Notification of Draft Measures Pursuant to Article 7 of Directive 2002/21/EC (Framework directive)

Section 1, Market definition

Market Definition for Broadcasting transmission services to deliver broadcast content to end users

Country: Austria
National regulatory authority: Kommunikationsbehörde Austria (KommAustria)
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1 Relevant Markets

The following relevant markets for 'broadcasting transmission services to deliver broadcast content to end users' have been defined by KommAustria (point 1.1. of the Summary Notification Form):

1. **The market for (analogue) terrestrial transmission services of TV signals to deliver TV content to end users**
2. **The market for (analogue) terrestrial FM transmission services of radio signals to deliver radio content to end users**

Both markets are defined on a nation-wide level (point 1.2. of the Summary Notification Form). They only comprise the point-to-multipoint conveyance of the broadcast signal and not the point-to-point transmission from the studio to the transmitter.

Although these markets do not appear in the Commission Recommendation 2003/311/EC[1], they can be regarded as parts of the there defined market '18. Broadcasting transmission services, to deliver broadcast content to end users'.

This market definition will simultaneously be submitted to the European Commission and to the National Regulatory Authorities and will at the same time be subject to a consultation procedure according to Art. 6 of Directive 2002/21/EC (Framework directive). Therefore no comments according to 1.3. and 1.4. of Summary Notification Form have been received at this point in time.

2 Market definition

The market 'broadcasting transmission services to deliver broadcast content to end users' as defined by the European Commission in its recommendation 2003/311/EC comprises all transmission platforms (terrestrial transmission, cable networks, satellite) as well as platforms for the transmission of different types of content (radio and television).

The answers to the following questions are based on the 'hypothetical monopolist test' (HM-Test) (point 1.5. of the Summary Notification Form):

1. Does the market for radio transmission have to be separated from the market for TV transmission?
2. Does the market for TV transmission have to be separated according to the three major transmission platforms terrestrial transmission, cable networks and satellite transmission?
3. Does the market for radio transmission have to be separated according to the three major transmission platforms terrestrial transmission, cable networks and satellite transmission?
4. The definition of geographic markets

[1] Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector

2.1 Radio and TV transmission

In order to answer the question whether TV transmission is in the same market as radio transmission or not, it has to be analysed whether a sufficient number of broadcasters could switch from one platform to the other as a response to a 5-10% increase in prices.

As for terrestrial transmission, switching in either direction is technically impossible, as different parts of the frequency spectrum are used for radio and TV transmission, and many parts of the transmission equipment can only be used for the specific part of the spectrum they have been constructed for. Supply-side substitution is also unlikely to constrain the market power of a hypothetical monopolist in one of the two markets, as a technical 'rededication' of equipment is costly and, due to interferences and the (international) coordination of the frequency spectrum, sites usually cannot be switched.

With regard to transmission via cable networks and satellite, the same technology and equipment is used for the transmission of TV and for radio content. However, the two services (TV transmission and radio transmission) are always provided by one and the same undertaking. Therefore a threat of 'switching platforms' would not constrain the market power of a monopolist who sets its prices with regard to a possible substitution between the different services it offers.

KommAustria therefore concludes that radio transmission and TV transmission constitute separate markets across all platforms.

2.2 TV transmission

To answer the questions whether the three platforms currently used for TV transmission – terrestrial transmission, cable networks and satellite – constitute a single market or not, the HM-Test has to be applied to each platform individually.

The demand side substitutability can be assessed according to four criteria:

1. Are there legal barriers to access a particular platform?
2. How many households can be reached by a particular platform?
3. What is the difference in price between the platforms?
4. Do consumers enjoy the same quality?

With regard to the second question, the current coverage situation of population in Austria is as follows: 34% receive TV programs via cable networks, 48% via satellite, and 18% terrestrial only. About 90% of the satellite households also receive terrestrial programs. Therefore, approximately 60% of population receive terrestrial TV.

2.2.1 Cable networks

Currently, three types of broadcasters are transmitting their programs via cable networks:

1. International (non-Austrian) broadcasters, such as ARD, ZDF, RTL, Sat1, Viva and MTV

2. Two Austrian nation-wide broadcasters: the public-service broadcaster ORF and the (private) broadcaster ATV
3. About 50 Austrian local broadcasters

Switching from cable networks to terrestrial transmission is impossible for most broadcasters as currently there are no more analogue terrestrial licenses available (due to lack of free frequencies). Nation-wide digital terrestrial transmission will not be available before 2006, therefore it is no alternative to cable networks in the near future. Only the present holders of terrestrial licences (beside the public-service broadcaster there are only one nation-wide private broadcaster and 8 local private broadcasters) would be able to switch. For them cable networks and terrestrial transmission form complements rather than substitutes, as they can significantly increase their coverage and revenues by transmission via both platforms. Virtually every holder of a terrestrial license also distributes its programs via cable networks.

A substitution of cable networks by 'free-to-air'/DTH[2] satellite transmission is infeasible for Austrian (private) broadcasters[3], as high fees have to be paid for transponder capacity and copyrights, amongst others. Coverage could only be increased slightly, and so the high costs would not be covered by higher revenues. One possibility to reduce fees for copyrights would be to transmit encrypted programs, which can be received only in a certain region by holders of conditional access modules (CAM). This would significantly reduce coverage in this region as only few households currently hold a CAM and only few can be expected to buy one just to see one more program. The only broadcasters for which satellite transmission is economically sensible are those serving a large market such as Germany, the UK or France. Many of these programs (e.g. RTL, Sat1), can also be received in Austrian cable networks. Satellite transmission cannot be regarded as a substitute to cable networks in this case, but rather as a complement. Cable networks urgently need those programs in order to be able to compete with DTH satellite on the retail market.

The question whether a substitution of cable networks by both platforms – terrestrial transmission and satellite transmission – would be possible is redundant, as terrestrial transmission is infeasible for most broadcasters due to lack of licenses anyway.

Supply-side substitution by satellite operators or operators of terrestrial infrastructure cannot be expected either, as non of them disposes of widespread cable networks or would be able to efficiently duplicate one. Operators of xDSL networks recently started to provide some television services in Austria. With regard to coverage and technical properties/quality, those services are currently and in the near future not comparable to transmission via (coaxial) cable networks, however.

KommAustria therefore concludes that TV transmission via cable networks constitutes a separate market.

A follow-up question is, whether the market is to be defined on a nation-wide basis or whether geographic markets have to be defined. As cable networks do not overlap (i.e., one household is only passed by or connected by one cable network), and most Austrian broadcasters provide local content, a cable network in region x cannot be regarded as a substitute for a cable network in region y. For

[2] direct to the home
[3] The Austrian public-service broadcaster ORF is currently attempting to start DTH transmission for one of its programs.

national broadcasters, different cable networks form complements rather than substitutes, as high coverage can only be achieved by transmission via several networks.

KommAustria therefore concludes that each cable network (as far as it does not intersect with another cable network) constitutes a separate market with regard to TV transmission.

2.2.2 Terrestrial transmission

Two types of broadcasters currently hold licenses for terrestrial transmission:

1. Two Austrian nation-wide broadcasters: the public-service broadcaster ORF and the (private) ATV
2. Eight Austrian local broadcasters

Substituting terrestrial transmission by cable networks is no alternative for those undertakings, as such a switching would significantly reduce coverage. Instead of approximately 60%, only 34% of the population could be reached (in some urban areas more, in rural areas usually much less). As mentioned above, the two platforms act as complements rather than as substitutes for nation-wide broadcasters as well as for local holders of a terrestrial license.

As also discussed above, satellite transmission will not be feasible for Austrian broadcasters as they serve a market too small to justify the high costs of this type of transmission.

As satellite transmission is infeasible due to cost reasons, it becomes redundant to ask whether satellite *and* cable transmission would form a substitute to terrestrial transmission.

KommAustria therefore concludes that terrestrial TV transmission constitutes a separate market.

Although terrestrial transmission infrastructure at location x usually does not constitute a substitute for infrastructure at location y, market conditions are sufficiently homogenous across the federal territory to define only one national market. The only supplier of terrestrial broadcast transmission services is the Austrian public-service broadcaster ORF, who provides its transmission services nation-wide, based on national average prices.

KommAustria therefore concludes that no geographic markets have to be defined with regard to terrestrial TV transmission.

2.2.3 Satellite transmission

Switching from satellite transmission to terrestrial transmission is not possible as currently no terrestrial licences are available. Cable networks, on the other hand, are complements for most broadcasters transmitting their programs via satellite. Therefore the price for satellite transmission is not constrained by cable networks.

KommAustria therefore concludes that TV transmission via satellite forms a separate market.

2.3 Radio transmission

As with TV transmission, the question arises, whether the three platforms, terrestrial transmission, cable networks and satellite transmission constitute a single market or not. In this case the question can be answered by a simple look at the market share of each platform on the retail market. As a large proportion of audience is listening whilst in a vehicle, at work or at home via a portable radio set, the market share of terrestrially transmitted programs is so large that a switch to another platform is impossible for each broadcaster who does not want to lose large parts of its audience. The situation is similar with regard to the transmission of radio signals by means of AM, which, due to lower sound quality, also has an extremely low market share on the retail market.

KommAustria therefore concludes that terrestrial FM radio transmission constitutes a separate market.

With regard to geographic markets the same as for TV transmission can be said.

KommAustria therefore concludes that no geographic markets have to be defined with regard to terrestrial radio transmission.

2.4 The 'relevance' of a market

In the previous section, the following markets have been defined by means of the HM-Test:

1. The market for terrestrial TV transmission services
2. The market for TV transmission services via cable networks on individual cable networks
3. The market for TV transmission services via satellite
4. The market for terrestrial FM radio transmission services
5. The market of radio transmission services via cable networks and/or satellite

as far a these services deliver broadcast content to end users.

Each of these markets will now be examined in regard to its 'relevance' in the sense of the Recommendation 2003/311/EC. For a market to be 'relevant', three conditions have to be fulfilled simultaneously.

1. The market is subject to high and non-transitory entry barriers.
2. The market has characteristics such that it will not tend towards effective competition over time.
3. Competition law itself is not sufficient.

The market for terrestrial TV transmission services does fulfil all three criteria and therefore constitutes a relevant market. High and non-transitory entry barriers are the following:

- At most sites, the operation of a new transmitter is impossible because of interferences with neighbouring transmitters.

- Even if frequency coordination with neighbouring transmitters was possible, frequently the permission to erect a tall mast will not be given, especially at sites where a mast already exists.
- The erection of a mast and the purchase of transmission equipment involve large sunk costs, which constitute an asymmetry between an established undertaking and an entrant. This will act as a barrier to entry if there is uncertainty about whether an entrant will be able to survive.
- Most antennas by which households receive their programs can receive signals only from a certain direction. If a new site is built far off from an existing one, most households will not be able to receive the signals transmitted from the new site at all.

The high barriers to entry in combination with the fact that the Austrian public-service broadcaster ORF is the only undertaking disposing of a nation-wide terrestrial transmission network suggest that the market will not tend towards effective competition over time. As the impediments to competition are of a structural rather than a behavioural kind, competition law by itself cannot be expected to be sufficient. Under competition law, lawsuits can only be filed after the anti-competitive behaviour has already occurred, and the possible remedies and fines are not apt to address structural problems. Sector specific competition law can prevent anti-competitive behaviour before it occurs and is also equipped to deal with structural problems.

The market for TV transmission services via cable networks on individual cable networks does not constitute a relevant market. The potential market power of the local cable 'monopoly' vis-à-vis broadcasters is restricted for two reasons:

- On the retail market there is fierce competition between cable networks and DTH satellite receivers. To be able to compete, cable operators strive to offer as many programs as possible. This affects international programs, nation-wide programs as well as local programs, the latter of which cannot be received via satellites. This strengthens the bargaining position of the broadcasters (countervailing buyer power).
- The must-carry rule under certain conditions allows the national regulatory authority to oblige a cable network operator to carry a certain number of programs. As demand for transmission via cable networks in Austria is not overwhelmingly large, this rule seems sufficient to give every broadcaster who wants to transmit its program via cable networks the opportunity to do so. The regulatory authority may also determine an appropriate remuneration.

Against this background, competition law will be sufficient to ensure effective competition.

The market for TV transmission services via satellite is not relevant as there are no satellite operators resident in Austria, which could be subject to regulation of the national regulatory authority.

The market for terrestrial radio transmission services does fulfil all three criteria and therefore constitutes a relevant market. The situation here is very similar to the one of terrestrial TV transmission. Entry barriers can be described as follows:

- At many sites, the operation of a new transmitter is impossible because of interferences with neighbouring transmitters.
- Even if frequency coordination with neighbouring transmitters were possible, frequently the permission to erect a tall mast will not be given, especially at sites where a mast already exists.
- The erection of a mast and the purchase of transmission equipment involve large sunk costs, which constitute an asymmetry between an established undertaking and an entrant will act as a barrier to entry if there is uncertainty about whether an entrant will be able to survive.

As with TV transmission, the public-service broadcaster ORF is the only undertaking disposing of a nationwide terrestrial transmission network. Competition law therefore will not suffice to ensure effective competition (see reasoning above).

The market of radio transmission services via cable networks and/or satellite as well as the market for radio transmission services via AM are not relevant. As there are no scarce resources and the demand for these types of transmission services is very limited, network operators are unlikely to be able to exercise market power. Thus, competition law will be sufficient to ensure effective competition.