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Case No: 92106
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Amt für Kommunikation
9490 Vaduz
Principality of Liechtenstein

For the attention of:
Dr. Rainer Schnepfleitner
Director

Dear Dr. Schnepfleitner,

Subject: LIE - Market 3b/2016 - Market analysis

**Comments pursuant to Article 7(3) of Directive 2002/21/EC
(Framework Directive)¹**

I. PROCEDURE

On 26 April 2024, the EFTA Surveillance Authority (“**ESA**”) received a notification of a draft national measure in the field of electronic communications pursuant to Article 7 of the Framework Directive from the Liechtenstein national regulatory authority, *Amt für Kommunikation* (“**the AK**”), concerning the market for wholesale central access provided at a fixed location for mass-market products (market 3b/2016) in Liechtenstein².

The notification became effective on the same day.

National consultation was carried out, pursuant to Article 6 of the Framework Directive, during the period 26 March to 15 April 2024.

¹ 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, OJ L 108, 24.4.2002, p. 33 (as amended by Regulation (EC) No 717/2007, OJ L 171, 29.6.2007, p. 32 and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12) as referred to at point 5 cl of Annex XI to the EEA Agreement and as adapted to the Agreement by Protocol 1 (“**the Framework Directive**”). On 24 September 2021, the EEA Joint Committee adopted Decision (“**JCD**”) No 275/2021 incorporating Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast), as corrected by OJ L 334, 27.12.2019, p. 164 and OJ L 419, 11.12.2020, p. 36 (“**the Code**”), into the EEA Agreement. The Code will repeal, inter alia, the Framework Directive. However, until JCD No 275/2021 enters into force, the Framework Directive remains applicable.

² Corresponding to market 3b of the EFTA Surveillance Authority Recommendation of 11 May 2016 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with the Act referred to at point 5cl of Annex XI to the EEA Agreement (*Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services*); adopted by Decision No 093/16/COL, OJ L 84, 30.3.2017, p. 7, (“**the 2016 Recommendation**”).

ESA had pre-notification exchanges with the AK, during which it requested and obtained some clarifications on the AK's draft measure.

The period for consultation with ESA and the national regulatory authorities in the EEA States ("EEA NRAs"), pursuant to Article 7 of the Framework Directive, expires on 27 May 2024.

Pursuant to Article 7(3) of the Framework Directive, ESA and the EEA NRAs may make comments on notified draft measures to the NRA concerned.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

ESA assessed the AK's last full review of the wholesale central access market in 2009³.

At the time, the AK defined a nationwide market comprising non-physical or virtual network access, notably bitstream access at a fixed location, including self-supply.

The AK designated Telecom Liechtenstein AG ("**TLI**") as an operator with significant market power ("**SMP**") and imposed on it the following remedies: (i) access, (ii) non-discrimination, (iii) transparency, including the publication of a reference offer after approval by the AK, (iv) accounting separation; and (v) price control (more specifically, cost-oriented prices and margin squeeze test). ESA had no comments on that notification.

II.2. Market definition

Retail market

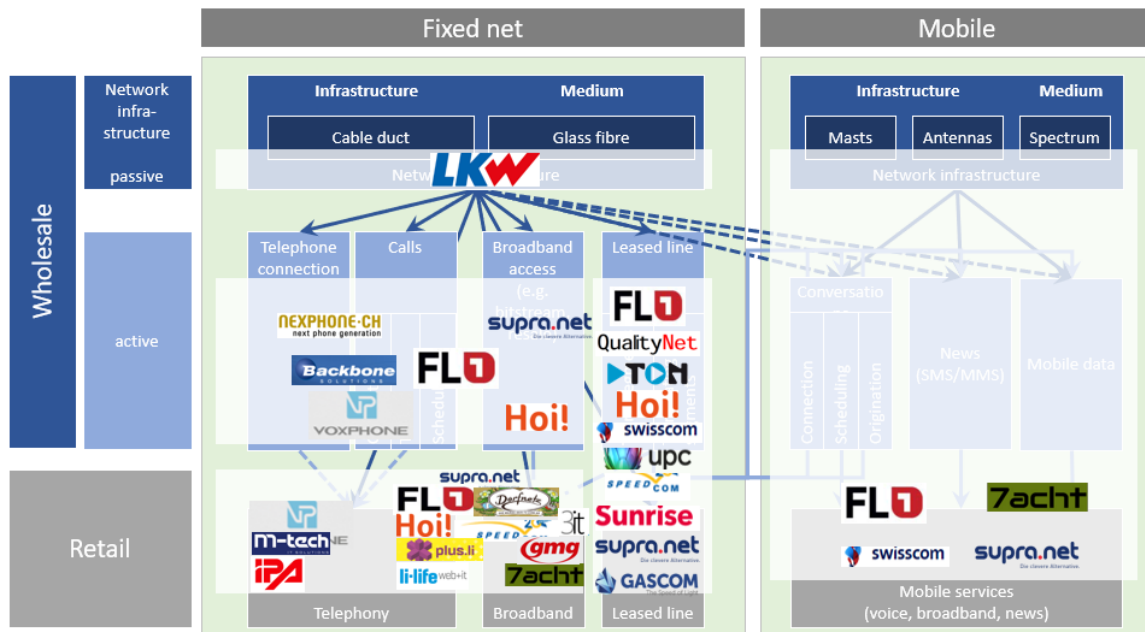
At retail level, the AK defines the product market as the market for internet broadband connections at a fixed location that are provided through the fixed network.

Fixed broadband internet connections are offered by 15 providers including the incumbent, TLI, of which 8 are serving the mass market (i.e. households and small businesses) and the others are active on the business (non-mass) market. By comparison, there are 4 mobile providers in Liechtenstein and the number of mobile connections is low.

Figure 1 shows the main providers categorised by (brand) name according to their market position.

³ Notified to and assessed by ESA under Case No [64717](#). At the time, the AK analysed the market for 'wholesale broadband access' in Liechtenstein, corresponding to market 5 of EFTA Surveillance Authority Recommendation of 5 November 2008 (Decision No 688/08/COL) on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with the Framework Directive, OJ C 156, 9.7.2009, p.18 ("**the 2008 Recommendation**").

Figure 1: main electronic communications providers in Liechtenstein



Source: the AK's notification, Figure 4.

Similarly as in case [90933](#)⁴, the AK does not expect that in Liechtenstein fixed/mobile substitution will be observed to an appreciable extent in the foreseeable future. The AK refers in particular to the data in **Table 1** (see below), showing that, during the period 2015-2023, the demand rate for fixed broadband has remained stable and has even slightly increased, whereas the mobile demand rate has followed a downwards trend. Further, the AK points out that the number of fixed connections has grown at a similar rate as the number of households and workplaces. Therefore, the AK excludes mobile internet connections from the retail market (as well as from the relevant wholesale market, as described in the next sub-section).

⁴ Concerning the AK's notification of its latest market analysis of market 3a in the 2016 Recommendation.

Table 1: development of fixed and mobile internet connections

| Values as at 31 December | 2015 | 2016 | 2017 | 2018 | 2019 | 2020 | 2021 | 2022 | 2023 |
|---|--------|--------|--------|--------|--------|--------|--------|--------|--------|
| Internet broadband connections in the fixed network | | | | | | | | | |
| Number of connections | 15'538 | 15'833 | 16'230 | 16'712 | 17'173 | 18'050 | 18'550 | 19'222 | 19'721 |
| Number of providers | 11 | 10 | 12 | 12 | 12 | 13 | 14 | 15 | 15 |
| of which with bundled offers ¹ in the mass market | 4 | 5 | 5 | 6 | 6 | 6 | 6 | 6 | 7 |
| Internet connections in the mobile network³ | | | | | | | | | |
| Number of connections +423 | 982 | 938 | 1'475 | 1'430 | 1'671 | 1'142 | 1'100 | 1'001 | 989 |
| Number of connections +41 (extraterritorial use in Liechtenstein) | 1'963 | 2'142 | 1'298 | 1'081 | 954 | 802 | 778 | 784 | 928 |
| Total | 2'945 | 3'080 | 2'773 | 2'511 | 2'625 | 1'944 | 1'878 | 1'785 | 1'917 |
| Households and workplaces | | | | | | | | | |
| Quantity | 21'551 | 21'836 | 22'263 | 22'689 | 23'097 | 23'483 | 23'813 | 24'170 | * |
| Demand rate ² Fixed network | 72% | 73% | 73% | 74% | 74% | 77% | 78% | 80% | * |
| Demand rate ² Mobile network | 14% | 14% | 12% | 11% | 11% | 8% | 8% | 7% | * |
| ¹ Internet broadband + telephone and / or TV. ² Connections per household or workplace. ³ Connections for mobile Internet, which are used at a fixed location as a substitute for fixed network connections. | | | | | | | | | |

Source: the AK's notification, Table 1.

Relevant wholesale market

The relevant wholesale market comprises access to broadband connections provided centrally at a fixed location for the purpose of providing broadband for the mass market. The product scope is technology-neutral, comprises private and business customer offers for the mass market and is offered both as bitstream and as resale access. For the same reasons as explained with regard to the retail market, the wholesale market defined by the AK does not include mobile broadband access.

Currently, only 3% of retail fixed broadband connections are provided on the basis of wholesale central access. All other broadband connections are provided on the basis of access to the regulated passive infrastructure of the company Liechtensteinische Kraftwerke (LKW) and the operators' own active equipment (self-supply). Broadband access as a bitstream or resale connection is presently offered by the (unregulated) companies Supranet and Hoi Internet. During the pre-notification exchanges with ESA, the AK explained that through a recent data collection exercise it became aware that TLI, designated as SMP operator in the 2009 market analysis⁵, ceased to provide 3b access in 2023 (already before then it was not the main access provider and in 2022 it had only provided 58 accesses). The AK added that the implications of this have been negligible, especially given the low demand for those services. Moreover, the number of accesses on market 3b has been decreasing (from 714 accesses in 2020 to 599 accesses in 2023).

The geographic market coincides with the territory of Liechtenstein.

⁵ See fn. 3.

II.3. Three-criteria test

Nature and substance of the test

The 2016 Recommendation explains that markets that overall (at EEA level) meet the following three cumulative criteria are susceptible to *ex ante* regulation:

- (i) high and non-transitory barriers to entry;
- (ii) the market structure tends towards effective competition within a relevant time horizon; and
- (iii) the application of competition law alone would not adequately address the market failure(s) concerned.

According to point 22 of the 2016 Recommendation, “*failure to meet any one of the three criteria would indicate that a market should not be identified as susceptible to ex ante regulation.*” Point 25 further specifies that “[f]or the markets listed in the Annex, an NRA may still consider it appropriate, on the basis of specific national circumstances, to conduct its own three-criteria test. An NRA may conclude that the three-criteria test is or is not met in the national circumstances. If the three-criteria test is not met for a specific market listed in the Recommendation, the NRA should not impose regulatory obligations on that market”.

Application to the present case

According to the AK, the relevant market is effectively competitive and no longer meets the three-criteria test for *ex ante* regulation.

The AK assesses both the first and the second criteria. As it is sufficient that one of the three criteria is not met for regulation to be withdrawn/not imposed, the AK does not proceed to assess the third criterion, also taking into account that there is neither a national competition act, nor a national competition authority, in Liechtenstein (although EEA competition rules apply).

Regarding the first criterion (barriers to entry), the AK states that entry into both the retail market and the relevant wholesale market is not overly difficult based on regulated market 3a access to LKW’s infrastructure. The number of providers (15) is high relative to the small market size. There are examples of recent entry (based on 3a access), notably by Vestra ICT and Speedcom in 2018, and Salt (Liechtenstein) in 2022.

The lack of entry barriers likewise applies to the wholesale level, where 97% of broadband connections are provided by self-supply (i.e. operators use their own equipment), and only 3% through wholesale central access.

Therefore, the AK concludes that the first criterion is not met, as it can be assumed that there are no longer any significant barriers to market entry.

On the second criterion (tendency towards effective competition), the AK points to a lively competitive dynamic.

First, the AK refers to the declining market share of the incumbent, TLI.

Table 2: retail market shares on the mass market by number of connections

| Values as at 31 December | | 2017 | 2018 | 2019 | 2020 | 2021 | 2022 | 2023 |
|---|----------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|
| Total Internet connections | | 16'230 | 16'712 | 17'173 | 18'050 | 18'550 | 19'222 | 19'721 |
| Provider name | Brand | | | | | | | |
| Telecom Liechtenstein | FL1 | 68% | 66% | 62% | 59% | 57% | 54% | 52% |
| Hoi Internet | Hi! | 12% | 13% | 13% | 13% | 13% | 13% | 12% |
| TV-COM | Dorfnetz.li | 5% | 6% | 8% | 9% | 9% | 9% | 10% |
| vestra ICT | plus.li | - | 1% | 3% | 4% | 6% | 8% | 9% |
| Supranet | supra.net | 9% | 9% | 9% | 9% | 8% | 9% | 8% |
| li-life web+it | li-life web+it | 4% | 4% | 4% | 4% | 3% | 3% | 3% |
| Salt (Liechtenstein) | 7eight | - | - | - | - | - | 0% | 2% |
| Speedcom (business customers only) | speedcom | 0% | 1% | 1% | 2% | 2% | 2% | 2% |
| - A dash in place of a number means zero. OA zero in place of another number means a quantity that is less than half of the counting unit used Market shares are stated as values rounded to whole %. | | | | | | | | |

Source: the AK's notification, Table 3.

As shown in **Table 2** above, between 2017 and 2023⁶, the retail market share of the incumbent, TLI, fell from an initial 68% to 52%, while the number of alternative providers has grown, as have the market shares of some of them. Projecting this trend into the future, TLI's market share is expected to fall below 50% in the next 3-5 years. According to the AK, even if a market share of 52% may still appear high in absolute terms, the uninterrupted decline in market share by 2 to 4 percentage points per year since 2017 is a strong indication that the competitive strength of TLI is no longer greater than that of its competitors. The AK further considers that, as TLI has left the wholesale central access market in 2023 (see section II.2), it will no longer be able to influence the retail market via wholesale offers for broadband access.

Further, according to the AK, the high number of providers results in a fundamentally high countervailing power for end users, who indeed do make use of it, as shown by the abovementioned shifts in market shares and the clear movement towards higher download speeds. Notably, the proportion of connections with a download performance of at least 500 Mbit/s is growing significantly. Initial statistical data for 2023 confirms this trend, as connections with 5 to 10 Gbit/s are already appearing on the mass market. In recent years, operators have introduced offerings with increased performance at the same or lower price points, which the AK interprets as a sign of intense competition.

Therefore, the AK assumes that the trend towards effective competition will continue to develop and that the relevant market no longer meets the second criterion of the three-criteria test.

In view of all of the above, the AK concludes that the retail fixed broadband market is competitive even without regulation on the wholesale central access market (but assuming continued regulation on the wholesale local access market).

⁶ During this time the FTTB rollout has been realised and all copper connections have been migrated to the fibre network.

As it finds that the relevant market no longer fulfils the three-criteria test, the AK proposes to withdraw all existing regulatory obligations on TLI and not to impose any new regulatory obligations on the relevant market.

III. COMMENTS

ESA has examined the notified draft measure and has the following comment:

Need to carry out periodic market reviews pursuant to Article 16(1) of the Framework Directive

Pursuant to Article 16(1) of the Framework Directive⁷, NRAs shall carry out an analysis of the relevant markets as soon as possible after any updating of the recommendation on relevant product and service markets.

The AK notified the last market analysis for the wholesale central access market in 2009⁸.

Since then, ESA has adopted the 2016 Recommendation (see footnote 2).

In line with its comment in case 90933⁹, ESA draws the AK's attention to the importance of timely enforcement and effectiveness of remedies. ESA wishes to emphasise strongly that a time gap of nearly 15 years between market analyses, and a gap of 8 years since the 2016 Recommendation, risks to seriously undermine the objectives of the regulatory framework, notably the development of an internal market and more specifically the need to ensure effective competition on the relevant markets and to provide market players with certainty as to regulatory conditions. Further, regular reviews are necessary to ensure that obligations are (or continue to be) based on the nature of the problem identified, proportionate and justified, in line with Article 8(4) of the Access Directive¹⁰.

In this respect, ESA wishes to emphasise that, as stated by the AK, for some years already wholesale central access has played a marginal role for retail competition and the position of the SMP operator to date (TLI) has gradually weakened. This indicates that, due to the long delay in the presently notified market analysis, the deregulatory outcome proposed by the AK might have been long overdue. As a consequence, during this time TLI has continued to be subject to regulatory burden, while the market at large could have benefitted from more regulatory predictability to reflect the changing competitive landscape.

In conclusion, for the markets still subject to *ex ante* regulation in Liechtenstein, ESA urges the AK to regularly review markets and the applicable remedies, ensuring that no further delays will occur in the future. ESA further notes that, once applicable, the revised regulatory framework introduced by the Code will include more stringent provisions on the timing of market reviews and on the review of obligations¹¹.

⁷ In the original text as incorporated in the EEA Agreement (see footnote 1).

⁸ See section II.1.

⁹ See p. 3 and fn. 4

¹⁰ Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities ("the Access Directive"), OJ L 108, 24.4.2002, p. 7, as referred to at point 5 cj of Annex XI to the EEA Agreement and as adapted to the Agreement by Protocol 1.

¹¹ In particular, once JCD No 275/2021 enters into force, the EEA EFTA States will need to comply with Article 67(5) of the Code, which stipulates that NRAs should, as a rule, review relevant markets at least every five years. Moreover, Article 68 contains detailed provisions on the imposition, amendment or withdrawal of obligations.

IV. FINAL REMARKS

Pursuant to Article 7(5) of the Framework Directive, the AK shall take the utmost account of comments of other regulatory authorities and ESA. It may adopt the resulting draft measure and, when it does so, shall communicate it to ESA.

ESA's position on the current notification is without prejudice to any position ESA may take in respect of other notified draft measures.

Pursuant to Point 15 of the Procedural Recommendation¹², ESA will publish this document on its eCOM Online Notification Registry. ESA does not consider the information contained herein to be confidential. You are invited to inform ESA within three working days¹³ following receipt of this letter if you consider, in accordance with EEA and national rules on confidentiality, that this letter contains confidential information which you wish to have deleted prior to publication. You should give reasons for any such request.

Yours sincerely,

Filip Ragolle
Deputy Director for Competition and Regulation
Competition and State Aid Directorate

This document has been electronically authenticated by Filip Ragolle.

¹² EFTA Surveillance Authority Recommendation of 2 December 2009 on notifications, time limits and consultations provided for in Article 7 of the Act referred to at point 5cl of Annex XI to the Agreement on the European Economic Area (Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services), as adapted by Protocol 1 thereto, OJ C 302, 13.10.2011, p. 12, and available [here](#) ("the Procedural Recommendation").

¹³ The request should be submitted through the eCOM Registry, marked for the attention of the eCOM Task Force.