



Brussels, 16 September 2009

Commission of the European Communities
Mr. Reinald Krüger, DG Information Society & Media
Mr. Joachim Lücking, DG Competition
Rue de la Loi 200
B-1049 Brussels
Belgium

Ref: Austria: Market 5 of the Recommendation on Relevant Markets

**National consultation/notification concerning a revision of the
market definition ordinance (TKMV 2008)**

Request for phase II investigation

Dear Mr. Krüger, Mr. Lücking,

On 3 September 2009, the Austrian Rundfunk und Telekom Regulierungs-GmbH (RTR) opened a national consultation (running until 29 September 2009) concerning a revision of the Market Definition Ordinance (TKMV 2008), and made a notification in parallel. The draft revised Market Definition Ordinance is proposed to be modified to explicitly contain a market for the provision of business-grade wholesale broadband access, but does not contain any reference to Market 5 more broadly, nor a specific market for consumer-grade wholesale broadband access.

The context of this notification is that: (i) Decision M1/07-534 of 4 July 2008 on Market 5 which proposed deregulation of a substantial part of the market through differential remedies was annulled by the administrative court on 17 December 2008 (the notification of draft measures relating to this specific decision was criticised in a letter by ECTA to the Commission at the time), and (ii) as a consequence the regulatory situation in Austria reverted to a

Decision dating back to 2005 on Market 12 of the first edition of the Recommendation.

RTR's new proposals are unprecedented as they entail, among others, an assertion that a key segment of Market 5 (concerning all connections to be made available to consumers – as opposed to businesses) need not be defined at all (and hence no 3-criteria test is conducted by RTR), on account of a direct constraint exercised by mobile Internet on a retail market. The retail market to which reference is made is itself proposed to be defined by RTR as including connections based on ADSL/SDSL, cable and mobile broadband (with a suggestion, but far from a definite confirmation, that other xDSL connections would possibly/likely also be included, and with an indication that connections based on FttH would, for at least 2 years, be excluded).

With regard to another key segment of Market 5 (concerning all connections to be made available to businesses – as opposed to consumers), RTR proposes to define a market, and proposes to find that this market fulfils the 3-criteria test, with reference to a retail market proposed to be defined by RTR as including only connections based on ADSL/SDSL, with the same doubt cast over other xDSL connections, and the same exclusion of connections based on fibre.

ECTA is writing on behalf not only of its Austrian members which will be directly affected by this decision but also on behalf of competitive operators Europe-wide to stress the importance for the Commission to address this case through a phase II investigation, in order to avoid an inappropriate precedent being set on the basis of flawed and in some cases cursory analysis and failure to follow due process.

Our key concerns are as follows:

Substantive elements

1. **Retail market definition and analysis:** Erroneous definition of the relevant market relating to consumers, which in turn determines the approach to the wholesale market for connections to be made available to consumers:

→ failure to recognise that the retail market may not be limited to broadband Internet access alone, but may increasingly be defined on the basis of bundled offers, given the widespread provision of triple-play offers including telephony and television by the incumbent operator (largest retail provider) and by the major cable company, together representing two-

thirds of all fixed retail connections, and the decline in market share of fixed operators unable to compete with such offers.

→ failure to properly assess evidence in the Austrian market (and increasingly in other markets) which suggests increasing complementarity for example in light of the the provision by the incumbent operator (largest retail provider, fixed and mobile) of quadruple-play (including mobile) and trends towards fixed mobile integration and 'homezone' offers in many markets which offer a combination of fixed and mobile functionality.

→ failure to adequately examine the relative technological capabilities and limitations of fixed and mobile infrastructure and which affect their suitability not just for bundling but also for downloading content (such as music and videos) and for various forms of online entertainment such as gaming. In fact, RTR includes in the same retail market as fixed broadband, Internet-only mobile connections with a monthly bandwidth allocation as low as 250 Mb or, for prepaid, a quarterly bandwidth allocation of 750 Mb (this implies that, for example, Internet-only mobile connections from T-Mobile Austria are included that entail explicit contractual restrictions on use of third party VoIP). We also note that in footnote 73 (in the Annex), RTR indicates that it is difficult to compare price and characteristics of fixed broadband and mobile Internet offers, and hence mobile Internet was not included in the price comparison. In this context, it is hard to see how a SSNIP test was performed.

→ flawed or biased questions in the survey, failing to indicate to respondents the capabilities and limitations of retail products, e.g. the non-suitability of mobile Internet for triple-play including television, multi-room television and other video streaming, certain types of entertainment (e.g. games requiring very low latency and packetloss) and business applications (e.g. real-time VPN access to mission-critical applications requiring strong bidirectional capabilities), etc.

→ Failure to consider that competitive deficiencies in the existing retail broadband market in which Telekom Austria is gaining market share, may have influenced the extent to which the capabilities of the technologies have been realised and therefore the perception of substitution between fixed and mobile. OECD data on speeds and pricing from Sept 2008 suggest that Austria is in the lower portion of performance in fixed broadband and that offers are not comparable to

those in more competitive broadband markets such as France and the UK where substitution has not been observed.

→ failure to properly examine competitive trends which suggest that Telekom Austria continues to strengthen its position in the retail (fixed) broadband market – attributed in financial statements to bundling strategies – with a market share approaching 50%. :

2. Wholesale market definition and assessment: Failure to consider the relevant wholesale market – i.e. Market 5, and in particular the demand-side, i.e. demand expressed by existing and potential alternative operators for wholesale inputs. RTR bases its proposal to deregulate Market 5 on the presumption that the retail consumer broadband market does not meet the 3 criteria test and is characterised by effective infrastructure competition. No proper assessment is made as to whether the relevant wholesale market is characterised by no SMP and/or fails to meet the 3 criteria test.

→ limited analysis of the extent to which effective wholesale offers would be made available in the absence of regulation, and in circumstances where unbundling is not viable and where NGA developments may render urban unbundling unviable. Other than the present offer from Telekom Austria, wholesale offers from other parties in Austria but have no material impact on Market 5 (less than 13000 connections whilst cable wholesale is often available only to a single access-taker).

→ failure to recognise that low take-up and declining usage of the existing bitstream offer could be explained by deficiencies in the product and uncertainty over its future: in particular the 'bitstream' offer available in the market today only supports the provision of basic Internet access, and, recently introduced, subject to additional fees, Voice over Broadband (VoB). The offer also entails additional wholesale fees for 'residential high usage'. This wholesale product is not suitable to support the provision of the retail bundles that characterise the retail markets.

3. Next generation access developments: The assessment fails to appropriately account for or provide certainty in relation to Next Generation Access (NGA).:

→ failure to acknowledge that NGA developments (vDSL is said to be in the pipeline) would be a normal expected progression to further provision of retail bundles and match the capabilities of cable technologies.

→ failure to recognise that potential interventions on Market 4 to address new bottlenecks resulting from NGA roll-out are unlikely to be sufficient to sustain competition downstream particularly absent point to point fibre architectures (as repeatedly recognised by the Commission in Article 7 letters and in the draft Recommendation on regulated access to NGA).

4. **Business markets:** identification of separate business service segments is in principle positive as is the decision to find a nationwide market reflecting the multi-site nature of demand. However, unfortunately deficiencies remain with this segment of the analysis: :

→ segmentation between business and residential has not been based on a full analysis of the differing product requirements of the two customer groups. This means the market definition has been based on insufficiently clear criteria and raises questions about whether the associated remedies will be appropriate for business use.

→ the importance of NGA and the need for wholesale products to allow for effective competition with the incumbent over the full range of speeds and capabilities has not been properly acknowledged in relation to the business service market.

We address these points in additional detail below, and we support our points with elements from the RTR draft and from relevant precedents. The remainder of our submission focuses largely on retail markets because the RTR draft is very heavily focused on the retail markets, and provides very little substantive analysis of the actual wholesale markets, which are (should be) the markets under direct consideration.

Procedural elements

In addition to the substantive points we have serious concerns about whether RTR has followed due process in its notification and consultation process.

→ RTR has not notified an analysis for Market 5 as a whole and has not conducted the 3-criteria test on the relevant wholesale market.

- RTR has simultaneously notified the Commission alongside its national consultation. The parallel consultations make it difficult to see how RTR could properly reflect the comments of respondents to the national consultation or those of the Commission and other NRAs in its final decision. The consultation timescale also appears very short for such a significant decision.

- RTR has again identified a proposed relevant market without conducting an SMP assessment and defining remedies. In the case of markets proposed to be deregulated, the intention is clear. However, it is difficult to gauge how the proposals to identify a separate business market will operate without being able to review the other aspects of market analysis simultaneously.

On the basis of the elements outlined above and below, ECTA urges the European Commission to prevent any adoption of RTR/TKK decisions that would amount to inappropriate and detrimental withdrawal of regulatory obligations on Market 5.

ECTA believes that Market 5 in Austria should instead become subject to reinforced ex-ante regulation, resulting in the imposition (for the first time) of fit-for-purpose wholesale broadband access on the fixed network of Telekom Austria, to support the differentiated requirements of alternative operators serving, on the one hand, consumers (requiring triple-play capability) and, on the other hand, businesses (requiring low contention services and strong SLAs) and explicitly incorporating in both cases services provided on the basis of vDSL and FTTH.

A. Characterisation of retail markets, and retail market definitions

A1. RTR starting point = retail Internet; failure to consider retail bundles and differing service offerings leads to incorrect substitution analysis and to incorrect market definition (erroneous inclusion of mobile Internet)

RTR's Begleittext starts with a presentation of the 'broadband market' in Austria at retail level (Chapter 1). It highlights, correctly, several important developments including: (i) the fact that Telekom Austria and UPC provide two-thirds¹ of all fixed broadband connections, with a substantive portion of

¹ Updated market data released by RTR on 9 September 2009, indicates that Telekom Austria's retail fixed broadband market is approaching 50% (page 35 of RTR Telekom Monitor

the remainder provided by other CATV companies, (ii) the retail price reductions that have occurred in 2007/8 for both fixed and mobile offers for consumers, and (iii) the spectacular growth of mobile Internet in Austria – stating that this is now offering real-world Internet access downstream speeds of 1-4 Mb.

RTR fails, however, to reflect in its market analysis the equally important trend towards the provision of bundles, in particular double-play and triple-play bundles including television, which are strongly promoted by Telekom Austria and by UPC (and other cable companies). It also fails to mention that Telekom Austria provides a very aggressively priced quadruple-play bundle including voice, Internet, television, and mobile, suggesting that the incumbent has identified a need to serve consumers with a product in which fixed and mobile are clearly complementary.

Nor does the RTR observe the trend towards downloads of large volumes of music and video content within an acceptable time (a few minutes) that has stimulated broadband usage in many advanced markets with or without bundled services.

In the product and geographic delineation of retail markets (Chapter 4), RTR implicitly equates 'broadband' with 'Internet' and again fails completely to address bundles, including television in the consumer market, or the differing speeds, contention and service levels that may be required for evolving consumer usage patterns such as large volume fast downloads or game playing.. RTR does recognise that for the business segment, 'additional services' such as static IP addresses, domain name management, QoS, SLAs etc. are relevant considerations, but makes no attempt to suggest that, for the consumer segment, bundling with voice, television or mobile or minimum speeds and unrestricted volumes, would have any relevance.

Chapter 4 also contains the results of a market survey conducted by or for RTR, as well as information on actual end-user switching behaviour, which aim to inform the demand-side substitution analysis, and which, according to RTR, demonstrate perceived substitutability by consumers, and actually exercised substitution by consumers between fixed broadband (implicitly fixed broadband Internet only) and mobile Internet.

ECTA does not have access to the entirety of the survey questions (only two are fully cited in the RTR consultation document) and to the survey results,

but, if the questions were put to respondents without indicating the different capabilities of xDSL, CATV and mobile Internet offers, notably with regard to their ability to deliver bundles and television as part of a bundle or to facilitate fast downloading of large volumes of content, we believe that this would constitute a fatal flaw in the methodology, critically undermining all conclusions drawn by RTR. It also appears that the survey questions addressed in the RTR document systematically take xDSL as the starting point, and that no questions are asked to users of mobile Internet about switching to fixed broadband or combining fixed and mobile in a package or 'homezone' offer in response to a SSNIP or in response to a realisation that mobile Internet does not in fact meet the totality of their requirements and therefore would not constitute a substitute for fixed broadband.

ECTA strongly disagrees with RTR's conclusion (page 24) that three-quarters of consumer mobile Internet usage would be substitutive for fixed broadband and/or would exercise (as RTR alleges) a direct constraint on fixed broadband offers.

Our objections are based on: (i) absence of evidence of examination by RTR/the survey as to whether mobile Internet users (or the households/housing they reside in) also subscribe to stand-alone services or bundles including cable-tv, satellite-tv or IPTV, (ii) flaws or bias in the survey methodology, (iii) failure to consider the intrinsic product capabilities of mobile Internet compared with fixed broadband and the impact this has on the speeds and services available in the consumer market.

At page 12 (in Chapter 2.2 on current wholesale regulation), RTR does note that takers of 'bitstream' clearly find it more difficult (than in the past) to compete with retail bundles from integrated providers or unbundlers, thereby acknowledging that this is a relevant retail development. However, RTR fails to assess properly the impact that bundling has had on competition in the market or the degree to which bundled offers can and have been replicated – we discuss this further below.). RTR also makes no mention in the consultation document that providers of mobile Internet cannot enable television on a residential TV set basis and that many of their offers do not enable users to fully benefit from all content, applications and services available on the Internet (e.g. some content downloads and applications require bandwidth which would use-up the monthly allocation of mobile Internet offers within hours, some communications applications and games require low packetloss for upstream connections).

In Section 5.1.2 (Chapter 5) which concerns the analysis of the second criterion of the 3-criteria test for the retail consumer market, the following is mentioned in passing: “*Umsätze wurden nicht erhoben, da ein Großteil der Produkte im Festnetz inzwischen im Bündel mit Sprachtelefonie bzw. Kabelfernsehen oder IPTV verkauft wird, und eine Aufteilung des Gesamtpreises auf die einzelnen Komponenten im Bündel arbiträr wäre*”, i.e. there is: (i) an explicit recognition by RTR that the retail market is largely characterised by bundling, and (ii) an explicit unwillingness by RTR to disaggregate the bundles for the purposes of its analysis of the competitive situation.

In summary, contrary to RTR’s rosy characterisation, the factual situation is that the Austrian retail market for consumer broadband services is characterised by commercially successful bundling, and retail triple-play bundles are provided by, at best, two (and very occasionally three) operators in any geographic area, with cable covering 50% of the population and unbundling reaching 60-65% of the population on aggregate.

This leads to an erroneous demand-side analysis (assuming that ‘users effectively switch or can switch’ to mobile) as well as an erroneous supply-side analysis (assuming implicitly ‘5/6 to 8+ operators (e.g. Telekom Austria + 1 cable + 1 or 2 unbundlers or bitstream takers + 4 mobile) competing for the consumer ‘broadband’ market anywhere, driving down prices nation-wide’). RTR should not only focus on prices, but also on what is actually being delivered in product terms.

This erroneous analysis leads to the erroneous inclusion of mobile Internet in the relevant retail market which is factually not a substitute for fixed broadband. This in turn undermines the entirety of RTR’s market definition reasoning, at the retail level and at the wholesale level.

ECTA therefore considers the substitution analysis and resulting (absence of) market definitions to be deficient, and considers that RTR should be enjoined to withdraw its proposals. If the proposals were to be maintained, the Commission would have no alternative but to veto such market definitions.

A2. Competitive situation of the retail market and lack of replicability of retail bundles (through mobile Internet, and in fact also through LLU/BSA)

The Austrian retail market is characterised by the ever-increasing importance of double and triple-play offers, and in fact a strong quadruple-play offer (including mobile) from the incumbent operator.

Telekom Austria and UPC (and other cable companies in other geographic areas) are capturing essentially the totality of 'net fixed broadband adds', and are taking existing customers away from fixed alternative operators, thanks to their ability to offer multi-play offers, with Telekom Austria enjoying sharp growth and cable remaining static (Telekom Austria Q2 2009 financial results, which are more recent than the data provided by RTR, show a decline for cable between Q2 2008 and Q2 2009; RTR's Market Monitor 3/2009 shows that Telekom Austria's retail market share is trending towards 50%).

Alternative operators relying on both local loop unbundling and 'bitstream' are experiencing a serious decline of their customer base, notably given their limited ability to deliver triple-play bundles including television (limited LLU footprint; 'bitstream' not fit-for-purpose). The number of LLU lines and bitstream lines in service has declined again in Q2 2009 according to Telekom Austria Q2 2009 financial results, which are more recent than the data provided by RTR.

Note: throughout the document, RTR fails to mention that alternative operators relying on LLU and 'bitstream', e.g. Tele2, Teleport, Silver Server, typically do not provide television.

Operators of mobile broadband networks are signing up new customers, a portion of which may be substitutive for fixed broadband, but an examination is needed about other products, notably fixed products that these customers also are subscribers to, or have access to in their place of residence.

The factual situation, for the past several years and especially in recent quarters, is that Telekom Austria is systematically strengthening its market position overall. This is evidenced by RTR's Market Monitor 3/2009. In its Q2 2009 financial results², Telekom Austria explicitly names bundling as a key in this respect (the Q2 2009 presentation in fact names bundling for both consumers and SME's as key; it also contains Q2 2009 data underlining the

² <http://www.telekomaustria.com/dateien/contentf/pr-results-qu2-2009.pdf>

points made in the paragraphs above). This must be taken into full account in any market analysis exercise.

We note that the potential for bundles to be used to strengthen dominant market positions, and the need to ensure replicability of bundles where dominance or a leading position exists (which is the case today for Telekom Austria), was acknowledged by the Commission in:

- a) the Commission's competition law case against Telefónica which states that *"creating and maintaining a leading position in the fast growing market of retail broadband access allows Telefónica to protect its position in adjacent retail mass markets like fixed telephony... End users are more likely to choose the same provider for all electronic communications services, i.e. fixed telephony, broadband internet, television over broadband and also mobile telephony"*.
- b) The Commission's Art. 7 letters on Market 5 in Spain dated 13 November 2008 and 26 December 2008³.
- c) The Commission's draft Recommendation on regulated access to NGA⁴.

Indeed, replicability of bundles is essential to preserve and promote competition, although replicability in and by itself is not sufficient: room for innovation and independent product definition is also essential – see below.

In the Austrian case, the full wholesale product capability which would enable replicability of bundles should allow the provision of triple-play services including television (and a case could be made for this in fact to extend to quadruple-play services including mobile) for consumers, as well as highly specified business services.

Replicability of bundles is not feasible in Austria at present or under the circumstances envisaged by RTR for the time horizon of the envisaged Market 5 definition/analysis, neither by providers of mobile Internet using their

³<http://circa.europa.eu/Public/irc/info/ecctf/library?l=/espa/registerednotifications/es20080804-0805&vm=detailed&sb=Title>

⁴http://ec.europa.eu/information_society/policy/ecomm/library/public_consult/nga_2/index_e

own network (not able to provide bundles including television on a residential TV set basis), nor by alternative operators relying on local loop unbundling (insufficient LLU footprint; long loops) or 'bitstream' – (not fit-for-purpose, therefore not able to provide bundles including television nation-wide).

Achieving replicability of bundles on a nation-wide basis is particularly important in the Austrian context given that: (i) LLU (all operators combined, including UPC's subsidiary iNode) reaches only 60-65% of the population, RTR does not expect new entry or expansion, and LLU does not enable replication in all cases due to long loops, and (ii) the current 'bitstream' offer of Telekom Austria does not enable the provision of television.

Furthermore, it seems likely that Telekom Austria will go beyond its current NGA trials (RTR mentions an expected VDSL2 roll-out), in order to match the capability of cable (DOCSIS 3.0 is already rolled-out by UPC, and UPC provides services including 100 Mb downstream Internet access) but there is no indication/guarantee that LLU will remain feasible and/or that bitstream over NGA (e.g. VDSL2) will be configured and provided in a manner that enables replication of triple-play bundles including television (see A.4 below). Also, RTR/TKK's definition/analysis Market 4 (ECTA expressed itself critically on the draft notification), and RTR's statements in the present consultation on Market 5, do not suggest that RTR/TKK intends to adopt any measures going beyond the scope of Market 4 to address the emergence of new bottlenecks relating to NGA roll-out by Telekom Austria, and it seems highly doubtful that Market 4 measures would suffice to preserve and promote competition on downstream wholesale and retail markets.

Addressing competitive problems in the context of Market 5 to enable competitive provision of triple play and anticipate vDSL developments would involve the definition of adequate QoS parameters and multicast capability, and the withdrawal of existing extra wholesale charges where end-users are characterised as 'high residential user' (page 30 of Telekom Austria's current reference wholesale 'broadband Internet solutions' offer, dated 1 September 2009⁵ contains the monthly recurring charges per user for wholesale

n.htm#responses

⁵ <http://unternehmen.telekom.at/Content.Node/dateien/wholesale-dsl.pdf>

'bitstream' services; various other wholesale charges are also listed in the same Annex 2 of the reference offer⁶).

ECTA submits that the market circumstances in Austria indicate significant competitive problems, and that, instead of adopting retail market definitions, and failing to adopt a crucial wholesale market definition, which would amount to the withdrawal of regulatory obligations on Market 5 (consumer segment), RTR/TKK should, as a matter of priority, strengthen remedies on Market 5, so as to guarantee real replicability of bundles including those comprising television (and real innovation through independent product definition by alternative operators on top of redesigned Market 5 products) and a case could be made for action to enable the inclusion of bundles comprising mobile.

A further problem which is not examined by RTR is the extent to which the lack of effective competition in fixed broadband may have affected the relative perception of fixed and mobile offers. In countries such as France and the UK which have a history of strong fixed broadband competition, there is little evidence of fixed mobile substitution but rather a more complementary approach due to the perception of significant price and quality differences. The development of online services – such as the BBC iPlayer in the UK – has also evolved to take advantage of specific fixed capabilities that were not so readily available when the market was less competitive.

Looking at data from the OECD⁷ concerning speeds and pricing of fixed broadband, in addition to the data on market share trends, there do appear to be indications that fixed broadband is not being offered so as to maximise the capabilities of the technology as would be expected in an effectively competitive market,. The fastest offer via DSL at 16Mbit/s (Sept 08) for example compares poorly with other European markets, whilst the OECD suggests that the fastest speed offered via FTTH in Austria was 10Mbit/s

⁶ An examination of the available margins, comparing the fees in Annex 2 of the reference offer, and Telekom Austria's quadruple-play retail bundle (sold for €29.99/month VAT incl. as a promotion and €34.99/month VAT incl. as an ongoing service, to which the monthly rental fee of a telephone line must be added) may also be a worthwhile exercise.

⁷ OECD Broadband portal
http://www.oecd.org/document/54/0,3343,en_2649_34225_38690102_1_1_1_1,00.html

(Sept 08). Austria also falls into the lower half of OECD countries on most broadband pricing measures.

ECTA submits that any perception of substitutability between fixed and mobile may have been influenced by the relatively poor prices and speeds available in fixed broadband in Austria which have been affected by lack of effective competition in that market.

A3. Distinction between consumer and business markets

ECTA has repeatedly argued that the retail demand from business customers is distinct from that from residential customers both in terms of products and in geographic terms.

ECTA has also repeatedly argued (including specifically with regard to the previous notification made by the Austrian RTR/TKK for Market 5) that wholesale markets (in particular Market 5) must be examined by taking into account the differentiated requirements of alternative operators for consumer-grade and business-grade capabilities, across the national territory.

It is satisfying to note that RTR has now (albeit belatedly) reached a similar conclusion, and ECTA welcomes in principle the distinction (at the market definition stage) put forward by RTR, at the retail level, and feeding through to the wholesale level.

However, RTR apparently establishes the retail market distinction based solely on the identity of the ultimate customer (consumer or business) and not on the basis of product characteristics. Indeed, RTR explicitly rules out differences such as overbooking and symmetry, which have been invoked by other NRAs to distinguish consumer and business retail and wholesale markets. RTR does invoke elements such as experience, reputation, complementary offers (voice, VPNs, leased lines, mobile), quick reaction times, need for nationwide coverage to serve multi-site businesses, etc. to state that providers of consumer broadband cannot readily penetrate the market for business broadband, and that consumer providers cannot sufficiently strongly and sufficiently quickly discipline business providers and vice-versa.

ECTA has concerns about the effects of such an approach at the wholesale level, and we discuss these concerns in section B below.

B. Wholesale market definitions

B1. Wholesale market for connections to deliver broadband to consumers

RTR's national consultation document devotes a total of one paragraph (at the top of page 57 of the Begleittext) to the definition of the wholesale market for connections to deliver broadband to consumers. In this paragraph, RTR states that effective competition exists on the retail market for 'broadband connections for consumers' (as indicated above, this relies on the alleged existence of direct constraint from mobile Internet) also without the existing (2005) regulation of wholesale broadband access, thereby obviating the need for any wholesale-level market definition.

Based on this approach, RTR elects not to conduct any 3-criteria test for the wholesale market for connections to deliver broadband to consumers. RTR also fails to assess the state of Market 5 itself (the wholesale broadband access market) or whether there would be sufficient incentives for continued supply of wholesale offers in the event that regulation was removed. The effective result of this approach is the withdrawal of the (2005) regulation of wholesale broadband access that remains in place to-date, insofar as it concerns the wholesale market for connections to deliver broadband to consumers.

ECTA has stated in Sections A1 and A2 of this letter the detailed reasons for its disagreement with RTR's approach (erroneous market definition at retail level for the consumer market, incorrect demand- and supply-side substitution analyses), and the conclusion to which it leads. ECTA strongly objects to the summary approach taken by RTR, which excludes any proper definition/examination of the situation of the wholesale market in its own right (in particular the demand of existing and potential alternative operators for wholesale inputs) and how wholesale access and competition would normally be expected to be present in an effectively competitive market and how it would contribute to reducing entry barriers and promoting healthy retail market development, etc.

B2. Wholesale market for connections to deliver broadband to businesses

RTR's national consultation document devotes only 3 ½ pages (pages 57 to 60 of the Begleittext) to the definition of the wholesale market for connections to deliver broadband to businesses.

ECTA has stated in Section A3 of this letter that it can potentially agree with the overall consequence of the retail and wholesale market definitions proposed by RTR for connections to deliver broadband to businesses. However, ECTA has also explained in Section A3 that it has concerns. We elaborate on these concerns in this section, given that, after all, Market 5 is the relevant market in question.

In our view, RTR's chosen approach makes RTR's draft decision, if finalised unchanged, vulnerable to challenge by those parties interested by inappropriate deregulation of wholesale markets, seeking inappropriate geographic segmentation of markets, or seeking the inappropriate reintroduction differentiated sub-national remedies, each of which would amount to a large proportion or the totality of the wholesale market being inappropriately deregulated, either at the market definition stage, or through differentiated remedies.

We would therefore encourage the Commission to insist that RTR revise its proposals, on the following points:

- a) Especially in the wholesale market definition, there is a need to revise the basis for the distinction between consumer and business segments, by focusing on objective differentiating factors reflecting explicit demand expressed at the wholesale level by existing or potential alternative operators for business-grade services, in particular: (i) overbooking incl. 1:1 up to 1:20 profiles, (ii) solid SLAs for delivery and repair incl. 4-hour intervention/repair times, (iii) the ability for the alternative operator to provision multiple VLANs, and (iv) the need for nation-wide coverage to address requirements of multi-site organisations.

Note: Such business-grade wholesale services are NOT available as part of Telekom Austria's current reference wholesale 'broadband Internet solutions' offer, including the SDSL segment of that offer. ECTA submits that there is a need for regulatory intervention to ensure that such business-grade wholesale services become effectively available, on a nation-wide basis.

b) We find RTR's statement (page 60) that consumer-grade xDSL (technically) constrains the wholesale market for connections to businesses a spurious assertion. This assertion is presumably based on the 'bitstream' offer of Telekom Austria (the title of which is "broadband Internet solutions' offer, and which barely distinguishes the wholesale products designed to serve consumers and businesses requiring services based on ADSL/SDSL, except in terms of ADSL versus SDSL and in terms of pricing...).

This offer does not constitute fit-for-purpose bitstream, neither to serve ultimate consumer needs nor to serve ultimate business needs, by any stretch of the imagination, and should therefore not be allowed to determine or influence RTR's reasoning in any way.

ECTA therefore advocates that the assertion should be removed.

c) ECTA is also profoundly concerned by the summary approach taken by RTR, limiting the definition/examination of the wholesale market for business-grade connections to 3 ½ pages, which, in and of itself, makes a resulting final decision vulnerable to appeal for insufficient substantiation.

We do agree that there is no substitution on the business-grade Market 5 between xDSL and cable (and, completely evidently, with mobile Internet), and that the wholesale market is evidently nation-wide given the demand profile.

C. 3-criteria test at wholesale level

C1. Wholesale market for connections to deliver broadband to consumers

RTR has elected not to conduct a 3-criteria test for the wholesale market for connections to deliver broadband to consumers.

As discussed in B1 above, this is wholly unacceptable for ECTA as this results from fundamentally erroneous approach, which we have materially criticised throughout this letter. One can also severely question whether the approach of RTR to this matter is compatible with the letter and the spirit of the EU regulatory framework, especially given the fact that the Austrian NRA

has previously defined and imposed regulation on a market corresponding to Market 12 of the first edition of the European Commission's Recommendation on Relevant Markets. The EU regulatory framework requires NRAs to perform a proper market analysis before proceeding to any amendment or withdrawal of existing regulatory obligations. We also refer to Recital 17 of the second edition of the Recommendation on Relevant Markets Susceptible to Ex-Ante Regulation, which creates an expectation, as regards the former Market 12, and the present Market 5, that at least a 3-criteria test be conducted. It is conceivable that RTR/TKK intends to proceed with this at a later stage, but, at least from a procedural/open consultation perspective, this makes it extremely difficult for the operators concerned to have their concerns taken into proper consideration.

C2. Wholesale market for connections to deliver broadband to businesses

With regard to the wholesale market for connections to deliver broadband to businesses (on a nation-wide basis), ECTA fully agrees that it is clear that this market fulfils each of the three criteria and will continue to meet these criteria for the foreseeable future, notably given the requirements of business customers, and the operators serving them, to deliver services on a nation-wide and often multi-national basis.

Only an obligation to provide fit-for-purpose wholesale broadband access can ensure the maintenance and promotion of competition on this market segment.

D. Treatment of NGA throughout the RTR consultation document

RTR's proposed definition of retail and wholesale markets systematically takes ADSL/SDSL as the starting point. This leads to a questioning (in Chapter 4.1) on substitution, and chains of substitution involving criteria such as bandwidth/speed, overbooking, asymmetry/symmetry, consumer/business.

With regard to bandwidth/speed, RTR puts forward that there is a chain of substitution between all existing ADSL/SDSL speeds (we agree), and a likely continuing chain of substitution with faster xDSL, notably VDSL2 (we agree).

ECTA has always argued that bandwidth/speed is not a relevant criterion to distinguish broadband markets, as there is a natural progression of supply and demand over time as technological capabilities and demand evolve. All

retail pricing since the advent of broadband, notably for services based on ADSL, ADSL2+, VDSL2 and FttH, reflects bandwidth/speed differences only to a very minor, and in some cases non-existent extent, with all speeds being offered within a retail pricing continuum, designed to attract a reasonable proportion of customers to higher speeds. Indeed, where services based on VDSL2 or FttH have been priced far above those for services based on ADSL2+, these offers failed to attract a meaningful number of customers.

ECTA hereby confirms its opinion that the chain of substitution between broadband speeds should not be restricted to particular technologies, and this position applies both for the retail and for the wholesale markets.

We would also like to express our concerns with regard to the statement made by RTR in the context of VDSL2 at the bottom of page 18: *“Sollten geeignete Vorleistungsprodukte jedoch nicht oder nicht rechtzeitig zur Verfügung stehen, so wäre diese Schlussfolgerung zu hinterfragen”*, which may open the door to gaming the envisaged regulatory set-up.

We note also the absence of any detailed consideration of bandwidth/speeds enabled by fibre access in the substitution analyses. While we understand that there is no substantial FttH deployment at this time in Austria (although Telekom Austria is a service provider on third party FttH and other initiatives do exist), RTR's indication that it would re-examine the situation within 2 years is not reassuring. RTR should give clear indications as to how FttH deployment, in particular by dominant operators, will be treated.

ECTA has previously advocated, for example in the context of the Commission's consultations on a Recommendation on regulated access to NGA (which concerns the wholesale level), that clearly stating that the market analysis process will continue to apply and that dominant operators will not benefit from exemptions or loopholes in the context of NGA roll-out although any genuine additional risk will be appropriately rewarded through pricing is the best way to create legal certainty, improving incentives to invest for incumbents and alternative operators alike.

In case you require any additional information with regard to the contents of this letter, or wish to discuss these and other aspects of the RTR proposals in more detail, please contact Ilsa Godlovitch.

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Yours sincerely,

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