



Republic of Serbia
**COMMISSION FOR PROTECTION
OF COMPETITION**

25 Savska St., 4th Floor, Belgrade

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Anonymized version

Pursuant to Article 22(2) of the Law on Protection of Competition (Official Gazette of the RS 51/09 and 95/13), Article 2(1/2) of the Tariff on the level of compensations for activities within the competence of the Commission for Protection of Competition (Official Gazette of the RS 49/11), in proceedings instituted on the receipt of a request of company Telenor d.o.o. Beograd, with registered office at 90 Omladinskih brigada St., Belgrade, company number: 20147229, whose legal representatives are Marek Slačik, Marian Mike Michel and Jan Kadanik, CEOs, and procuration holders are attorneys at law Aleksandar Petrović, Bojan Đorđević and Milica Milenković, all from Belgrade, 12 Trg Nikole Pašića Sq., and company Preduzeće za telekomunikacije Telekom Srbija akcionarsko društvo, Beograd, with registered office at 2 Takovska St., Belgrade, company number: 17162543, whose legal representative is Vladimir Lučić, CEO, for individual exemption of restrictive agreement from prohibition – Fiber Optic Indefeasible Right to Use Agreement, at the 48th session held on 21 April 2021, the Council of the Commission for Protection of Competition adopts the following

DECISION

I Restrictive agreement - Fiber Optic Indefeasible Right to Use Agreement of 30 December 2020, **SHALL BE EXEMPT FROM PROHIBITION**, concluded between undertakings, company Telenor d.o.o. Beograd, with registered office at 90 Omladinskih brigada St., Belgrade, and company Preduzeće za telekomunikacije Telekom Srbija akcionarsko društvo, Beograd, with registered office at 2 Takovska St., Belgrade.

II **TIME PERIOD SHALL BE SET**, pertaining to the individual exemption from prohibition of the restrictive agreement referred to in Paragraph I of the enacting terms herein, in the duration of seven (7) years from the date of adoption of this decision, until 21 April 2028.

III **IT SHALL BE ORDERED** to the Parties referred to in Paragraph I of the enacting terms herein that in the period of three (3) years from the date of communication of this decision submit reports to the Commission for Protection of Competition:

- 1) on the conclusion of agreements having the purpose of use of fiber optic assets, with the obligatory indication of contractual parties, contract period and the number of user rooms that can be connected under said agreements;

- 2) on requests to conclude agreements having the purpose of use of fiber optic assets and under which said agreements are not concluded, with the obligatory indication of the name of undertaking filing the request and the Party receiving the request and reasons for not concluding said agreements;
- 3) on the conclusion of agreements having the purpose of distribution of media content, with the obligatory indication of contractual parties, program content to be distributed and the contract period;
- 4) on requests to conclude agreements having the purpose of distribution of media content and under which said agreements are not concluded, with the obligatory indication of the name of undertaking filing the request and the Party receiving the request, and reasons for not concluding said agreements.

The reports referred to in points 1) - 4) of this Paragraph of the enacting terms herein shall be submitted to the Commission within 7 days from the date of conclusion of each individual agreement or dismissal of requests.

IV IT SHALL BE ORDERED to company Telenor d.o.o. Beograd that in the period of three (3) years from the moment of connection of the first user under the Fiber Optic Indefeasible Right to Use Agreement, to submit six-monthly reports with the obligatory indication of:

- 1) the total number of new user rooms that are, in the performance of the Fiber Optic Indefeasible Right to Use Agreement, connected to the company's network during the reporting period, and on the cumulative number of all connections from the start of the reporting period under this order;
- 2) the number of users, out of the total number of connections during the reporting period, that have not been the users of any other operator prior to the connection;
- 3) the number of users, out of the total number of connections during the reporting period, that have exclusively used the services of other operators prior to the connection, indicating the operators whose services they stopped using upon the connection;
- 4) the number of users that have used some of the services of company Telenor d.o.o. Beograd in the previous period, including the services of other operators, deciding to exclusively use the services provided by company Telenor d.o.o. Beograd during the reporting period;
- 5) the number of users that have stopped using the services provided by company Telenor d.o.o. Beograd on all grounds during the reporting period.

V In case of non-compliance with orders referred to in Paragraphs III and IV of the enacting terms herein, the Commission for Protection of Competition may, during the period of individual exemption of restrictive agreement from prohibition, annul this decision.

VI IT SHALL BE ESTABLISHED that undertakings referred to in Paragraph I of the enacting terms herein have complied fully with the obligation of the Parties to pay a stipulated fee amount for the issuance of this decision, namely Telenor d.o.o. Beograd by paying the amount of 70,549.86 RSD and Preduzeće za telekomunikacije Telekom Srbija akcionarsko društvo, Beograd by paying the amount of 70,547.70 RSD into the account of the Commission for Protection of Competition, totaling to 1,200.00 EUR in the dinar-currency equivalent value calculated at the middle exchange rate of the National Bank of Serbia on the day of payment.

Exposition

The Commission for Protection of Competition (hereinafter referred to as the ‘Commission’) received the Request for individual exemption (hereinafter referred to as the ‘Request’) on 12 January 2021, of the Fiber Optic Indefeasible Right to Use Agreement of 30 December 2020 (hereinafter referred to as the ‘Fiber Optic Indefeasible Right to Use Agreement’ or the ‘Agreement’), whose contractual parties and the Requesting parties are - company Telenor d.o.o. Beograd, with registered office at 90 Omladinskih brigada St., Belgrade, company number: 20147229, whose legal representatives are Marek Slačik, Marian Mike Michel and Jan Kadanik, CEOs, and procuration holders are attorneys at law Aleksandar Petrović, Bojan Đorđević and Milica Milenković, all from Belgrade, 12 Trg Nikole Pašića Sq. (hereinafter referred to as ‘Telenor’) and company Preduzeće za telekomunikacije Telekom Srbija akcionarsko društvo, Beograd, with registered office at 2 Takovska St., Belgrade, company number: 17162543, whose legal representative is Vladimir Lučić, CEO (hereinafter referred to as ‘Telekom’ and jointly hereinafter referred to as the ‘Parties’).

Subject matter of the Request for individual exemption

The Request seeks the individual exemption from prohibition of the Fiber Optic Indefeasible Right to Use Agreement, which regulates and defines the rights and obligations of the contractual parties as to the use of fiber optic assets of Telekom at a fixed location by Telenor with a view to providing the fixed telephony, media content distribution and Internet access services.

The Agreement concerned is concluded with the term of validity of [...] and the Request seeks the individual exemption from prohibition in the duration of [...].

In addition to the Request, the Agreement concerned and accompanying annexes, data and evidence required under the Regulation on the content of requests for individual exemption of restrictive agreements from prohibition (Official Gazette of the RS 107/2009, hereinafter referred to as the ‘Regulation’), the Commission also received copies of the Fiber Maintenance Agreement, Television Programming Distribution Agreement, and the Agreement on Ethernet Bitstream Services, signed by the Parties, including commercial components of the operations in their entirety that govern the whole of the business relationships between the contractual parties.

Considering that the Parties have presented their legal view in the Request according to which the Fiber Optic Indefeasible Right to Use Agreement does not represent a restrictive agreement within the meaning of Article 10 of the Law on Protection of Competition (Official Gazette of the RS 51/2009 and 95/2013 – hereinafter referred to as the ‘Law’), the Parties alternatively requested the Commission to adopt a decision declaring that it has no jurisdiction or, if the Commission finds evidence of a restrictive agreement, to exempt it from the prohibition.

Requesting parties - Parties to the proceedings

1. **Telenor** is founded as a limited liability company on 4 April 2006, registered at the Business Registers Agency of the Republic of Serbia under company number 20147229, ISIC Code 6120 - Wireless Telecommunications Activities, with registered office in Belgrade at 90 Omladinskih brigada St., whose legal representatives are Marek Slačik, Marian Mike Michel and Jan Kadanik, CEOs. The shareholder, holding 100% of share capital, is a company from the Netherlands, PPF TMT BIDCO 1 B.V, Strawinskyiaan 933, Amsterdam, company registration number 70498288.

The following companies affiliated to Telenor also operate on the market of the Republic of Serbia, namely:

- Cetin d.o.o. Beograd-Novi Beograd, with registered office in Belgrade at 90 Omladinskih brigada St., company number 21594105, ISIC Code 6110 - Wired Telecommunications Activities;
- Mobi banka a.d. Beograd, with registered office in Belgrade at 88 Omladinskih brigada St., company number 17138669, ISIC Code 6419 – Other Monetary Intermediation.

The Regulatory Agency for Electronic Communications and Postal Services of the Republic of Serbia (hereinafter referred to as the ‘Agency’) issued the License for the provision of public fixed telecommunications services using the public fixed communications network to Telenor on 22 January 2010. Under the License, the provision of services is secured by providing support on the part of an operator with a significant market share including, inter alia, the use of transport capacities. In June 2010, the Agency also adopted a decision¹ governing access and access charges for Telenor in respect of Telekom’s infrastructure. Having regard to the fact that the License is issued for a period of 10 years, Telenor addressed the Agency with a license extension request. In the meantime, the relevant legal framework was amended, no longer stipulating the authorization requirements for the provision of public fixed telecommunications services, instead, the services concerned were to be provided under a general authorization regime. The above implies that operators no longer need a permit to provide communications networks or services but to report to the Agency for the registration as an operator. For this reason, Telenor was not issued a license in 2019, instead, the Agency adopted a decision² that also extended the right to use transport capacities by leasing the fiber optic assets of Telekom until 2030.

2. **Telekom** is a joint stock company founded on 23 May 1997, registered at the Business Registers Agency of the Republic of Serbia under company number 17162543, ISIC Code 6110 - Wired Telecommunications Activities, with registered office in Belgrade at 2 Takovska St., whose legal representative is Vladimir Lučić, CEO.

Telekom’s affiliated companies in the Republic of Serbia are the following:

- Privredno društvo za održavanje i obvezbeđivanje objekata, imovine i druge usluge Telus a.d. Beograd, ISIC Code 8010 – Private Security Activities;
- ARENA CHANNELS GROUP d.o.o. Beograd, ISIC Code 6110 - Wired Telecommunications Activities;
- mts banka a.d. Beograd, ISIC Code 6419 – Other Monetary Intermediation;
- MTEL Global d.o.o. Beograd, ISIC Code 6120 - Wireless Telecommunications Activities;
- MTS d.o.o. Kosovska Mitrovica, ISIC Code 6110 - Wired Telecommunications Activities;
- Lika d.o.o. Zvečan, ISIC Code 6110 - Wired Telecommunications Activities;
- VGN Net d.o.o. Kosovska Mitrovica, ISIC Code 6120 - Wireless Telecommunications Activities;
- MTS AntenaTV d.o.o. Beograd, ISIC Code 6120 - Wireless Telecommunications Activities;
- YUNET INTERNATIONAL d.o.o. Beograd, ISIC Code 6110 - Wired Telecommunications Activities;
- MTS sistemi i integracije d.o.o. Beograd, ISIC Code 6202 - Computer Consultancy and Computer Facilities Management Activities;
- Telus PRO d.o.o. Beograd, ISIC Code 8121- General Cleaning of Buildings;
- Moja Supernova d.o.o. Beograd, ISIC Code 6110 - Wired Telecommunications Activities;
- Euronews d.o.o. Beograd, Television Programming and Broadcasting Activities;

¹ Decision 1-Kab-031-946/10-6 of 4 June 2010

² Decision No. 1-02-349-45/19-4 of 26 July 2019

- Limes Telekomunikacije d.o.o. Depostovac, ISIC Code 6110 - Wired Telecommunications Activities.

Available data, information and documentation

The subject of the Fiber Optic Indefeasible Right to Use Agreement, also known as IRU agreement, governs and defines the rights and obligations of the contractual parties in terms of use of the fiber optic network of Telekom at a fixed location by Telenor [...], for the purpose of provision of fixed telephony, media content distribution and Internet access to end-users of Telenor. Essentially, the Agreement concerned governs the right of use or lease of the fiber optic assets of company Telekom by Telenor.

[...]

The Standard offer for the provision of wholesale broadband access services of Telekom explicitly provides that it does not cover the access realized via Telekom's fiber networks built-in FTTH and FTTB³ architecture, making the Fiber Optic Indefeasible Right to Use Agreement the subject of a commercial agreement between the contractual parties. The Standard offer defined in such a manner is fully in line with the provision of the Decision adopted by the Agency (RATEL) No. 1-03-349/18-18 of 5 July 2019 – Paragraph III, point 1) of the enacting terms therein, which sets out the companies Telekom Srbija and Serbia Broadband – Srpske kablovske mreže d.o.o. (hereinafter referred to as 'SBB'), as operators with a substantial degree of combined market power.

[...]

In a supplement to the Request submitted by Telenor to the Commission on 31 March 2021 by filing the submission No. 4/0-02-209/2021-15, is set out that the Agreement concerned is concluded in full compliance with the earlier adopted own business decision by Telenor, envisaging the entry into the retail market for distribution of media content and improvement of fixed Internet and fixed telephony services, specifically via Telekom's fiber optic network. The main reasons that have affected this company to use the fiber network lie in the fact that the use of fiber-coax networks is not economically viable / sustainable for the company as a lessee, while on the other hand, the use of ADSL services through copper networks is technologically obsolete. At the same time, the construction of its own access network is assessed as inadequate. Namely, according to Telenor, the construction of its own access network was not an option since it is an extremely time and resource consuming process, in addition to not corresponding to the environmental and sustainability goals in a situation where the access networks of other operators exist. For all the reasons above, Telenor opted for the FTTx⁴ network of company Telekom as an access network in its development.

In assessing the legal nature of the Agreement concerned, the Parties have also presented their legal understanding stating that the Agreement concerned is not restrictive within the meaning of competition regulations for several reasons. In view of the above, they have outlined that the Fiber Optic Indefeasible Right to Use Agreement is not exclusive considering there are no obstacles for Telenor to conclude an agreement dealing with the same subject matter with other operators nor obstacles for Telekom to conclude the identical agreement with any other interested third operator, and in particular since the fiber optic infrastructure of Telekom has sufficient capacities to provide for identical services to several operators. It is further mentioned that the Agreement concerned does not establish resale prices or any other conditions of trade by none of the contractual parties, nor does it

³ Fiber to the Building – a network architecture where a copper cable laid to the building goes from the end-user to a point on a shared property (telecom closet), and a fiber optic cable is run from the building to the operator's communication node.

⁴ Fiber to the X – implies any of the network architectures: FTTC, FTTB or FTTH.

restrict or control the output, market, technical development or investments. Instead, Telenor will, by entering the market as an operator with significant experience on the mobile telephony market, contribute to the competitiveness on the market for public fixed telecommunications network and services, market for broadband Internet access, and the market for media content distribution. It is further outlined that the Telenor's market entry will also undoubtedly increase the competitive pricing, competitiveness with regard to the content available to users, thus increasing the possibility of users to choose between service providers, which will also affect the increase in investments on the market by all operators since the current and new operators will strive to improve their services to secure the improved user experience and in that manner better position themselves on the relevant market. In support of the same legal understanding of the legal nature of the Agreement concerned, emphasis is also placed on the fact that the conclusion of said agreement is not conditioned by the acceptance of any other supplementary obligations which, given their nature and trading customs and practices, are not related to the subject of the agreement - the Fiber Optic Indefeasible Right to Use Agreement, in addition that it does not share sources of supply or arrange for the joint procurement of any equipment.

In stating the reasons for the exemption period requested, the Parties said that Telenor, in exercising the rights acquired under the Fiber Optic Indefeasible Right to Use Agreement, will carry out significant investments implying [...].

In terms of the definition of the relevant market, the Request states that the Parties are active on the market for electronic communications, specifically: Telekom on the markets for public fixed telecommunications network and services, broadband Internet access, and media content distribution, while both Parties are active on the market for public mobile telecommunications network and services.

For the reasons outlined above, the Parties proposed that in determining the relevant market the Commission considers the fact that Telekom will under the Agreement concerned allow Telenor to only use the FTTH fiber infrastructure, and that Telenor will use the said fiber infrastructure with a view to providing services to its users at a fixed location, thus to define the wholesale market for central access provided at a fixed location for mass-market products as the relevant market, and the market of the Republic of Serbia as the relevant geographic market.

The Parties also provided information on the market shares that other undertakings hold on the markets where they actively operate, that is, on the markets for public mobile telecommunications network and services, public fixed telecommunications network and services, broadband Internet access, and media content distribution, where the direct effects of the Agreement concerned will appear, regardless of the technology used for the provision of said services. The said information is also published on the Agency's website in the 'Market' section under the 'Quarterly Report – Electronic Communications' submenu in the document titled "Overview of the electronic communications market in the Republic of Serbia – Q3 2020".

Based on the data provided, Telekom's share on the market for public fixed telecommunications network and services is 76.5% (its first closest competitor holds a market share of 19.8%), on the market for broadband Internet services Telekom with affiliated companies holds 50.9% of the market (followed by the closest competitor with a 32.5% market share), while on the market for media content distribution Telekom with its affiliates holds a 42.4% market share (its largest competitor holds a market share of 46.1%).

In stating the advantages to result from the Agreement concerned, the Parties have in more detail duly justified the compliance with requirements for individual exemption, particularly elaborated in a supplement to the Request submitted by Telenor to the Commission, filed under No. 4/0-02-209/2021-15 of 31 March 2021. In view of the above mentioned, it is underlined that consumers would benefit from increased choice by Telenor's entry into the retail market for media content distribution in Serbia, where the current options would not be restricted in any manner. Namely, it is said that satisfied consumers of other operators would continue to use their services, while a certain number of

consumers would find Telenor's offer more attractive than those of the other operators. By creating a situation like this on the market for media content distribution, including on the markets for the provision of fixed telephony services and Internet, the competition would be intensified both in terms of prices and quality, content and benefits offered by operators to their users. In terms of the manner in which the implementation of the Agreement concerned contributes to the improvement in output and trade / incentivizes technical and economic progress, it is said that since Telenor is a member of an international group active in several countries in the field of telecommunications, the company will be able to also apply individual experiences and know-how of its holding group on the Serbian market, thus contributing to the improvement of economic growth and technological development on the relevant market. According to Telenor, a higher quality of fixed Internet services through the fiber optic access network can significantly contribute to the overall digitalization of Serbian society, that is, facilitate the implementation of the Digital Agenda of the Government of the Republic of Serbia. It is also said that consumers will receive a fair share of the resulting benefits from the Agreement concerned in terms of the increased price competitiveness between operators, causing lower prices for users, increased choice of operators, [...], improved quality of services provided by Telenor through innovative, digital solutions in the media content distribution, fixed Internet and fixed telephony services. It is added that mutual competition between the Parties will intensify by implementing the Agreement concerned. Telenor bases its reasoning on the fact that the Agreement will enable the company to further effectively compete with Telekom, not only in the media content distribution segment but also on the retail markets for fixed Internet and fixed telephony services. Furthermore, Telenor claims that further agreements with a number of other distributors and media content producers will certainly be entered into, outlining the company's commitment and efforts that will be made in ensuring that its offer also includes the media content for which SBB owns rights over the broadcast. It is outlined that companies Telenor and Telekom will wholly independently establish prices and other elements of their conduct on retail markets, and that in that respect there are no restrictions, by any of the contractual parties, laid down in the Agreement concerned subject to the request for individual exemption from prohibition.

In addition to the information provided by the Parties, the Commission also considered a submission of 8 February 2021, presented on its own initiative by an undertaking operating on the retail market for public fixed telecommunications network and services, broadband Internet access and media content distribution services, company SBB. In the submission is said that the arguments and opinions are based on publicly available information on business cooperation between Telekom and Telenor with respect to the fiber network lease by Telekom. SBB believes that business cooperation between Telekom and Telenor is arranged to eliminate SBB as a competitor, constituting the grounds for the Commission to assess the Agreement concerned as restrictive.

Findings of the Commission

In order to determine the jurisdiction *ratione materiae* over the Request, the Commission approached the Agency as the electronic communications sector regulator. Based on replies received from the Agency, the Commission established that the fiber optic infrastructure is not susceptible to *ex-ante* regulation, based on which it is established that the assessment of the Agreement concerned is not under the jurisdiction of the Agency but the Commission.

The Commission assessed the legal nature of the Agreement concerned proceeding from the provisions of the Law, in particular Article 10 that defines the concept of restrictive agreements, and relevant regulations to determine whether the Agreement concerned falls within their scope, that is, should the Commission decide on the Request concerned in a proceedings of individual exemption from prohibition.

The Commission establishes that the Request is submitted under Article 12, read in conjunction with Article 11 of the Law, in full accordance with the Regulation.

- Subject, nature and purpose of the Agreement and the relevant market -

Proceeding from the markets where the contractual parties operate, the Commission established that the case concerns primarily a vertical supplier-buyer relationship, with some horizontal elements and characteristics. The Commission has established and notes that under the Fiber Optic Indefeasible Right to Use Agreement, company Telenor, currently a potential competitor on the retail market for public fixed telecommunications network and services, broadband Internet access and media content distribution services, will become the user of wholesale services of Telekom. In that manner, de facto, Telenor will enter the market and become an active undertaking and real competitor to already existing undertakings on the markets for: public fixed telecommunications network and services, broadband Internet access and media content distribution services, thus to Telekom as well. Therefore, under the vertical relation allowing Telenor to access Telekom's fiber optic infrastructure, Telenor will become a new active competitor in the provision of services at a fixed location in retail, a market on which Telekom is also already active, which represents a horizontal relationship between the Parties.

The Commission did not accept the relevant market definition proposed by the Parties, proceeding from Article 6 of the Law when defining the relevant market, which stipulates that the relevant market within the meaning of this law is a market that includes the relevant product market on the relevant geographic market. The Regulation on criteria for defining the relevant market (Official Gazette of the RS 89/2009) in more detail regulates the criteria for defining the relevant product market and relevant geographic market.

The Commission also took as a relevant fact the statement made by Telenor on a request of the Commission for the provision of information, presented in a submission filed under No. 4/0-02-209/2021-14 of 31 March 2021, stating that the company currently does not plan to offer the fixed telephony, media content distribution and Internet services over a copper network and xDSL technology as they are obsolete technologies that preclude the technological competitive advantage on the market, nor through a hybrid fiber-coax network built by operators offering the media content distribution services as their access price is too high, meaning that it disables competitive pricing by Telenor as a new undertaking on the market for media content distribution services.

On the basis of all the above considerations, particularly in view of the subject of the Fiber Optic Indefeasible Right to Use Agreement, for the purpose of deciding on the Request, the Commission defined the relevant product market as the wholesale market for the lease of fiber optic infrastructure with a view to providing retail services of public fixed telecommunications network and services, broadband Internet access and media content distribution services. Given that the analyzed business practice will be implemented in the entire territory of the Republic of Serbia, said territory is set as the relevant geographic market.

To correctly establish the structure of the relevant market, the Commission requested the Agency to provide information on the fiber infrastructure market. The Agency, in responding to the request of the Commission, provided information that it has no information on the present state of the fiber optic market in the territory of the Republic of Serbia since the market is not susceptible to ex-ante regulation but only on the number of broadband connections available via FTTB/FTTH technologies. For this reason, that is, the inability to obtain relevant information and assessments from the sector regulator, in handling the case, the Commission has analyzed its own information obtained in proceedings conducted by the Commission in the previous period in the relevant area, especially in merger control procedures, including the publicly available information, considering that, under the circumstances, the above mentioned represents the acceptable and sufficient factual material to support its decision-making in this administrative matter.

Based on information from the Agency's document providing an overview of the electronic communications market, the number of internet connections via fiber optic cables in FTTH/B architecture remains small in the total number of fixed broadband internet access users (10%). However, the document also mentions that this access method has the highest annual % growth rate of close to 53%. In Telekom's statement No. 4/0-02-210/2021-17 of 2 April 2021 provided on the Commission's request for information, it is said that the Internet access service via fiber optic networks implemented in FTTH/B architecture in 2017 was used by around 5% of the total number of broadband internet access users. It is also said that the fiber optic infrastructure in FTTH/B architecture is built in the territory of 76 local municipalities or 45% of the total number of LSG units. Referencing the Agency's report, Telekom said that Telekom, SBB, and Orion Telekom d.o.o. are the largest operators with this type of network, with 82% of the relevant market share by number of users realized in FTTH/B architecture. Also, in a publicly published article⁵ is said that by 2019, Telekom has built hundreds of kilometers of underground infrastructure and laid more than 4 000 kilometers of fiber optic cables, allowing more than 700 000 households by the end of 2019 to access a fast, stable and safe Internet connection, and that Telekom's FTTx network coverage of homes in Serbia increased to around 30%.

The Commission further investigated whether the Agreement concerned falls within the scope of agreements of minor importance. Given the market shares of the Parties and companies considered their affiliates within the meaning of Article 5 of the Law, both on the wholesale and retail markets concerned, where the information on retail market shares is provided by the Parties and accepted by the Commission, it is assessed that the Agreement concerned does not represent an agreement of minor importance within the meaning of Article 14 of the Law. For the same reason, the Agreement concerned cannot be automatically exempt under the Regulation on agreements between undertakings operating at the different level of production or distribution chain exempted from prohibition (Official Gazette of the RS 11/2020) given that the relevant market shares exceed 25% provided for in Article 5 of the said Regulation.

The Commission further assessed the possibility of individual exemption of the Agreement concerned from prohibition, and to this effect has analyzed data and evidence provided by Telekom and Telenor and the provisions of the Agreement concerned, and performed the assessment of the compliance with requirements set out in Article 11 of the Law.

- Analysis of the available documentation –

On the basis of an internal document of Telenor from June 2019 which, in its essence, represents the company's own assessment of reasons, possibilities and economic feasibility of the entry into the retail market for electronic communications, the Commission established that Telenor has expressed serious intent, followed by a later business decision, to become an active undertaking on the retail markets for public fixed telecommunications network and services, broadband Internet access and media content distribution services a year and a half before the conclusion of the Agreement concerned. The said document elaborates on the model and expected effects of the planned entry method, and only analyzes the resulting benefits to be achieved by Telenor in that manner, without examining the possible effects on each individual already present competitor on those markets.

From the document concerned, and also based on other documents, data, information and statements obtained in the case, the Commission could not find any reasonable grounds to believe that in the negotiation process preceding the conclusion of the Agreement concerned, Telenor as its purpose or object, by entering and later implementing the Agreement concerned, intended to cause harm to

⁵ <https://pcpress.rs/mts-optika-na-pragu-polovine-domacinstava-u-srbiji/>

competition on the relevant market. Also, the Commission found no indications constituting reasonable grounds to believe that Telenor knew, considered and/or accepted any of the reasons for entering into the Agreement concerned that, within the meaning of competition regulations, could potentially be contested. Namely, the internal document of Telekom, aside for providing an analysis of all benefits and an economic justification enabling the business activity with Telenor, also gives certain findings that concern possible outcomes of the implementation of the Agreement concerned for the competing undertaking.

The Commission also analyzed said findings and arguments, and in relation thereto points out that the changes in the market structure or market shares held by existing undertakings may occur due to the market entry of a new undertaking, and that it is beyond dispute that, under the required elements of business cooperation established by the Agreement concerned, such a change may happen to any existing undertakings and not just only one of them.

In view of all the foregoing, the Commission concluded that there are no reasonable grounds to believe that the cooperation between the Parties and conclusion of the Agreement concerned occurred for the purpose of a hardcore restriction of competition, nor can the Agreement be concerned to contain a restriction "by object", and therefore has concluded that it is eligible for verifying compliance with requirements for individual exemption from prohibition.

- Analysis of the contractual provisions –

Under the contractual provision [...].

Based on a reply received from Telekom and Telenor, the Commission established that the term NR from the Agreement concerns all potential end-users, irrespective whether they already use the services provided by other operator, including Telekom's users, or completely new users that are still not using the services concerned. This de facto means that Telenor, by offering its services, will exert competitive pressure on all competitors on the retail markets where it appears as an active undertaking, and therefore on Telekom as well.

It is established that the Fiber Optic Indefeasible Right to Use Agreement contains a provision [...].

Given the statement of Telenor presented in the Request that the intent of this company to enter, among others, the retail market for media content distribution exclusively via the fiber optic network, the Commission assessed as acceptable the position of the Parties that the Television Programming Distribution Agreement also relates to the Agreement concerned. The Commission also assessed the argument of Telenor presented in a reply of 31 March 2021 on the Commission's request for provision of information, that the provision is included because [...].

In addition, the Commission established that Telenor's plan is to substantially increase its offer, relative to Telekom's, by securing cooperation with other broadcasters as well, namely based on evidence that Telenor also tried to establish cooperation with United Media before entering into the media content distribution agreement with Telekom. Based on currently available data and information, the Commission establishes that such cooperation has not yet occurred, while the possibility of such a cooperation nonetheless occurring in the coming period is not, neither explicitly nor definitively excluded, from which, undeniably, the end-users of those services would also significantly benefit.

- Compliance with requirements set out in Article 11 of the Law –

By examining the compliance with requirements set out in Article 11 of the Law, the Commission was assessing whether the Agreement concerned contributes to the improvement of output and trade or incite technical or economic progress while providing consumers with a fair share of benefits, provided that it does not impose restrictions on undertakings that are not necessary for the purpose of attaining the objectives of the Agreement or exclude competition on the relevant market or in its substantial part.

The Commission accepted the arguments presented by the Parties, mentioning that the implementation of the Fiber Optic Indefeasible Right to Use Agreement will improve conditions for market competitiveness since Telenor will be introduced as a new operator on the market for media content distribution services and create conditions for the active involvement of this company on the fixed telephony and Internet access market. It is also accepted, considering that Telenor has extensive experience in the area of mobile telephony services and is a recognizable brand to users, that the market entry of this company as a new operator can only contribute to the improvement of competitiveness between operators, who will endeavor to ensure the best possible conditions in terms of the provision of their services by improving the quality and range of said services. It is assessed that the implementation of the Agreement concerned may bring operators to improve their services by introducing new TV channels, enhance user experience, which can all potentially lead to a decline in prices, introduction of discounts and offers to attract and/or keep users.

The Commission also assessed the arguments presented in a supplement to the Request submitted by Telenor to the Commission, filed under No. 4/0-02-209/2021-15 of 31 March 2021, as well founded and acceptable, concerning the resulting benefits of the Agreement concerned, set out above on Pages 8 and 9 hereof (of the original Serbian version).

- Request for joinder of proceedings -

The Request contains a proposal made by the Parties for the joinder of the proceedings initiated on the receipt of a request for the exemption of the Fiber Optic Indefeasible Right to Use Agreement, with a simultaneously filed request for the exemption of the Agreement on Ethernet Bitstream Services concluded between the same parties. By way of the Conclusion No. 4/0-02-209/2021-21 of 21 April 2021, the Commission dismissed the proposal.

- Requests for Recognition of Party's Capacity –

In the proceedings conducted before the Commission, companies SBB and United Media have filed requests for granting of capacity of a party, which the Commission dismissed as unfounded by adopting conclusions No. 4/0-04-255/2021-06 of 22 March 2021 and No. 4/0-04-256/2021-06 of 22 March 2021. Under the provision of Article 152 of the Law on General Administrative Procedure (Official Gazette of the RS 18/16 and 95/18 – authentic interpretation), said companies will be notified of the decision that the Commission has adopted. Under the said provision of the Law on General Administrative Procedure, the notification thereof will contain the number of the decision and the name of the authority adopting it, the parties participating in the procedure, the enacting terms of the decision and the notice of legal remedy against the decision.

Final assessment

Following a comprehensive analysis of the Request concerned and contractual documents, including the data obtained, the Commission assessed that the Agreement concerned imposes no restrictions on undertakings which are not indispensable to the attainment of the objective pursued, meaning that the

conclusion and implementation of the Agreement concerned do not result in a substantial lessening of competition on the relevant market or its substantial part.

The Commission assessed that the Fiber Optic Indefeasible Right to Use Agreement does not substantially restrict the access to fiber optic infrastructure of Telekom, nor does it disrupt competition on the market for the provision of services at a fixed location in retail. Specifically, Telenor's entry into the market for the provision of fixed telecommunications services or fixed telephony services, under the License, implied a mandatory use of transport capacities by leasing the fiber optics or fiber optic network of Telekom. The Agreement concerned enables Telenor to also offer other electronic communications services by using the same infrastructure (Internet and TV), that is, it enables the new entry into other electronic communications markets. It contributes to increasing the variety in supply and bringing more choices for consumers. With an increasing number of active undertakings, the more intensive price competitiveness is also expected on the retail market for electronic communication services at a fixed location. It also increases the choice on the demand-side of the market where consumers choose between operators having regard to the variety and assessed quality of content offered at a price, while the number of users selecting a telecom services provider is in direct relation to the operator's market share. In other words, the market shares of operators, to a large extent will depend on the consumer choice and their selection of operators.

The Commission assessed in particular the fact that Telenor, as an active undertaking on the mobile telephony market, will be a sole competitor to Telekom able to offer a "package" of four services (fixed and mobile telephony, TV, Internet). It is assessed given Telenor's statement provided in a reply of 31 March 2021 to the Commission's request for provision of information, indicating that the retail services concerned will be offered both as stand-alone and in bundled packages of two or more services.

The Commission assesses that impacts of implementation of the Agreement concerned will largely be procompetitive and that such elements will prevail over all possible anticompetitive elements. It has also assessed that the compliance with requirements set out in the Law for individual exemption of the restrictive Agreement concerned from prohibition is sufficiently reasoned and proven, and in accordance with this assessment it is decided as in Paragraph I of the enacting terms herein.

Having regard to the foregoing, and considering in particular the contract period, level of additional investments needed for the implementation of the Agreement concerned, and its implementation period leading to the first connections based on the IRU model, the Commission has set the period pertaining to the individual exemption from prohibition of the Fiber Optic Indefeasible Right to Use Agreement in the duration of seven years from the date of adoption of this decision, until 21 April 2028, pursuant to Article 12(3) of the Law. The period is assessed as adequate, and at the same time sufficient for the Commission to monitor the implementation of the Agreement concerned through reports provided by undertakings under the Commission's orders. Considering the above, in accordance with the provision of Article 60(2) of the Law, the Commission decided as in Paragraph II of the enacting terms herein.

Although it is assessed that the Agreement imposes no restrictions on undertakings which are not indispensable to the attainment of the objective pursued, meaning that the conclusion and implementation of the Agreement concerned do not result in a substantial lessening of competition on the relevant market or its substantial part, it is determined that it is necessary to provide periodical reports to the Commission to monitor the conditions on the relevant market. It is ordered in particular because the case concerns an agreement whose effects also have the characteristics of a horizontal agreement, where the market is intensely developing and the Agreement concerned enables the entry of a new undertaking, previously not active on the relevant market. The Commission assessed that the ordered behavioral measures are necessary so that the Commission could monitor the implementation of the Agreement concerned. Considering the above, it is decided as in Paragraphs III and IV of the enacting terms herein.

The Commission bases its decision solely on the information, data and documentation available to it at the time of the adoption of the decision. The Commission may, under the provision of Article 60(5) of the Law, in a repeated proceedings ex officio within the meaning of Article 46 of the Law, annul the decision in case of substantial change in circumstances under which the exemption is granted, or set aside the decision within one year of its adoption if the exemption is based on inaccurate or misleading statements or if the exemption is misused.

The substantial change in circumstances referred to in Article 60(5) of the Law means the change in circumstances that the Commission had considered and assessed when deciding on the request, where the non-compliance under this decision may annul this decision during the period of individual exemption, which led the Commission to decide as in Paragraph V of the enacting terms herein. As the substantial change in circumstances under which the exemption is granted the Commission will also consider a decision adopted by the sector regulator on ex-ante regulation of the market for the provision of wholesale access to fiber optic network.

This decision refers exclusively to the Fiber Optic Indefeasible Right to Use Agreement and attachments submitted with reference to the Agreement concerned, and not to any possible future annexes that would, during the period of individual exemption, amend the exempt Agreement.

Under Article 60(6) of the Law and Article 2(1/2) of the Tariff on the level of compensations for activities within the competence of the Commission for Protection of Competition (Official Gazette of the RS 49/11), it is decided as in Paragraph VI of the enacting terms herein.

Instruction of legal remedy

This administrative decision is final and is susceptible to administrative appeal filed with the Administrative Court in Belgrade, 9 Nemanjina St., no later than 30 days from the date of communication of this decision.

A court fee of 390 dinars is to be paid for bringing an action, set out in the Law on Court Fees (Official Gazette of the RS 28/1994, 53/1995, 16/1997, 34/2001 – as amended, 9/2002, 29/2004, 61/2005, 116/2008 – as amended, 31/2009, 101/2011, 93/2012, 93/2014, 106/2015, and 95/2018).

PRESIDENT OF THE COMMISSION

(Signed)
Nebojša PERIĆ