measures only once the latter's implementation details, in particular as regards the pricing methodology, are determined by OCECPR. The relevant pricing decision is planned to be notified under the Article 7 consultation procedure in the fourth quarter of 2016. The Commission acknowledges this and invites the OCECPR to notify the specification of the costing model without undue delay.

Pursuant to Article 7(7) of the Framework Directive, OCECPR shall take the utmost account of the comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measure; where it does so, shall communicate it to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC²⁹ the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission³⁰ within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication.³¹ You should give reasons for any such request.

Yours sincerely,

For the Commission,
Roberto Viola
Director-General

²⁹ Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 301, 12.11.2008, p. 23.

³⁰ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

³¹ The Commission may inform the public of the result of its assessment before the end of this three-day period.