

EU Commission issues recommendation concerning the wholesale high quality access market in Hungary

Today the European Commission issued a recommendation on the Hungarian regulator's (NMHH's) proposed regulation of access to the wholesale high-quality telecoms network of Magyar Telekom. It has also withdrawn its serious doubts on the costing methodology used to determine the regulated rates for obtaining access to Magyar Telekom's network.

The Commission has issued a recommendation to the regulator regarding its calculation of the return on investment (calculated via the weighted average cost of capital, or WACC) which will be granted to Magyar Telekom for the provision of wholesale access to its high-quality network lines ('leased lines'). The Commission has also lifted its previous concerns on the methodology that NMHH will use to assess the cost-based access rates that Magyar Telekom's competitors will have to pay to gain access to its wholesale leased lines network.

NMHH assessed the competitive conditions on the leased lines market in Hungary and found that Magyar Telekom enjoyed a dominant position that enabled it to act independently of its competitors and customers, for example by setting prices above competitive levels or refusing access to competitors.

Under the EU Framework and Access Directives, telecoms regulators can decide to impose specific remedies on dominant operators to allow competitors to compete more effectively with them for consumers. Among other remedies, NMHH proposed to oblige Magyar Telekom to provide access to its leased lines network - which are typically used to provide telecoms services to large businesses - against the payment of an access fee.

On 17 September 2018, the Commission opened a 'Phase 2' investigation on NMHH's proposals regarding the regulation of the wholesale leased lines market. The Commission's concerns targeted in particular i) the perceived under-recovery of Magyar Telekom's joint and common costs, ii) the calculation of the WACC, and iii) the assessment of Magyar Telekom's significant market power (SMP).

On 25 October 2018, the Body of European Regulators for Electronic Communications (BEREC) issued its opinion in which it considered the Commission's serious doubts with regard to the remedies imposed on Magyar Telekom were partly justified (BoR(18)205).

After three months of additional investigations, the Commission concluded that its serious doubts regarding NMHH's calculation of the WACC had not been addressed. The concerns relate to the use of a 'size premium', a mark-up added to the WACC that is not consistent with the framework typically used by regulators to estimate the WACC, i.e. the capital asset pricing model (CAPM). In the Commission's view, NMHH's notified WACC is unlikely to reflect the currently prevailing competitive conditions in both the relevant market and the capital markets in Hungary, taking into account the risk incurred by the investing undertakings. The Commission argued that the use of the size premium could lead to excessively high access prices.

Therefore, today the Commission recommends that NMHH amends or withdraws the remedies relating to price regulation of Magyar Telekom's leased lines in Hungary in order to avoid overestimating the WACC. In particular, the Commission recommends that the size premium mark-up is not included in the WACC calculation.

If NMHH does not amend or withdraw its draft measure accordingly, in the absence of a valid reasoned justification, the Commission could reserve its right to assess whether to consider other legal measures available.

On the other hand, the Commission decided to withdraw its concerns regarding the possible under-recovery of Magyar Telekom's joint and common costs. The Commission considers that NMHH has addressed its serious doubts, as the regulator committed to change its approach to ensure that Magyar Telekom can recover a fair share of its joint and common costs through the regulated rates.

On 16 November 2018, the Commission lifted its serious doubts regarding NMHH's assessment of Magyar Telekom's significant market power.

Background

The EU Regulatory Framework for electronic communications requires National Regulatory Authorities (NRAs) to review national telecoms markets regularly and assess the need for ex-ante regulatory remedies to foster competition. NRAs are required to determine appropriate regulatory measures to be imposed on operators with SMP in these markets and notify such measures to the Commission under Article 7 of the Framework Directive.

Following an opening of an in-depth investigation due to the presence of serious doubts on the remedies proposed by the regulator, the Commission has three months to discuss the case with the regulator, in close cooperation with the body of European regulators (BEREC), in order to remove any elements giving rise to serious doubts as to compliance with EU law. The Commission may, at the end of the investigation period, either lift its reservations or issue a Recommendation under Article 7a of the Framework Directive.

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