

MEMORANDUM

Ref. Pregled nacrtu analize statusa značajne tržišne moći (SMP) od strane RRA Srbije

Datum 27. jul 2018.

UVOD

1. Dana 14. juna 2018. godine, Regulatorna agencija za elektronske komunikacije i poštanske usluge ("RATEL", "Agencija") objavila je nacrt odluke o definisanju relevantnih tržišta koja podležu *ex ante* regulisanju ("nacrt Odluke"). U ovom nacrtu Odluke, RATEL definiše relevantna tržišta koja podležu *ex ante* regulisanju u Republici Srbiji i njihovu geografsku dimenziju.
2. Dodatno, Agencija je objavila u junu 2018. godine nacrt Izveštaja o analizi veleprodajnog tržišta centralnog pristupa ("WCA") koji se pruža na fiksnoj lokaciji za proizvode za tržište široke potrošnje ("nacrt Izveštaja"), u kojem je Agencija odlučila da je *ex ante* regulisanje potrebno za ovo tržište.
3. U svojoj analizi, Agencija je identifikovala dva preduzeća, tj. Telekom Srbija i SBB, kao operatere koji imaju značajnu tržišnu moć, nakon čega će im nametnuti pet regulatornih obaveza: i) obaveza objavljivanja određenih informacija kao standardnih ponuda; ii) zabrana diskriminatornog ponašanja; iii) obaveza odvojenog vođenja računovodstvenih evidencija; iv) obaveza omogućavanja pristupa i korišćenja elemenata mreže i odgovarajuće imovine; i v) obaveza kontrole cena i vođenja troškovnog računovodstva.
4. RATEL tvrdi da je njen nacrt Odluke "rezultat analiza koje su vršene u skladu s evropskim smernicama i preporukama". Agencija iznosi sličnu tvrdnju i u nacrtu Izveštaja, navodeći da, "za potrebe harmonizacije s regulativom Evropske Unije (...)", primenjuje Preporuke Evropske komisije.
5. Stoga, cilj ovog memoranduma jeste pregled analize Agencije i procena njene usklađenosti s pravilima EU. Ovaj memorandum najpre daje opšti pregled SMP režima prema zakonima EU (1.) pre pregleda svakog poglavlja u nacrtu Izveštaja Agencije (2.) i zaključka o usklađenosti sa zakonima EU (3.).



1. PREGLED SMP REŽIMA PREMA ZAKONIMA EU

1.1 Opšti regulatorni okvir EU

6. Uz otvaranje tržišta telekomunikacija konkurenciji, Evropska Unija je usvojila regulatorni okvir vezan za elektronske komunikacije u skladu s tehnološkim napretkom i zahtevima tržišta.¹
7. Cilj jeste uspostavljanje harmonizovanog regulatornog okvira za mreže i usluge na teritoriji cele Unije i odgovor na trendove konvergencije pokrivanjem svih mreža i servisa za elektronske komunikacije.
8. Ovaj okvir zahteva da nacionalni regulatorni organi ("RRA") definišu relevantna tržišta i procene da li operateri imaju značajnu tržišnu moć. Ako RRA utvrdi da relevantno tržište nije zaista otvoreno za konkurenciju, ista može nametnuti konkretne regulatorne obaveze.

1.2 Koncept značajne tržišne moći ("SMP")

9. Pravni koncept SMP definisan je u članu 14(2) Okvirne direktive:

"2. Smatra se da privredni subjekt ima značajnu tržišnu moć ako, bilo pojedinačno ili zajedno s drugim subjektima, uživa položaj ekvivalentan dominantnom, odnosno, položaj ekonomske snage koji tom licu daje moć da se u značajnoj meri ponaša nezavisno od konkurencije, klijenata i krajnjih potrošača."

10. Ova definicija data je u skladu sa zakonom za zaštitu konkurencije EU i njegovim **konceptom dominantnosti** navedenom od strane Evropskog suda pravde.²
11. Zakonodavstvo EU pravi jasnu razliku, u okviru opšteg koncepta SMP, između položaja SMP koji može držati **jedno lice (pojedinačna SMP)** s jedne strane i položaja SMP koji se može **držati zajedno s drugim privrednim subjektima (zajednička SMP/kolektivna dominantnost)** s druge strane.

1.3 EU Smernice

12. Član 15 Okvirne direktive navodi da su RRA dužne da "*maksimalno uzmu u obzir*" na relevantne smernice koje je objavila Evropska komisija za analizu tržišta i procenu značajne tržišne moći.

¹ Vidi posebno Direktivu 2002/21/EC Evropskog Parlamenta i Veća od 7. marta 2002. o zajedničkom regulatornom okviru za mreže i servise za elektronske komunikacije ("Okvirna direktiva").

² Vidi slučaj 27/76, *United Brands protiv Komisije* EU:C:1978:22, paragraf 65. Vidi i slučaj T-342/99, *Airtours protiv Komisije*, EU:T:2002:146, paragraf 58 i dalje vezano za kolektivnu dominantnost.

13. Ove smernice naročito obuhvataju sledeće: i) Preporuku 2014/710/EU o relevantnim tržištima proizvoda i usluga³ i ii) Smernice za SMP 2018. godine o analizi tržišta i proceni značajne tržišne moći.⁴
14. Mora se napomenuti da su Smernice za SMP iz 2018. godine zamenile niz Smernica objavljenih 2002. godine.⁵ Revidirane smernice iz 2018. godine odražavaju najskoriji razvoj precedentnog prava i bave se novim pitanjima koja nisu bila uključena u prethodni niz Smernica.
15. Ovaj pregled je naročito bitan jer uzima u obzir regulatorno iskustvo stečeno tokom više od 15 godina primene ključnih pojmova definisanih u Smernicama za SMP iz 2002. godine.

1.4 Principi prema metodologiji EU za procenu SMP

16. Pravni okvir EU zahteva da RRA preduzme tri koraka pre nametanja bilo kojih regulatornih obaveza operaterima u oblasti elektronskih komunikacija: (1) definisanje relevantnog tržišta, (2) imenovanje privrednih subjekata sa SMP i (3) definisanje odgovarajućih regulatornih lekova tim privrednim subjektima sa SMP.
17. **Definisanje relevantnih tržišta.** Kako je to jasno definisano u revidiranim Smernicama za SMP iz 2018. godine, početna tačka bilo koje analize "treba biti procena relevantnih maloprodajnih tržišta, imajući u vidu međusobnu zamenljivost ponude i potražnje iz perspektive krajnjeg korisnika tokom perioda sledećeg pregleda na osnovu postojećih tržišnih uslova i izgleda za njihov razvoj".⁶ (naše naglašavanje)
18. Zatim, pošto je identifikovano relevantno maloprodajno tržište i **ustanovljeno da li bi, u nedostatku preventivne regulatorne intervencije, postojao rizik od nanošenja štete potrošačima usled nedostatka konkurencije na maloprodajnom tržištu**, RRA treba, tad, da identifikuje odgovarajuće veleprodajno tržište kako bi procenila da li isto podleže *prethodnom* regulisanju prema članu 16 Direktive 2002/21/EC.
19. *Ex ante* regulatorne obaveze nameću se samo na tržištima koja nisu zaista konkurentna, tj. tržišta gde postoji samo jedan ili nekoliko privrednih subjekata koji imaju značajnu tržišnu moć i gde pravni lekovi prema nacionalnim i evropskim zakonima o zaštiti konkurencije nisu dovoljni za rešavanje utvrđenih problema s konkurencijom.
20. U okviru vršenja analize tržišta, RRA treba da sprovede **strukturalnu procenu relevantnog tržišta usmerenu na budućnost** tokom relevantnog perioda.

³ Preporuka Komisije od 9. oktobra 2014. godine o relevantnim tržištima proizvoda i usluga u sektoru elektronskih komunikacija koja podleže prethodnom regulisanju u skladu s Direktivom 2002/21/EC Evropskog Parlamenta i Veća o zajedničkom regulatornom okviru za mreže i service elektronskih komunikacija.

⁴ Smernice za analizu tržišta i procenu značajne tržišne moći prema regulatornom okviru EU za mreže i service elektronskih komunikacija, C(2018) 2374, objavljene u Službenom listu EU C 159/1, 7. maj 2018. ("Smernice za SMP iz 2018. godine").

⁵ Smernice Komisije za analizu tržišta i procenu značajne tržišne moći prema regulatornom okviru Zajednice za mreže i service elektronskih komunikacija, SL C 165, 11.7.2002, str. 6–31 ("Smernice za SMP iz 2002. godine").

⁶ Vidi Smernice za SMP iz 2018. godine, paragraf 15.

21. **Imenovanje privrednih subjekata sa SMP.** Kako je gore navedeno, smatra se da privredni subjekt poseduje SMP ako, **bilo samostalno ili zajedno s drugim licima**, uživa položaj koji je **ekvivalentan dominantnosti**, odnosno, položaj ekonomske snage koji mu daje moć da se u značajnoj meri ponaša nezavisno od konkurenata, klijenata i potrošača.
22. **Pojedinačna SMP.** Prilikom razmatranja tržišne moći privrednog subjekta, važno je razmotriti **tržišni udeo** privrednog subjekta i njegovih konkurenata, kao i ograničenja koja srednjeročno nameću eventualni konkurenti. Međutim, tržišni udelo se tumače samo u svetlu relevantnih tržišnih uslova.
23. Ako je tržišni udeo niži od 50%, RRA treba da se osloni na druge ključne strukturalne tržišne elemente kako bi ocenila SMP. RRA mora izvršiti **temeljnu strukturalnu procenu** ekonomskih karakteristika relevantnog tržišta **pre izvlačenja bilo kakvih zaključaka** o postojanju SMP.
24. Smernice za SMP iz 2018. godine daju listu kriterijuma, **koja nije iscrpna**, za merenje tržišne moći privrednog subjekta i njegove sposobnosti da se u značajnoj meri ponaša nezavisno od konkurenata, klijenata i potrošača.
25. 'Ovo **posebno** (ali ne i isključivo) uključuje: sprečavanje ulaska na tržište, sprečavanje širenja, apsolutnu i relativnu veličnu privrednog subjekta, kontrolu nad infrastrukturom koju nije moguće lako duplicirati, tehnološke i komercijalne prednosti ili nadmoći, nedostatak ili niska kompenzaciona kupovna moć, lak ili privilegovan pristup tržištima kapitala/finansijskim resursima, diversifikacija proizvoda/usluga, ekonomija količine, ekonomija obima, direktni i indirektni mrežni efekti, vertikalna integracija, izuzetno razvijena distribuciona i prodajna mreža, zaključivanje dugoročnih i održivih ugovora o pristupu, stupanje u ugovorne odnose s drugim učesnicima na tržištu koje bi moglo dovesti do zatvaranja tržišta, nedostatak potencijalne konkurencije.
26. Prema Smernicama za SMP, utvrđivanje SMP "*mora biti zasnovano na kombinaciji faktora*",⁷ 'uz pažljivo razmatranje **svih karakteristika** tržišta.
27. **Zajednička SMP.** Kolektivni dominantni položaj postoji ako svaki član dominantnog oligopola – koji je upoznat sa zajedničkim interesima – smatra da je moguće, ekonomski racionalno i preporučljivo usvojiti na dugoročnom nivou **zajedničku politiku tržišnog ponašanja** u cilju prodaje robe i usluga iznad konkurentnih cena.
28. Prema precedentnom pravu EU⁸ i Smernicama za SMP, potrebno je ispuniti tri kumulativna uslova kako bi se utvrdilo postojanje kolektivne dominantnosti:
- Prvo, svaki član dominantnog oligopola mora biti sposoban da zna kako se ponašaju drugi članovi kako bi mogao pratiti da li su usvojili zajedničku politiku ili ne.

⁷ Smernice za SMP, paragraf 58.

⁸ Slučaj T-342/99, *Airtours plc protiv Komisije* EU:T:2002:146.

- Drugo, stanje prećutne koordinacije mora biti održivo duži vremenski period, odnosno, mora postojati podsticaj da se ne odstupi od zajedničke politike na tržištu.
 - Treće, predvidljiva reakcija trenutnih i budućih konkurenata, kao i klijenata, ne bi ugrozila rezultate koji se očekuju od zajedničke politike.
29. Tek ako se **ispune sva tri kumulativna kriterijuma**, RRA može utvrditi da postoji zajednička SMP.
30. Što se tiče pojedinačne SMP, **potencijalna analiza** zajedničke SMP mora razmotriti očekivani i predvidljivi razvoj tržišta.
31. **Nametanje regulatornih pravnih lekova.** Pošto se jednom relevantno tržište definiše, a privredni subjekti koji imaju SMP identifikuju, RRA mora nametnuti barem jednu regulatornu obavezu privrednom subjektu koji je označen kao subject koji ima SMP.
32. Specifične regulatorne obaveze koje se mogu nametnuti privrednim subjektima sa SMP mogu se primenjivati na veleprodajna ili maloprodajna tržišta; ali maloprodajno tržište treba **biti podvrgnuto prethodnom regulisanju samo** ako konkurencija na tom tržištu i dalje pokazuje značajnu tržišnu moć uprkos postojanju *prethodnog* regulisanja povezanog veleprodajnog tržišta.⁹

2. PREGLED NACRTA IZVEŠTAJA AGENCIJE

33. Pregled nacrt Izveštaja Agencije ispituje pojedinačna poglavlja regulatornog okvira EU (2.1.), o definisanju relevantnog tržišta (2.2.), o analizi relevantnog tržišta (2.3.), o obavezama operatera sa SMP (2.4.), sumiranje sadržaja svakog poglavlja i procena njegove usklađenosti s pravilima EU.

2.1 Regulatorni okvir RATEL i EU

34. U uvodnom poglavlju nacrt Izveštaja Agencija daje prikaz Regulatornog okvira u Evropskoj Uniji. Ovo poglavlje uključuje pregled zakonodavnih¹⁰ i regulatornih tekstova.
35. Nacrt Izveštaja uključuje elemente vezane za najskorije zakonodavne promene, kao što je zakonodavni predlog Evropskog zakonika o elektronskim komunikacijama, koji je na sto stavljen u septembru 2016.
36. Nacrt Izveštaja uključuje i elemente vezane za Preporuku Komisije o relevantnim tržištima proizvoda i usluga u sektoru elektronskih komunikacija koja podležu *ex ante* regulisanju.

⁹ C. 2014 Preporuka Komisije, paragraf 18.

¹⁰ Ovo uključuje relevantne EU directive i uredbe iz 2002. i 2009. godine

37. Međutim, ovo poglavlje **ne odnosi se na najnovije regulatorne promene** i objave u Službenom glasniku EU **ažuriranih Smernica EU za SMP u maju 2018** u Službenom glasniku EU.
38. Kako je navedeno gore u poglavlju 1, Smernice za SMP odražavaju najnovije promene u precedentnom pravu i bave se pitanjima koja ranije nisu bila uključena u Smernice za SMP iz 2002. godine.
39. Ovo je posebno važno pošto se ažurirane Smernice za SMP bave kriterijumima za definisanje relevantnog tržišta (i geografski i u smislu proizvoda), što je ključni korak u proceni SMP, kao i kriterijuma za ocenu pojedinačne i zajedničke SMP.
40. Sve ažurne, potpuno usklađene analize Agencije moraju da se odnose na Smernice za SMP iz 2018. godine i da u skladu s tim uzimaju u obzir sve relevantne promene tržišta i dodatna razjašnjenja vezana za SMP metodologiju.
41. Na primer, Agencija na strani 17 nacrtu Izveštaja navodi nekoliko kriterijuma koje je potrebno posebno uzeti u obzir prilikom utvrđivanja SMP. Ova lista kriterijuma nije potpuna u svetlu (dodatnih) kriterijuma nabrojanih u Smernicama za SMP iz 2018. godine (na primer, zaključivanje dugoročnih i održivih ugovora o pristupu).
42. **Stoga, iz perspektive metodologije, mora se zaključiti da pristup Agencije, koji ne upućuje na Smernice za SMP iz 2018. godine niti ih primenjuje, nije kompletan i nije u potpunosti usklađen s pravilima EU.**

2.2 RATEL definicija relevantnog tržišta

43. U poglavlju 3 nacrtu Izveštaja, Agencija daje definiciju relevantnog tržišta. Ista je usmerena na **veleprodajno tržišta centralnog pristupa**, a analiza je podeljena na dva dela.
44. Agencija sukcesivno ispituje i) tehnološki razvoj širokopojasnog internet pristupa, ii) karakteristike maloprodajnog tržišta širokopojasnog internet pristupa u Srbiji; pre prelaska na iii) veleprodajno tržište centralnog pristupa i iv) njegove karakteristike u Srbiji.¹¹
45. Zatim, u svetlu tih karakteristika, Agencija procenjuje zamenu na strani potražnje na maloprodajnom nivou, zamenu na strani potražnje na veleprodajnom nivou; i zamenu na strani ponude na veleprodajnom nivou, kako bi donela zaključak o relevantnom tržištu proizvoda na veleprodajnom nivou.
46. Prema Agenciji, *"analiza veleprodajnog tržišta centralnog pristupa tržište usledila je nakon analize konkurencije koja bi vladala na relevantnom maloprodajnom tržištu u slučaju nedostatka prethodnog regulisanja"*.¹²
47. Takav pristup, iako je generalno dosledan metodologiji predviđenoj u Preporuci EU i Smernicama za SMP (najpre procena maloprodajnih tržišta, pre ispitivanja veleprodajnih tržišta), nije baš onaj koji je primenila Agencija.

¹¹ Vidi poglavlje 3.1. nacrtu Izveštaja.

¹² Strana 21 nacrtu Izveštaja.

48. Prema zakonima EU, RRA mora najpre da utvrdi **da li je maloprodajno tržište stvarno konkurentno ako nema ex ante regulative**. Ključno pitanje je da li je tržište **potencijalno konkurentno** i da li je bilo koji nedostatak konkurencije trajan, uzimajući u obzir očekivani ili predvidljivi razvoj tržišta.
49. Ovo zahteva detaljnu procenu uslova konkurentnosti na maloprodajnom nivou: uzimajući u obzir, na primer, sprečavanje ulaska na tržište (mreže, ekonomija količine) kojim se sprečava razvoj konkurencije na maloprodajnom nivou, pregled raspodele udela u tržištu među učesnicima na tržištu i razvoj cena i negativni uticaj na maloprodajne klijente.
50. Pošto se donese zaključak da maloprodajno tržište nije zaista konkurentno ukoliko nema *prethodne* regulative, RRA može regulisati **odgovarajuća veleprodajna tržišta**; ako ova tržišta nisu navedena u Preporuci, RRA treba da sprovede test tri kriterijuma.
51. Prema pravilima EU, tržišta mogu podlegati *ex ante* regulative pod uslovom da ispunjavaju **tri kumulativna kriterijuma**: prvi kriterijum jeste prisustvo visokih i trajnih prepreka ulasku na tržište; drugi kriterijum se bavi time da li tržišna struktura naginje prema stvarnoj konkurenciji u relevantnom vremenskom roku; treći kriterijum se odnosi na to da primena zakona o zaštiti konkurencije sama po sebi ne bi na odgovarajući način rešila predmetne probleme na tržištu.¹³
52. WCA tržište je navedeno u Preporuci tako da teret dokaza na RRA nije tako visok kao u slučaju drugih tržišta (koja nisu na listi).
53. Međutim, u svakom slučaju, u stadijumu definisanja tržišta, Agencija očigledno ne preduzima analizu konkurencije na maloprodajnom (širokopojasnom) tržištu koja bi bila okrenuta ka budućnosti i ne dokazuje da maloprodajno (širokopojasno) tržište nije stvarno konkurentno bez *ex ante* regulative.
54. Umesto toga, Agencija se usredsređuje, u svojoj definiciji tržišta, na opštoj **analizi zamenljivosti**, uglavnom na osnovu podataka o tržištu iz 2017. godine.
55. **Stoga, zaključak Agencije o definiciji tržišta**, iako zadržava široko tržište proizvoda (veleprodajno tržište centralnog pristupa s bakarnim parovima i xDSL tehnologijom, hibridnom optičko–koaksijalnom mrežom i optičkim kablovima u FTTx mrežnoj arhitekturi) nacionalne dimenzije, **nije dosledan s EU SMP metodologijom, nije usmeren na budućnost što se tiče maloprodajnih tržišta, pa stoga nije usklađen s pravilima EU.**

¹³ Među pokazateljima koje treba razmotriti prilikom procene konkurencije u analizi tržišta usmerenoj na budućnost, Preporuka iz 2014. godine uključuje pokazatelje sprečavanja ulaska na tržište u nedostatku regulative (uključujući stepen nepovratnih troškova), strukturu tržišta, učinak tržišta i dinamiku tržišta, uključujući i pokazatelje, kao što su udeli i trendovi na tržištu, cene na tržištu i njihove trendove i stepen i pokriće konkurentnih mreža ili infrastruktura.

2.3 RATEL-ova procena SMP

56. Kao što je objašnjeno u daljem tekstu, postoje značajni nedostaci u proceni SMP Agencije: u njoj nema jasne razlike između pojedinačne i zajedničke SMP, analiza se suviše oslanja na udele u tržištu prilikom dodele SMP statusa i nema temeljne, detaljne, strukturalne analize karakteristika tržišta usmerene na budućnost.
57. **Pojedinačna SMP ili zajednička SMP?** Agencija ispravno navodi u poglavlju 4.1. da dominantni položaj implicira da operater "bilo pojedinačno ili udruživanjem s drugim subjektima" ima takvu ekonomsku moć na tržištu koja mu omogućava da se ponaša, u velikoj meri, nezavisno od konkurenata, klijenata i potrošača.
58. Onda se izričito podvlači činjenica da "nema dokaza da su u periodu koji je uključen u analizu ispunjeni kriterijumi za postojanje zajedničkih tržišnih moći na veleprodajnom tržištu centralnog pristupa" (naše naglašavanje), pa je stoga fokus isključivo na ostatku nacrta Izveštaja o kriterijumima za utvrđivanje pojedinačne SMP.¹⁴
59. Međutim, Agencija dalje identifikuje **nekoliko preduzeća** koja poseduju SMP, odnosno **operatere Telekom Srbija a.d. i SBB DOO**.
60. Kako je objašnjeno u poglavlju 1 gore, pojedinačna SMP i zajednička SMP predstavljaju različite koncepte koji se ne preklapaju. Smernice Evropske komisije za SMP iz 2002. godine, na primer, razjasnile su da "Ako RRA utvrdi postojanje više od jednog privrednog subjekta koji je dominantan, tj. da postoji zajednički dominantni položaj, ista mora i da utvrdi najadekvatnije regulatorne obaveze koje treba nametnuti na osnovu principa proporcionalnosti."¹⁵ (naše naglašavanje)
61. Izjave vezane za "zajedničke" ili "združene" tržišne udele Telekoma Srbija i SBB-a nisu relevantne i Agencija se ne može osloniti na njih u svojoj SMP proceni pošto se fokusirala na pojedinačnu SMP.¹⁶
62. Naknadni zaključci u nacrtu Izveštaja koji se odnose i na Telekom Srbija i na SBB kao SMP operatere takođe nisu relevantni.¹⁷
63. **Metodologija i procena Agencije, koja prelazi s "analize pojedinačne SMP" na "analizu zajedničke SMP" nedosledna je i nije u skladu s pravilima EU.**
64. **Preterano oslanjanje na tržišne udele u dodeli SMP statusa.** Prema poglavlju 4.1.1 nacrta Izveštaja, Agencija ispituje tržišne udele operatera na relevantnom tržištu i **odmah zaključuje** da oba operatera imaju značajnu tržišnu moć na evidentiranom veleprodajnom tržištu centralnog pristupa.

¹⁴ Videti stranu 55 nacrta Izveštaja.

¹⁵ Paragraf 114 Smernica za SMP iz 2002. godine.

¹⁶ Videti strane 56, 57 i 65 nacrta Izveštaja. Vidi i stranu 62 nacrta Izveštaja i pozivanje na 76% zajedničkog udela na tržištu na osnovu broja korisnika.

¹⁷ Videti zaključke prema poglavljima 4.1.1 do 4.1.12 nacrta Izveštaja.

65. Prema pravilima EU, prilikom razmatranja tržišne moći privrednog subjekta, važno je razmotriti njegov tržišni udeo. U slučaju tržišnih udela ispod 50% (kao što je slučaj sa SBB-om koji je imao 33% tržišnog udela u 2017. godine), RRA treba da se oslanja na druge ključne strukturalne tržišne elemente u proceni SMP.
66. Međutim, Agencija izvlači zaključak vezano za (navodni) SMP status SBB-a (i Telekoma) isključivo na osnovu tržišnih udela, ne uzimajući u obzir druge ključne strukturalne tržišne elemente.
67. Zaključci do kojih je došla Agencija¹⁸, stoga, predstavljaju netačnu primenu SMP metodologije EU; oni se suviše oslanjaju na tržišne udele, kad je SBB u pitanju, prilikom odlučivanja o njegovom SMP statusu.
68. **Nedostatak temeljne analize usmerene na budućnost.** Kako se navodi u Smernicama za SMP, RRA treba da izvrši temeljnu (ili dinamičku) evaluaciju okrenutu ka budućnosti ekonomskih karakteristika relevantnog tržišta **pre donošenja bilo kakvih zaključaka** o postojanju SMP.
69. Analiza Agencije očigledno **nije temeljna niti detaljna**. Najpre, kao što je gore objašnjeno, ista se ne oslanja na ažurirane Smernice za SMP. Drugo, date su mnoge izjave s visokog nivoa bez pratećih dokaza.
70. Na primer, prema poglavlju 4.1.4 nacrta Izveštaja o kompenzacionoj moći klijenata, Agencija navodi da se moć obično odražava kroz značajne udele klijenta u ukupnom prihodu operatera. Međutim, u tom poglavlju nisu navedene nikakve brojke.¹⁹
71. Slično, prema poglavlju 4.1.5. nacrta Izveštaja o lakom ili privilegovanom pristupu tržištu kapitala, Agencija ne daje dinamičku procenu finansijskih resursa i ne navodi **nikakve** podatke/dokaze kojima bi potkrepila svoje izjave na osnovu kojih smatra da "*operateri koji su dugo bili na tržištu mogu imati lakši pristup bankarskim zajmovima*". (naše naglašavanje)
72. Prema poglavlju 4.1.6. nacrta Izveštaja o diversifikaciji proizvoda/usluga, Agencija navodi izjave s visokog nivoa o mogućnosti Telekoma Srbija i SBB-a da povežu proizvode i usluge. Međutim, ne navode se nikakve dalje informacije o tome koji proizvodi/usluge bi se povezali i kako bi se to izvelo u praksi.
73. Agencija ovde upućuje na "*nekoliko povezanih maloprodajnih tržišta*" bez davanja detaljnih objašnjenja kojima bi se napravila razlika između povezanih maloprodajnih tržišta na kojima su Telekom Srbija, odnosno, SBB aktivni.
74. **EU standardi procene SMP** su visoki, kako je to ilustrovano regulatornim odlukama na nivou EU, i to od nacrta analize koji priprema RRA do njihovog pregleda od strane Evropske komisije

¹⁸ Videti strane 57 i 65 nacrta Izveštaja.

¹⁹ Napominjeno da bi ovo poglavlje moglo biti relevantnije sa stanovišta operatera (koji bi, zaista, bio operater koji poseduje pojedinačnu SMP), da je bilo moguće (za Telekom Srbija) da pokaže da su klijenti (Telekom Srbija) bili obavešteni o mogućnostima prelaska kod drugog operatera (kao što je SBB) uz minimalne troškove.

i BEREC-a²⁰ i naknadnih izmena integrisanih u konačne odluke RRA.

75. U nekim slučajevima, ovo može ići i dotle da RRA povuče svoju prijavu Evropskoj komisiji nakon što ista izrazi ozbiljnu sumnju u nalaze RRA. Takav je bio slučaj, na primer, vezano za prijavu malteške RRA u vezi s veleprodajnim tržištem širokopojasnog pristupa.²¹
76. U skorašnjoj istrazi Faze II i Mišljenju BEREC-a vezano za procenu SMP od strane holandske RRA, BEREC naglašava ograničenja nacrta Odluke RRA i važnost za Komisiju da RRA uzme u obzir sve relevantne faktore, kao što su "simetrija, inovacija i spajanje" kako bi se procenila navodna dominantnost/SMP.²²
77. U drugoj skorašnjoj istrazi Faze II, BEREC i Komisija izrazili su ozbiljne sumnje vezane za procenu SMP od strane holandske RRA. Komisija je, na primer, iskazala sumnje vezane za faktore korišćene za procenu SMP: prema Komisiji, holandska RRA **nije dovoljno uzela u obzir ograničavajući uticaj potencijalne konkurencije** na navodno dominantnog operatera; holandska RRA **nije dala dovoljan značaj činjeničnim elementima**, kao što su investicije u infrastrukturu; i holandska RRA nije izvukla prave zaključke iz promena koje je identifikovala na tržištu (u tom slučaju, smanjenje prednosti ekonomije količine za tržišnog operatera).²³
78. Stoga, u svetlu tih primera i tekuće prakse EU, mora se zaključiti da analiza Agencije nije u skladu s EU standardima za procenu SMP.
79. Napokon, ali ne i manje važno, analiza Agencije **obično nije usmerena na budućnost, a kad jeste, ostaje veoma uopštena i nedostaju joj podaci ili projekcije**.
80. Na primer, prema poglavlju 4.1.2 nacrta Izveštaja o kontroli nad infrastrukturom, Agencija jedino navodi da "*nije realno očekivati da u bilo kom budućem periodu oni [konkurentni operateri] dostignu pokrivenost koju imaju mreže Telekom Srbija a.d. i SBB DOO*".
81. Međutim, nisu dati nikakvi dokazi koji bi objasnili zašto/kako je Agencija došla do tog zaključka. U svetlu prakse EU, takva izjava bi morala da se obrazloži (na primer, uzimajući u obzir potencijalne planove investicija operatera i uticaj na razvoj konkurencije, postojanje ugovora o zajedničkim investicijama...).

²⁰ Vidi, na primer BEREC-ovo mišljenje o istrazi Faze II prema članu 7a Direktive 2002/21/EC u slučajevima PT/2016/1888, Veleprodajni lokalni pristup na fiksnoj lokaciji (tržište 3a) u Portugaliji i PT/2016/1889, Veleprodajno tržište centralnog pristupa na fiksnoj lokaciji (tržište 3b) u Portugaliji (BoR (16) 154). U ovoj odluci, procena portugalske RRA – koja se odlučila za lakše zahteve – osporena je i od strane Evropske komisije i BEREC-a.

²¹ Vidi slučaj MT/2008/0803: Veleprodajni širokopojasni pristup na Malti.

²² Vidi Mišljenje BEREC-a o istrazi Faze II prema članu 7 Direktive 2002/21/EC, u slučaju NL/2015/17/27, Veleprodajni lokalni pristup na fiksnoj lokaciji u Holandiji, str.10.

²³ Vidi Mišljenje BEREC-a o istrazi Faze II prema članu 7 Direktive 2002/21/EC u slučaju NL/2017/1960, Veleprodajni kvalitetni pristup na fiksnoj lokaciji u Holandiji, str. 7

82. Slično, prema poglavlju 4.1.12 nacrtu Izveštaja o sprečavanju širenja, Agencija konstatuje da postoji šest operatera koji poseduju optičku mrežu koju ne koriste za pružanje usluga, te da postoji određeni prostor za povećanje kapaciteta.
83. Međutim, Agencija se jedino oslanja na nizak tržišni udeo operatera prisutnih na WCA tržištu i njihove "slabe kapacitete" (u poređenju s Telekomom Srbija i SBB) da bi zaključila da i dalje postoje prepreke širenju na opserviranom veleprodajnom tržištu, bez davanja dinamičke procene promena u kapacitetima operatera (RATEL konstatuje, međutim, da postoji 73 operatera koji poseduju koaksijalnu kablovsku mrežu za distribuciju medijskih sadržaja).
84. Opštije govoreći, potencijalna konkurencija se tek ograničeno razmatra (na primer, ne spominje se fiksna/mobilna zamena i mogućnost mobilnih operatera da uključe i širokopojasne usluge) i mogućnost razvoja alternativnih mobilnih ponuda u budućnosti.²⁴
85. **Agencija se uglavnom oslanja na statičku analizu, ne daje dokaze o razlozima za svoja "očekivanja" često ne razmatra budući razvoj tržišta. U svetlu napred navedenog, mora se zaključiti da pristup Agencije nije u skladu s EU metodologijom.**

2.4 RATEL-ova procena tržišne konkurencije i obaveza

86. Član 8 Direktive o pristupu zahteva da se pravni lekovi moraju zasnivati na osnovnom problemu (konkurencije) koji je identifikovan, i moraju biti srazmerni i opravdani u svetlu ciljeva zadatih RRA u članu 8 Okvirne direktive.
87. Kao što je gore objašnjeno, EU metodologija za SMP nije ispravno primenjena pd strane Agencije: definicija tržišta je problematična, karakterizacija (pojedinačne/zajedničke) SMP je pogrešno primenjena, nema dinamičke procene. Stoga, sama osnova na kojoj Agencija razvila poglavlje 5 i 6 je pogrešna, a ovo poslednje poglavlje zahteva dalje revidiranje i temeljne izmene.
88. Posebno, ne može biti nametanja *ex ante* regulative SBB-u pošto isti ne može **(pojedinačno) posedovati SMP s Telekomom Srbija**, a pošto nema nikakve procene u nacrtu Izveštaja vezano za **eventualnu zajedničku SMP** na identifikovanom tržištu.

²⁴ Vidi odeljak 3.2.1.4. nacrtu Izveštaja.

3. ZAKLJUČAK

89. Pravila EU daju složen i detaljan okvir za procenu značajne tržišne moći. Zakonodavstvo i regulative EU obezbeđuju jasne standarde i metodologiju u tom pogledu; a relevantne smernice EU redovno se ažuriraju kako bi se bolje odražavale razvoj tržišta.
90. Nacrt Izveštaja RRA Srbije i analiza SMP upućuju u više navrata na pravila EU; međutim, pristup Agencije nije usklađen ni s formom ni sa sadržinom EU okvira.
91. Iz opšte metodološke perspektive, nacrt Izveštaja ne uzima u obzir najnovije EU Smernice za SMP of 2018.
92. Prilikom prvog utvrđivanja koje je relevantno tržište, nacrt Izveštaja ne identifikuje jasno maloprodajno (širokopojasno) tržište i zašto isto ne bi stvarno bilo konkurentno da nema *prethodne* regulative.
93. Ono što još više zabrinjava jeste činjenica da nacrt Izveštaja Agencije jasno pogrešno primenjuje koncepte pojedinačne i zajedničke SMP, namećući status "pojedinačne SMP" dvama operaterima uprkos činjenice da je Agencija izričito navela da nije bilo dokaza o zajedničkoj SMP na predmetnom tržištu.
94. Dodatno, tokom procene SMP, RATEL navodi nepotpunu i statičku analizu, kojoj nedostaju podaci, potkrepljujuće brojke, progonoze i dinamičko razmatranje mogućih razvoja tržišta.
95. U ovoj fazi, identifikovani su jasni problemi; značajna neusklađenost s pravilima EU mora se otkloniti. U svetlu obaveza koje su preuzele srpske vlasti u Sporazumu o stabilizaciji i pridruživanju s EU, Srbija je dužna da obezbedi da njeno zakonodavstvo i praksa budu usklađeni s pravnim tekovinama EU, uključujući i mreže i servise za elektronske komunikacije i pravila SMP.

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Kraj prevoda

Da je prevod na srpski jezik u potpunosti veran izvornom tekstu na engleskom jeziku svojim potpisom i pečatom potvrđuje sudski prevodilac za slovenački, engleski i švedski jezik na osnovu rešenja Ministarstva pravde Republike Srbije br. 760-06-197/2002-04 od 02.10.2002. god.
U Beogradu, 30.07.2018.

Milena Kovačević



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Milena Kovačević

MEMORANDUM

Ref. Review of Serbian NRA draft analysis on Significant Market Power (SMP) status

Date 27 July 2018

INTRODUCTION

1. On 14 June 2018, the Regulatory Agency for Electronic Communications and Postal Services ("RATEL", "the Agency") issued a draft decision on designating relevant markets subject to *ex ante* regulation ("the draft Decision"). In this draft Decision, RATEL defines the relevant markets subject to *ex ante* regulation in the Republic of Serbia and their geographical dimension.
2. In addition, the Agency issued in June 2018 a draft Report on the analysis of wholesale central access ("WCA") market provided in fixed location for products for mass market ("the draft Report"), in which the Agency decided that *ex ante* regulation would be necessary for this market.
3. In its analysis, the Agency identified two undertakings, i.e. Telekom Srbija and SBB, as operators with significant market power, upon which it would impose five regulatory obligations: i) obligation to publish certain information as standard offers; ii) prohibition on discriminatory treatment; iii) accounting separation; iv) allowing access and use of elements of network and corresponding assets; and v) price controls and cost-based accounting.
4. RATEL claims that its draft Decision is "*the result of analyses that were implemented in accordance with European guidelines and recommendations*". The Agency makes also a similar claim in its draft Report, stating that "*for the purpose of harmonization with the regulations of the European Union (...)*" it applies the European Commission's Recommendations.
5. This memorandum aims therefore at reviewing the Agency's analysis and assessing its alignment with EU rules. This memorandum provides first a general overview of the SMP regime under EU law (1.) before reviewing each of the sections of the Agency's draft Report (2.) and concluding on its alignment with EU law (3.).

1. OVERVIEW OF THE SMP REGIME UNDER EU LAW

1.1 The general EU regulatory framework

6. To accompany the opening up of the telecommunications market to competition, the European Union has adopted a regulatory framework with regard to electronic communications in line with technological progress and market requirements.¹
7. The aim is to establish a harmonised regulatory framework for networks and services across the Union and to respond to convergence trends by covering all electronic communications networks and services.
8. This framework requires national regulatory authorities ("NRAs") to define relevant market(s) and assess whether operators have significant market power. Where an NRA determines that a relevant market is not effectively competitive, it can impose specific regulatory obligations.

1.2 The concept of significant market power ("SMP")

9. The legal concept of the SMP is laid down in Article 14(2) of the Framework Directive:

"2. An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers."

10. This definition follows the EU competition law **concept of dominance** set out by the European Court of Justice.²
11. EU legislation clearly distinguishes within the general concept of SMP between SMP position which can be **held alone (single SMP)** on the one hand, and SMP position which can be **held jointly with other undertakings (joint SMP/collective dominance)** on the other.

1.3 EU guidance

12. Article 15 of the Framework Directive provides that NRAs are to *"take utmost account"* of the relevant guidance issued by the European Commission for market analysis and the assessment of significant market power.

¹ Cf. in particular 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 ("the Framework Directive").

² Cf. Case 27/76, *United Brands v Commission* EU:C:1978:22, para 65. See also Case T-342/99, *Airtours v Commission*, EU:T:2002:146, para 58 et ss regarding collective dominance.

13. This guidance consists notably in the following acts: i) Recommendation 2014/710/EU on relevant product and service markets³ and ii) the 2018 SMP Guidelines on market analysis and the assessment of significant market power.⁴
14. It must be noted that the 2018 SMP Guidelines replaced the set of Guidelines issued in 2002.⁵ The (2018) revised guidelines reflect the latest developments in case-law and address new issues not included in the previous set of Guidelines.
15. This review is particularly important, since it takes into account the regulatory experience of over 15 years of application of the key concepts laid down in the 2002 SMP Guidelines.

1.4 Principles under the EU methodology for SMP assessment

16. The EU legal framework requires NRAs to follow three steps before imposing any regulatory obligations on electronic communications operator(s): (1) to define a relevant market, (2) to designate undertaking(s) with SMP, and (3) to define appropriate regulatory remedies on the SMP undertaking(s).
17. **The definition of the relevant market(s).** As clearly spelled out by the 2018 revised SMP Guidelines, the starting point of any analysis "*should be an assessment of relevant retail market(s), taking into account demand-side and supply-side substitutability from the end-user's perspective over the next review period based on existing market conditions and their likely development*".⁶ (our emphasis)
18. Then, having identified the relevant retail market(s) and **established whether absent regulatory intervention upstream, a risk of consumer harm due to a lack of competition in the retail market(s) would persist**, NRAs should then identify the corresponding wholesale market(s) to assess whether they are susceptible to *ex ante* regulation under Article 16 of Directive 2002/21/EC.
19. *Ex ante* regulatory obligations are only imposed in markets that are not effectively competitive, i.e. markets where there are one or more undertakings with significant market power and where national and EU competition law remedies alone are not sufficient to address the competition problem identified.
20. In carrying out their market analysis, NRAs are to conduct **a forward-looking, structural evaluation of the relevant market** over the relevant period.

³ Commission Recommendation 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.

⁴ Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services, C(2018) 2374, published in the EU Official Journal C 159/1, 7 May 2018 (the "2018 SMP Guidelines").

⁵ Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, OJ C 165, 11.7.2002, p. 6–31 ("the 2002 SMP Guidelines").

⁶ Cf. 2018 SMP Guidelines, para. 15.

21. *The designation of undertaking(s) with SMP.* As recalled above, an undertaking is deemed to have SMP if, **either individually or jointly with others**, it enjoys a position **equivalent to dominance**, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and consumers.
22. *Single SMP.* When considering the market power of an undertaking it is important to consider the **market share** of the undertaking and its competitors as well as constraints exercised by potential competitors in the medium term. But the market shares are to be interpreted in the light of the relevant market conditions.
23. If the market share is below 50%, NRAs should rely on other key structural market features to assess SMP. NRAs must carry out a **thorough structural evaluation** of the economic characteristics of the relevant market **before drawing any conclusions** on the existence of SMP.
24. The 2018 SMP Guidelines provide a **non-exhaustive** list of criteria to measure the market power of an undertaking and its ability to behave to an appreciable extent independently of its competitors, customers and consumers.
25. These include **notably** (but not only): barriers to entry, barriers to expansion, absolute and relative size of the undertaking, control of infrastructure not easily duplicated, technological and commercial advantages or superiority, absence of or low countervailing buying power, easy or privileged access to capital markets/financial resources, product/services diversification, economies of scale, economies of scope, direct and indirect network effects, vertical integration, a highly developed distribution and sales network, conclusion of long-term and sustainable access agreements, engagement in contractual relations with other market players that could lead to market foreclosure, absence of potential competition.
26. Pursuant to the SMP Guidelines, a finding of SMP "*must be based on a combination of factors*",⁷ carefully taking into account **all the characteristics** of the market.
27. *Joint SMP.* A collective dominant position exists where each member of the dominant oligopoly - being aware of common interests- considers it possible, economically rational, and preferable, to adopt on a lasting basis a **common policy for their market conduct** with the aim of selling at above competitive prices.
28. According to EU case law⁸ and the SMP Guidelines, three cumulative conditions are necessary for a finding of collective dominance:
 - First, each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting a common policy.

⁷ SMP Guidelines, para 58.

⁸ Case T-342/99, *Airtours plc v Commission* EU:T:2002:146.

- Second, the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy in the market.
 - Third, the foreseeable reaction of current and future competitors, as well as customers, would not jeopardise the results expected from the common policy.
29. It is only where the **three cumulative criteria** are fulfilled that there may be a finding of joint SMP by the NRA.
30. As for single SMP, the **prospective analysis** for joint SMP must consider expected or foreseeable market developments.
31. **Imposing regulatory remedies.** Once the relevant market(s) have been defined, and undertaking(s) holding SMP have been identified, the NRA must impose at least one regulatory obligation on an undertaking that has been designated as having SMP.
32. The specific regulatory obligations which may be imposed on SMP undertakings can apply to wholesale and retail markets; but a downstream (retail) market should **only be subject to ex ante regulation** if competition on that market still exhibits significant market power despite the presence of *ex ante* regulation on the related wholesale upstream market(s).⁹

2. REVIEW OF THE AGENCY'S DRAFT REPORT

33. The review of the Agency's draft Report examines in turn the sections on the EU regulatory framework (2.1.), on defining the relevant market (2.2.), on the analysis of the relevant market (2.3.), on the obligations of the operator with SMP (2.4.), summarising for each section its content and assessing its alignment with EU rules.

2.1 RATEL and the EU regulatory framework

34. The Agency provides in the introductory section of its draft Report a presentation of the Regulatory framework in the European Union. This section includes an overview of both legislative¹⁰ and regulatory texts.
35. The draft Report includes elements regarding the latest legislative developments, such as the legislative proposal for a European Electronic Communications Code, tabled in September 2016.
36. The draft Report includes also elements regarding the Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation.

⁹ C. 2014 Commission Recommendation, para 18.

¹⁰ This includes the relevant EU Directives and Regulations from 2002 and 2009.

37. However, this section **does not refer to the latest regulatory developments** and the publication in the EU Official Journal of the **updated EU SMP Guidelines in May 2018**.
38. As stated above in Section 1, the SMP Guidelines reflect the latest developments in case-law and address issues previously not included in the 2002 SMP Guidelines.
39. This is particularly important since the updated SMP Guidelines address the criteria for defining the relevant (product and geographic) market, a key step in the SMP assessment, as well as the criteria for assessing single and joint SMP.
40. Any up-to-date, fully aligned analysis by the Agency should refer to the 2018 SMP Guidelines and take into account accordingly all relevant market developments and additional clarifications regarding the SMP methodology.
41. For instance, the Agency lists on page 17 of its draft Report several criteria which are to be particularly taken into account when determining SMP. This list of criteria is incomplete in light of the (additional) criteria enumerated in the 2018 SMP Guidelines (for instance the conclusion of long-term and sustainable access agreements).
42. Therefore, **from a methodology perspective, it must be concluded that the Agency's approach, which does not refer to or apply the 2018 SMP Guidelines, is incomplete and does not fully align with EU rules.**

2.2 RATEL definition of the relevant market(s)

43. The Agency provides in Section 3 of its draft Report a definition of the relevant market. It focuses on the **wholesale central access market**, with an analysis in two parts.
44. The Agency examines successively i) technological development in the broadband internet access, ii) the characteristics of retail market of the broadband internet access in Serbia: before turning to iii) the wholesale central access market and iv) its characteristics in Serbia.¹¹
45. Then, in light of these characteristics, the Agency assesses the demand-side substitution at retail level, the demand-side substitution at wholesale level; and the supply-side substitution at wholesale level, in order to conclude on the relevant product market at wholesale level.
46. According to the Agency, the *"analysis of the wholesale central access market was preceded by the analysis of competition that would rule in the relevant retail market in case of absence of ex ante regulation"*.¹²
47. Such an approach, although generally consistent with the methodology foreseen in the EU Recommendation and the SMP Guidelines (assessment of retail markets first, before examining wholesale markets), is not exactly the one applied by the Agency.

¹¹ Cf. Section 3.1. of the draft Report.

¹² Page 21 of the draft Report.

48. Under EU law, NRAs must first determine **whether a retail market is not effectively competitive absent ex ante regulation**. The key question is whether the market is **prospectively competitive** and whether any lack of competition is durable, by taking into account expected or foreseeable market developments.
49. This requires a detailed assessment of the competitive conditions at retail level: taking into account for instance entry barriers (networks, economies of scale) which restrict the development of competition at retail level, reviewing market shares' distribution among market players, and evolution of prices and negative impact on retail customers.
50. Once the conclusion that a retail market is not effectively competitive absent *ex ante* regulation is reached, NRAs may regulate **the corresponding wholesale market(s)**; where this/these market(s) is/are not listed in the Recommendation, NRAs should conduct the three criteria test.
51. Pursuant to EU rules, markets may be subject to *ex ante* regulation provided they meet **three cumulative criteria**: the first criterion is the presence of high and non-transitory barriers to entry; the second criterion addresses whether a market structure tends towards effective competition within a relevant time horizon; the third criterion is that the application of competition law alone would not adequately address the market failure(s) concerned.¹³
52. WCA market is listed in the Recommendation, so the burden of proof on the NRA is not as high as for other (non-listed) markets.
53. But in any case, at the stage of market definition, the Agency clearly does not undertake a forward-looking competition analysis of the retail (broadband) market and does not demonstrate that the retail (broadband) market is not effectively competitive absent *ex ante* regulation.
54. Instead, it focuses its market definition on a general **substitutability analysis**, mostly on the basis of 2017 market data.
55. **Therefore, the conclusion of the Agency on market definition**, although it retains a wide product market (Wholesale central access market with copper pairs and xDSL technology, hybrid optical-coaxial network and optical cables in FTTx network architecture) of national dimension, **is not consistent with the EU SMP methodology, is not forward looking as far as retail markets are concerned, and therefore does not align with EU rules.**

¹³ Among the indicators to be considered when assessing competition in a forward-looking market analysis, the 2014 Recommendation includes indicators of barriers to entry in the absence of regulation (including the extent of sunk costs), market structure, market performance and market dynamics, including indicators such as market shares and trends, market prices and trends, and the extent and coverage of competing networks or infrastructures.

2.3 RATEL's SMP assessment

56. As explained below, there are significant flaws in the Agency's SMP assessment: it does not appropriately distinguish between single and joint SMP, there is an over-reliance on market shares to assign SMP status, and there is no thorough, detailed, forward-looking structural analysis of the market characteristics.
57. **Single SMP or joint SMP?** The Agency correctly recalls in Section 4.1. that a dominant position implies that an operator, "either individually, or by joining with other entities" has such economic power in the market that allows it to behave, to a large extent, independently from the competitors, clients and consumers.
58. It then underlines explicitly the fact that "there is no evidence that in period that is included in the analysis the criteria for the existence of joint market powers on wholesale central access market were met" (our emphasis) and focuses therefore exclusively in the rest of the draft Report on criteria for determining single SMP.¹⁴
59. However, the Agency goes on to identify **several undertakings** as holding SMP, namely **operators Telekom Srbija a.d. and SBB DOO**.
60. As explained in Section 1 above, single SMP and joint SMP are distinct concepts which do not overlap. The European Commission 2002 SMP Guidelines for instance clarified that "Where an NRA determines the existence of more than one undertaking with dominance, i.e. that a joint dominant position exists, it should also determine the most appropriate regulatory obligations to be imposed, based on the principle of proportionality."¹⁵ (our emphasis)
61. Statements referring to "joint" or "together" market shares of Telekom Srbija and SBB are irrelevant and cannot be relied upon by the Agency in its SMP assessment, since it focused on single SMP.¹⁶
62. Subsequent conclusions in the draft Report referring to both Telekom Srbija and SBB as SMP operators are also irrelevant.¹⁷
63. The methodology and assessment of the Agency, which switches from "single SMP analysis" to "joint SMP conclusions" is inconsistent and not aligned with EU rules.
64. **Over-reliance on market shares to assign SMP status.** Under Section 4.1.1 of the draft Report, the Agency examines market shares of operators on the relevant market and **concludes immediately** that both operators have significant market power in the observed wholesale central access market.

¹⁴ Cf. page 55 of the draft Report.

¹⁵ Para. 114 of the 2002 SMP Guidelines.

¹⁶ Cf. pages 56, 57, and 65 of the draft Report. See also page 62 of the draft Report and the reference to 76% joint market shares based on the number of users.

¹⁷ Cf. the conclusions under Sections 4.1.1 to 4.1.12 of the draft Report.

65. Pursuant to EU rules, when considering the market power of an undertaking it is important to consider its market share. For market shares below 50% (as is the case for SBB with 33% market share in 2017), NRAs should rely on other key structural market features to assess SMP.
66. However, the Agency is drawing conclusion regarding the (alleged) SMP status of SBB (and Telekom) on the sole basis of market shares, without taking into account other key structural market features.
67. The conclusions reached by the Agency¹⁸ are therefore an incorrect application of EU SMP methodology; they over-rely on market shares as far as SBB is concerned to conclude regarding its SMP status.
68. **The lack of a thorough, forward-looking analysis.** As recalled in the SMP Guidelines, NRAs should carry out a thorough, forward-looking (or dynamic) evaluation of the economic characteristics of the relevant market **before drawing any conclusions** on the existence of SMP.
69. The Agency analysis is clearly **not thorough and detailed**. First, as explained above, it does not rely on the updated SMP Guidelines. Second, many high-level statements are made, without any supporting evidence.
70. For instance, under Section 4.1.4 of the draft Report on customers' countervailing power, the Agency recalls that power is typically reflected in significant share of the customer in total revenues of the operator. However, no figures are provided in that section.¹⁹
71. Similarly, under Section 4.1.5. of the draft Report on easy or privileged access to capital markets, the Agency does not provide any forward-looking assessment of financial resources and does not provide **any data/evidence** to support its statements on the basis of which it considers that "*operators that have been present in the market for a long time may have easier access to bank loans*". (our emphasis)
72. Under Section 4.1.6. of the draft Report on diversification of products/services, the Agency provides high-level statements about the ability of Telekom Srbija and SBB to tie products and services. However, no further information is provided about which products/services would be tied and how this would play out in practice.
73. The Agency refers here to "*several connected retail markets*" without providing detailed explanations distinguishing between the connected retail markets on which Telekom Srbija and SBB are active respectively.
74. **EU standards for SMP assessment** are high, as illustrated by regulatory decisions at EU level, ranging from NRA draft analysis, to their review by the European Commission

¹⁸ Cf. pages 57 and 65 of the draft Report.

¹⁹ We note that this section may be more relevant from the point of the view of the incumbent operator (which arguably would be the operator holding single SMP), if it were possible (for Telekom Srbija) to demonstrate that (Telekom Srbija) customers are informed about the possibilities of transfer to another operator (such as SBB) with minimum costs.

and by the BEREC²⁰ and subsequent changes integrated in their final decisions by NRAs.

75. In some cases, this may go as far as the NRA withdrawing its notification to the European Commission after the latter expressed serious doubts about the findings of the NRA. Such was the case for instance with respect to a notification by the Maltese NRA in relation to the market for wholesale broadband access.²¹
76. In a recent Phase II investigation and Opinion by BEREC regarding the SMP assessment by the Dutch NRA, BEREC underlined the limits of the NRA draft decision, and the importance for the Commission of the NRA taking into account all relevant factors, such as "*symmetry, innovation and bundling*" in order to assess an alleged dominance/SMP.²²
77. In another recent Phase II investigation, BEREC and the Commission expressed serious doubts with respect to the Dutch NRA assessment of SMP. The Commission had for instance concerns regarding the factors used for the SMP assessment: in the views of the Commission, the Dutch NRA had **not sufficiently taken into account the constraining influence of potential competition** on the alleged dominant operator; the Dutch NRA had **not given sufficient weight to factual elements** such as infrastructure investments; and the Dutch NRA had not drawn the right conclusions from changes it had identified in the market (in that case, reduction of scale advantages for a market operator).²³
78. Therefore, in light of these examples and ongoing EU practice, it must be concluded that the Agency analysis falls short of the EU standards for assessing SMP.
79. Last, but not least, the Agency analysis is **usually not forward-looking, and when it is, it remains very general and lacks data or projections.**
80. For instance, under Section 4.1.2 of the draft Report on control over infrastructure, the Agency merely states that "*it is not realistic to expect that in the future period they [competing operators] would reach coverage that the networks of Telekom Srbija a.d. and SBB DOO have*".
81. No evidence whatsoever is provided to explain why/how the Agency reaches this conclusion. In light of EU practice, such a statement would need to be elaborated upon (for instance, taking into account the prospective investment plans of operators and impact on the development of competition, existence of co-investment agreements...).

²⁰ See for instance BEREC Opinion on Phase II investigation pursuant to Article 7a of Directive 2002/21/EC in cases Case PT/2016/1888, Wholesale local access provided at a fixed location (market 3a) in Portugal and Case PT/2016/1889, Wholesale central access provided at a fixed location (market 3b) in Portugal (BoR (16) 154). In this decision, the assessment by the Portuguese NRA - which opted for light requirements - was challenged by both the European Commission and BEREC.

²¹ Cf. Case MT/2008/0803: Wholesale broadband access in Malta.

²² Cf. BEREC Opinion on Phase II investigation pursuant to Article 7 of Directive 2002/21/EC, in case NL/2015/17/27, Wholesale local access provided at a fixed location in the Netherlands, p.10.

²³ Cf. BEREC Opinion on Phase II investigation pursuant to Article 7 of Directive 2002/21/EC in Case NL/2017/1960, Wholesale high-quality access provided at a fixed location in the Netherlands, p. 7

82. Similarly, under Section 4.1.12 of the draft Report on obstacles for expansion, the Agency acknowledges that there are six operators which own optical network they do not use for the provision of services, and that there is certain room for increase in capacities.
83. But the Agency merely relies on the low market share of the operators present in the WCA market and their "*weaker capacities*" (in comparison with Telekom Srbija and SBB) to conclude that there are still obstacles for expansion in the observed wholesale market, without providing any forward-looking assessment of the evolution of capacities for operators (RATEL acknowledges however there are 73 operators that own coaxial cable network for distribution of media content).
84. More generally, limited consideration is given to potential competition (no reference for instance to fixed mobile substitution and the ability of mobile offers to include broadband services) and the ability of alternative mobile offers to develop in the future.²⁴
85. **The Agency relies mostly on a static analysis, does not produce evidence of the reasons for its "expectations", and often does not consider future market developments. In light of the above, it must be concluded that the Agency approach does not align with the EU methodology.**

2.4 RATEL assessment of market competition and obligations

86. Article 8 of the Access Directive requires that remedies must be based on the underlying (competition) problem identified, proportionate and justified in light of the objectives set out for NRAs in Article 8 of the Framework Directive.
87. As explained above, the EU SMP methodology is not correctly applied by the Agency: the market definition is problematic, the characterisation of (single/joint) SMP is misapplied, there is no forward-looking assessment. Therefore, the very basis on which the Agency develops Sections 5 and 6 is flawed, the latter would require further review and in-depth modifications.
88. In particular, there can be no imposition of *ex ante* regulation on SBB since it cannot be **(individually) holding SMP with Telekom Srbija**, and since there is no assessment whatsoever in the draft Report of a **possible joint SMP** on the markets identified.

²⁴ Cf. Section 3.2 1.4. of the draft Report.

3. CONCLUSION

89. EU rules provide a complex and detailed framework for the assessment of significant market power. EU legislation and regulation provide clear standards and methodology in that respect; and relevant EU guidance is regularly updated to better reflect market developments.
90. The Serbian NRA draft Report and SMP analysis refer on multiple occasions to EU rules; however, the Agency approach is aligned neither with the letter nor with the spirit of the EU framework.
91. From a general methodological perspective, the draft Report does not take into account the latest EU SMP Guidelines of 2018.
92. When first determining what the relevant market are, the draft Report does not identify clearly retail (broadband) markets and why they would not be effectively competitive absent *ex ante* regulation.
93. Even more concerning, the Agency draft Report clearly misapplies the concepts of single and joint SMP, imposing "single SMP" status to two operators in spite of the fact that the Agency explicitly stated that there were no evidence of joint SMP on the markets concerned.
94. Moreover, throughout its SMP assessment, RATEL provides an incomplete and static analysis, which lacks data, supporting figures, forecasts, and forward-looking consideration of possible market developments.
95. Clear issues have been identified at this stage; the significant misalignment with EU rules must be remedied. In light of the commitments undertaken by Serbian authorities in the Stabilisation and Association Agreement with the EU, Serbia has a duty to ensure that its legislation and practices align with the EU *acquis*, including electronic communications networks and services and SMP rules.

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