

3b or not 3b: ex-ante regulation of wholesale FTTH in Denmark

April 2022

James Allen

Background to ex-ante regulation of FTTH

In the EU regulatory framework for electronic communications (known as the European Electronic Communications Code or, more simply, the Code), national regulatory authorities (NRAs) have to define and review relevant markets susceptible to ex-ante regulation. They then have to impose one or more proportionate remedies on operators that are found to have significant market power (SMP). The European Commission provides a Recommendation on relevant markets; the latest iteration is from December 2020 and includes market 1, the market for “wholesale local access at a fixed location”. However, many NRAs are still applying regulation from reviews undertaken according to the 2014 Recommendation on relevant markets, or have only just finished such reviews. The 2014 Recommendation contains (among others):

- market 3a, the market for “wholesale local access at a fixed location”, where local access means interconnection at the main distribution frame (MDF) or optical distribution frame (ODF) and includes, for example, copper local-loop unbundling
- market 3b, the market for “wholesale central access at a fixed location for mass-market products” (that is, access via a more centralised, regional or national point of interconnection), which includes many bitstream services.

We are currently part way through a generational shift from copper to fibre services; as a result, the extent to which copper (xDSL) services and fibre services can be considered to be part of the same relevant market is changing over time. Indeed, it appears that where FTTH is available, many broadband customers in leading markets do not consider xDSL to be a substitute. When conducting their market reviews, NRAs are trying to safely navigate this tricky change in the market.

As part of their market reviews, NRAs in the EU are allowed to deviate from the Recommendation on relevant markets by proposing a different market definition, as long as they can show that the proposed relevant market will pass all parts of a so-called ‘three-criteria test’. This requires that:

- there are high and non-transitory barriers to entry
- the market structure does not tend towards effective competition
- ex-post competition law would not be sufficient to address the market failure.

The recent DBA review regarding high-capacity services in Denmark has provided some interesting results

A market review process that has recently completed in Denmark concluded that the market definition for market 3 of the 2014 Recommendation should instead separate high-capacity services (FTTH and cable) from low-capacity services (copper, including DSL), and should not differentiate between local (3a) and central

access (3b). The latter decision was based on the fact that in Denmark LLU has been largely superseded with (central) VULA services and that wholesale access to cable (which does exist in the Danish market) is only provided centrally. So, the answer to our Hamlet-inspired question is perhaps: “3b, but not as we know it”.

This review has led to the following results.

- The Danish NRA, the Danish Business Authority (DBA), defined 21 sub-national markets for wholesale high-speed services based on the (mutually exclusive) electricity distribution areas of the regional electricity distribution utilities (many of which have built very extensive FTTH networks in their territory).
- The DBA found that an operator had SMP in 17 of the 21 sub-national markets; this was TDC in only 4 of these cases.
- The European Commission issued a ‘serious doubts’ letter relating to 5 of the 17 geographic markets in which SMP was found on the grounds that the so-called three-criteria test was not passed (mostly because there was considerable overlap with a competing high-capacity network) and/or that it disagreed with the finding of SMP. The DBA withdrew four of the decisions but defended the fifth; the Commission allowed this decision to stand after BEREC agreed with the DBA.
- There has been a mix of approaches in terms of remedies. Binding commitments (a new option under the Code) have been agreed for some of the SMP operators, while ex-ante remedies have been imposed for the others.
- Wholesale-only operators have been subject to slightly lighter remedies (access, non-discrimination and “fair and reasonable” prices), as is allowed under the Code.

As a result, we will see ex-ante (‘asymmetric’) regulation of an altnet in many areas of Denmark. By contrast, and contrary to many years of regulation in fixed markets, the former incumbent TDC is the SMP operator in this wholesale high-capacity market in only 4 of the 21 geographic areas in the country. This ex-ante regulation of altnets is specific to Denmark and will not necessarily be adopted in other countries, where the facts are likely to differ (for example, as regards wholesale access, competing network coverage and perhaps consumer behaviour). Nevertheless, the DBA’s decision shows that:

- operators with very high wholesale market shares of FTTH in discrete regions can be, and will be, regulated under the Code in certain circumstances, whether or not they were the monopolist pre-liberalisation (often called the ‘former incumbent’)
- appropriate definition of the relevant market can separate declining copper services (in which the former incumbent is still likely to be the dominant player) from FTTH and cable.

Similar cases are likely to occur in the next round of market reviews in other Member States, and operators and investors will need to understand the risks and implications. For further information, please contact [James Allen](#), Head of Regulation, Analysys Mason.