

ETNO Reflection Document in reply to the European Commission call for input - Recommendation on relevant markets

Introduction^a

ETNO welcomes the Commission call for input on the review of the Recommendation on relevant products and services markets.

The Recommendation is a key instrument of the EU Regulatory Framework for enabling the Commission to guide the transition of the e-communications sector towards the increasing application of general competition law. As the Commission was largely bound by an Annex to the EU Framework Directive in the choice of market areas to be included in the first list of relevant markets, the current review provides the first objective assessment of the remaining need for ex-ante intervention in the European e-communications sector.

In this review, the Commission faces a dramatically changed market environment in comparison to 2002 when the 1st Recommendation was drafted. Convergence, already discussed at that time, is now a reality, underpinned by a move to next generation core and access networks which are capable of delivering a variety of data services to the end-customer over different devices and at different locations.

A number of takeovers and cooperation agreements - starting in 2005 - demonstrate that convergence of the internet, media and telecoms is changing business models and the communications market.¹ Convergence is leading to the entry of new market players in the sector, in many areas resulting in an increase of competition and innovation. Applications developed on the internet are able to provide services traditionally offered by vertically integrated telecoms companies without depending on regulated wholesale products, while content developed for one delivery platform is readily adapted for delivery over other platforms.

^a BT does not support this document.

These market developments

- Increase the scope for the emergence of sustainable competitive communications markets where this is not already the case.
- Increase complexity of economic interactions in a multi-product environment, further cautioning against an *ex-ante* regulatory intervention in the markets.
- Raise the question to what extent the e-communications sector can and should still be subject to a different regulatory regime than the sectors converging with e-communications such as IT- and media.

Despite these major shifts in the wider e-communications sector, so far market analysis procedures in the Member States have yielded little or no deregulatory results.² To the contrary, NRAs in many instances have deepened or 'refined' regulation, leading to a higher regulatory burden overall. With some remarkable exceptions, implementation so far has deepened ETNO's concerns that NRAs - individually and together in the framework of the ERG - do not fulfil the role of drivers for a less bureaucratic, less interventionist and more competitive European e-communications sector.

The approach of EU regulatory actors sharply contrasts with the regulatory response to related pressures in other markets, notably the US. The Federal Communications Commission committed to not grant access at regulated prices to new fibre in December 2004, and largely removed access requirements in relation to incumbents' wireline broadband DSL services in August 2005. The decision on fibre was based on a judgement over the balance of costs and benefits of *ex ante* access regulation in relation to new investment, while the decision relating to DSL placed wireline and cable modem services on an equal regulatory footing.³

The Commission review of the Recommendation will be *the* crucial test whether the EU Framework is also capable of reacting to the changing market conditions and let go of increasingly competitive and dynamic market areas. If deregulation fails in the context of the review of the Recommendation, the Framework itself will have failed to deliver its objectives, with unforeseeable negative consequences for the pace of innovation and investment in the European telecoms industry and, eventually, EU competitiveness.

A. Principles - 3 criteria and justification of ex-ante intervention

Call for input question:

“Should the 3 criteria, which are used to determine which markets may warrant ex ante regulation, be adjusted?”

ETNO response: No change of 3 criteria, but guidance on more rigorous and more comprehensive application

- The 3 criteria for identifying markets susceptible to sector-specific regulation are a main pillar of the current regulatory framework and should as such not be called into question in the present review.
- The Recommendation should contain additional guidance on the first criterion (high and non-transitory entry barriers) to make it more operational and link it to the possibility of replication of assets.
- The revised Recommendation should instruct NRAs to apply the 3 criteria test on their national markets and contain clear guidance in this respect.
- Different geographical market conditions have to be reflected in regulatory practice - the Commission should encourage the correct application of competition law methodology in the definition of sub-national markets to better focus regulation.
- The Recommendation should clarify that ex-ante regulation will not apply to new and emerging markets and that such markets will not be included in the list of relevant markets.

1. The 3 criteria as a main pillar of the EU regulatory regime

ETNO does not see the need for a revision of the 3 criteria for identifying markets susceptible to sector-specific regulation as contained in the Recommendation but calls on the Commission to add guidance on a strict and concise interpretation, both at EU and national level.

When discussing the appropriate trigger for the application of an ex-ante regulatory regime, a basic consideration is that the burden of proof for sector regulation to intervene on a market is significantly lower than for intervention under general competition law. Current Commission and ERG guidance on remedies foresees that once SMP is found on a relevant market, some form of ex-ante remedies must apply, irrespective of the appraisal of the competitive situation.⁴ Because of this characteristic of the framework - once a market area is selected, intervention is relatively easy - the threshold for selecting market for regulation must be set at a very high level.⁵ In other words, the three criteria should be used to effectively limit

regulation to markets where the risks of erring on the side of over-regulation⁶ are low and the risks of not intervening where intervention is required⁷ are high. In dynamic markets such as e-communications markets, the costs of unjustified intervention tend to be particularly high.⁸

As such, the 3 criteria can, if rigorously applied, fulfil an important function and constitute a main pillar of the current EU regulatory framework in limiting sector-specific regulation to specific remaining market areas of e-communications markets where competition law is deemed to be insufficient.

Recent discussions on the susceptibility of markets for ex-ante regulation have shown that the scope of the three criteria can be subject to different interpretations.⁹

2. Additional guidance on the 3 criteria to better focus regulation

ETNO proposes to specify in the Recommendation that the **first criterion** (high non-transitory entry barriers) is meant to target a market situation in which control over a non-replicable legacy facility impedes access for competitors to downstream markets (one-way access situation). Entry barriers should be so important that only one operator permanently is able to be present on the market. To make this criterion operational, ETNO proposes that the Commission adopts a two-stage approach¹⁰. It would start with an empirical analysis of the degree to which operators in Europe or worldwide have built out competitive networks in similar circumstances and in prospectively viable economic conditions¹¹. In absence of empirical evidence of replication, this analysis would be complemented with cost analysis based on engineering models that estimate the cost curve or econometric cost functions. Care should be taken that any cost analysis is properly tested against changes in the underlying assumptions as cost modelling tends to underestimate the scope for replication.¹²

Concerning the application of the first criterion, the Commission has recently underlined that the analysis of entry barriers should not be limited to the question of replicability of particular infrastructure currently used to deliver a specific service. It should also include competitive constraints from potential competitors using different technology that are currently not active in the market in question.¹³ ETNO encourages the Commission to consequently follow this approach in the context of this review.

Following a proposal by *De Streef* in a forthcoming paper on the review of the EU Regulatory Framework, the **second criterion** (dynamic aspects, competition behind entry barriers, tendency towards effective competition) can ensure that a dynamic view is adopted and correct the static bias that the first criterion may carry. It covers cases where the market delivers the results of dynamic competition (i.e. innovation) despite high entry barriers. This may be the case if there is an ex-ante competition *for* the market, although there is no more ex-post competition *in* the market.¹⁴

Equally, the first and the 2nd criterion may cover specific two-way access situations where market forces may still prove to be insufficient (voice termination).

The **third criterion** is of paramount importance for two reasons. First, it translates and clearly spells out the principle of the Directives that sector-specific intervention is only possible where general competition law is not sufficient.¹⁵ In the logic of the present framework and in view of the overarching principle of proportionality, the choice between a regulatory ex-ante regime and the application of general competition law is not one between 'equal', complementary sets of rules. The application of competition law is the rule; the use a sector-specific ex-ante regime involving a stronger intervention for the regulated undertaking is the exemption requiring justification.

Secondly, the third criterion when applied by NRAs to national markets (see below) allows for a more concrete regulatory options appraisal or cost-benefit analysis embracing both ex ante remedies and the alternative of reliance on general competition law before one or more ex ante remedies are applied. This assessment opens the possibility of forbearance on markets which fulfil the first two criteria but where ex-ante intervention would not be welfare enhancing. The Commission should encourage NRAs to apply the third criterion to reduce the risk of ex-ante regulation that produces regulatory costs which exceed the benefits for the end-user.

3. Three criteria also to be applied by NRAs to national and sub-national markets

In the revised Recommendation, the Commission should instruct NRAs to apply the three criteria on their national markets, irrespective of whether the market is contained in the Recommendation or not, subject to a Commission decision under Art 7 (4) Framework Directive.

This requirement follows directly from the EU Directives as the imposition of regulation on a relevant product and geographical market where the three criteria are not fulfilled, i.e. where competition law would suffice, is not justified under the Framework. Intervention without fulfilment of the three criteria does not have an economic or legal rationale and ex-ante regulation in such circumstances would be disproportionate and ultimately act to the detriment of consumers. Application of the three criteria by NRAs will also deliver practical benefits as they dispose of more information for applying the test than the Commission in its necessarily summary analysis.

The application of the three criteria is for example stipulated in the German telecoms act¹⁶ and the criteria have been applied, for example, by the UK regulator.¹⁷ The Commission has accepted the removal of regulation on the grounds that the 3 criteria for ex-ante regulation are not fulfilled on markets contained in the Recommendation and has recently argued for a

deregulation of parts of the broadband access market in a Member State on the basis of the three criteria.¹⁸

Especially in view of strongly diverging national and regional market situations (e.g. degree of roll-out of parallel networks) an analysis of the need for regulation at EU level in the context of the Recommendation – as important as it is – cannot be conclusive.

Clear guidance to all NRAs to apply the 3 criteria to national and regional markets will foster harmonisation by ensuring a common understanding by NRAs on the decisive role of the three criteria test throughout the EU. The Commission should supplement such recommendations by a close monitoring in the context of Art. 7 procedures whether NRAs carry out a prospective and thorough analysis of the need for ex-ante regulation, subject to Commission veto.

4. Guidance on geographical market definition

ETNO is aware that the call for input refers to the Recommendation on relevant product and services markets under Art. 15 (1) Framework Directive. Geographical market definition is carried out by NRAs in line with the Commission's SMP-Guidelines.

The SMP-guidelines state that “ [...] *the relevant geographic market comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which area the conditions of competition are similar or sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different.*”

ETNO notes that NRAs do not appear to consequently follow the Commission's SMP guidelines in that respect. Under the current Recommendation, NRAs have largely continued to define national markets even though conditions of demand and supply are in many Member States determined by regional factors, notably the actual or potential reach of alternative networks.¹⁹ As a result, NRAs continue to apply disproportionate regulation in areas with higher competition intensity.

Against this background, ETNO believes that the Commission should – as explicit guidance in the Recommendation and / or in the course of Art. 7 procedures – weigh specifically over the correct application of competition law methodology to geographical differentiation of markets.

An analysis of competitive conditions in geographical sub-national markets in Member States, where appropriate, allows regulation to be lifted when and where infrastructure competition develops. For example, where cable-based and or ULL-based competitors operate in the broadband market in a specific area a bitstream obligation can be both unsuited and unnecessary to remedy a potential market failure at the retail level.

In such sub-national markets with high competition intensity, for example covering a high-density urban area, the reason for ex-ante intervention in the form of the 3 criteria may no longer be fulfilled or the largest operator nation-wide may no longer have an SMP-position and may often no longer be the largest operator in that area. If excess retail and wholesale regulation is applied to the nation-wide largest operator by limiting its ability to compete on price and innovation in these highly competitive regional markets, consumer choice in these areas is limited.

The ERG in a recent document defends the application of regulation at a national scale as under the old ONP-framework, arguing that “[...] *it is often the case that geographical markets are national in character due to a common pricing constraint. The origin of such a common downstream pricing constraint may in fact be regulatory or the result of normal economic forces.*”^a However, the imposition of uniform national tariffs for example under a Universal Service regime is no evidence for the existence of a national market for the purpose of SMP-regulation. In a future multi-service environment and in the absence of retail regulation, prices will increasingly reflect underlying costs linked to geography. Substantially different conditions of demand and supply in different areas in ETNO’s view require a reasonably differentiated approach to geographic market definition.

5. No inclusion of new and emerging markets

ETNO calls on the Commission not to include new and emerging markets in the list of relevant markets.

In view of the strong commitment of the EU Regulatory Framework to support investment and innovation, and protect new and emerging markets from inappropriate intervention, this would normally seem self-evident.

However, the ERG in a recent paper broadly discusses the case of ex-ante regulation of emerging markets. It apparently favours a regulation on new and emerging markets when ‘exceptionally the three criteria are fulfilled’ on such a market.²⁰ At the same time the ERG considers the three criteria sufficient for identifying emerging markets. ETNO notes that there is both an inconsistency in these propositions (how can an emerging market fulfil the three criteria if they - together with the standard market definition criteria - allegedly constitute the test to identify emerging markets?) and that the ERG proposals are worryingly biased towards short-term considerations, disregarding the decisive role of innovation and dynamic competition in increasing consumer welfare in the long- and medium term. For example, the ERG states that even in presence of a new service market, where “early replication” of underlying infrastructure is unlikely, regulation would seem “more justified”.

The ERG paper equally claims that NRAs do not have to analyse whether a market is emerging. ETNO maintains that in order to respect and implement the concept of new and emerging markets introduced by the

Framework Directive in regulatory practice, NRAs which carry out the market analysis on national markets have to be in the position to apply it. We therefore also call on the Commission to include corresponding guidance on the Recommendation. Such guidance is urgently needed for investors to regain confidence in a deregulatory approach to new and emerging markets.

On the issue of new and emerging markets, ETNO would like to refer to its more detailed comments on the revised ERG remedies paper (RD 233). We will also discuss the potential for the emergence of new broadband services markets in the course of the paper (s. below, B III. 1.2.3).

B. A revised list of relevant markets

Call for input questions:

- *“ Are there markets listed in the Recommendation which should be withdrawn or modified?”*

- *“Are there markets which should be added to the list in the Recommendation?”*

ETNO response: All retail markets and a number of wholesale markets should be removed from the list of relevant markets as they no longer justify ex-ante regulation.

No new markets should be included in the list.

I. Approach to selecting markets for the list of relevant markets

- The three criteria must be applied rigorously to limit regulation to a core set of wholesale markets where persisting market failure may still require ex-ante intervention.
- A market should be removed from the list of relevant markets if there is a tendency towards competition in the more advanced national e-communications markets
- The Commission should carry out a forward looking analysis of the 3 criteria in view of the period of application of the next Recommendation (2007 – 2009)
- Any rule of thumb (e.g. inclusion if need for regulation in majority of Member States) risks to seriously impede the development of more advanced markets.
- A significant reduction of the scope of the list would also help to reduce the bureaucratic burden inherent in the Article 7 procedures for NRAs, EC and market players.

Next to the economic foundations for ex-ante intervention contained in the 3 criteria, the actual pragmatic approach of including markets to the list of relevant markets can prove equally decisive to ensure a substantial deregulation for the EU telecoms sector.

As a result of the review, the list of relevant markets should be limited to a core set of wholesale markets which still fulfil the three criteria as defined above. This would not only be a strong signal to NRAs to initiate a progressive roll-back of sector-specific intervention on their national markets in all other areas but also help to reduce the bureaucratic burden inherent in the Article 7 procedures for NRAs, EC and market players for future rounds of market analysis. A more focused Recommendation containing a limited number of markets that still raise major competition concerns justifying ex-ante regulation will in turn allow a better use of scarce resources such as technically skilled workforce in NRAs and lessen the probability of regulatory failure through a more focused action by NRAs and the Commission itself.

It should be kept in mind that NRAs may apply regulation on markets no longer in the list if they can prove the 3 criteria are still fulfilled on their national market. This possibility is subject to a Commission veto under Art. 7 (4) Framework Directive. The veto ensures that the approach taken by individual NRAs is in line with the harmonised principles of the EU Regulatory Framework. Accordingly there is no risk of NRAs being unable to regulate where it is still necessary, for example in markets where competition is still little developed.

On the other hand, as not all NRAs are currently obliged to apply the three criteria test on their national and regional markets (see above), the risk of excess regulation in more advanced Member States is omnipresent. According to Commission and ERG guidance, a market is automatically subject to ex-ante remedies once it is subject to ex-ante regulation and SMP is found.

Therefore, a presumption for deregulation should apply if there is tendency towards competition in advanced markets. In selecting markets for the list, the Commission will adopt a forward looking approach. In doing so, it should take the most advanced markets as the relevant benchmark. The Recommendation could stay in force until 2009 and the situation on the most advanced national markets may serve as a proxy for later developments in other Member States. Even where this is not the case, the possibility for NRAs to deviate from the Recommendation call for a deregulation of markets which no longer fulfil the 3 criteria in a group of advanced Member States.

In particular, markets should not be included to the list only because a market is currently regulated in most Member States - which would clearly not be in line with the forward looking character of the analysis - or because regulation is expected to be needed in the majority of EU Member States.

II. Retail markets

- The revised list of relevant markets should no longer contain retail services markets. General competition law provides appropriate safeguards against potential anti-competitive behaviour on these markets.
- For markets 3-6, deregulation is already underway in the present round of market analysis and a removal from the list of relevant markets is overdue. Technological developments further lower barriers to entry in these markets.
- On markets 1 and 2, a forward looking analysis of the 3 criteria equally calls for a deregulation. Art. 19 of the Universal Service Directive does not impede the removal of markets 1 and 2 from the Recommendation.
- There is no longer a rationale for the regulation of the minimum set of leased lines. As the issue is specifically dealt with in Art. 17 Universal Service Directive, an inclusion in the list of relevant markets may not be required.

1. General considerations

ETNO is of the opinion that there is no longer a need for the inclusion of retail markets in the list of relevant markets of the Recommendation.

A thorough deregulation at retail level would reflect the principle of the NRF that regulatory controls on retail services should not be imposed where relevant wholesale or related measures achieve the objectives of the framework.²¹ In a recent decision, the Commission has underlined that existing or potential voluntary or regulated wholesale offers have already to be taken into account when analysing whether the first criterion of the Recommendation, high and non-transitory entry barriers, is met.²²

An application of the three criteria to retail markets in ETNO's view does not only result in a deregulation of current markets 1-6 but also precludes any inclusion of new retail markets in the Recommendation. In the future, retail services in the e-communications sector will be characterised by multi-product offerings and bundles, leading to increasingly broad and potentially overlapping product markets.²³ The communications sector is characterised by many sources of actual or potential pricing constraints which can easily be overlooked, often leading to the definition of overly narrow services markets. The Commission should resist calls for allowing regulation in specific market areas where competition problems are perceived to exist at retail level today. Any competition problem arising can be addressed by concentrating on the upstream source of market failure, if any, and the applicability of competition law.

Recently, certain new entrant operators have pointed to an alleged continuous need for ex-ante retail regulation as a “precautionary safeguard” for the successful operation of the ‘ladder of investment’.²⁴ ETNO would like to recall that on prospectively competitive markets, competition law precisely provides the safeguard against potential anti-competitive behaviour such as price squeeze, unjustified bundling etc.²⁵ In addition, the framework would not allow any “safeguard” ex-ante regulation in circumstances where - taking into account the existence of wholesale regulation - the 3 criteria are not met.

Against this background, questions of market *definition* on retail markets in the following are mainly relevant for the potential imposition of corresponding wholesale obligation.

2. Markets 1 – 6

Already at the time of the drafting of the first Recommendation, the fulfilment of the 3 criteria on markets 1-6 of the Recommendation was questionable, notably in view of the existence of related wholesale products. A forward-looking analysis of the three criteria for those markets did not take place²⁶ as the Commission was bound by the Annex 1 to the Framework Directive to include the retail markets for public available telephony services and access at a fixed location in the first list of relevant markets.

Since that time, entry barriers for the provision of access and calls to the end-customer have further decreased substantially due to mainly two factors:

- Increased availability and take-up of related wholesale products, notably LLU and carrier selection (e.g. for local calls; this obligation was introduced only at the time of the first Recommendation in some Member States)
- Technological and market developments, such as the breakthrough of voice over IP. In the timeframe of the next Recommendation, retail offers will further move away from minute-based tariffs for calls to increasingly complex and flexible IP-based service bundles, including voice telephony as only one element.

2.1 Markets 3 – 6

2.1.1 Need for regulation

Already for the present market situation, several NRAs have found no need for regulation on retail markets for public available telephone services provided at a fixed location, such as PTS, BNetzA²⁷ and Ficora. The Swedish NRA PTS has most accurately summed up the competitive situation on retail markets as defined under the current Recommendation (summary taken from the final Commission phase 1 decision):

*“PTS carries out the three criteria test and concludes that **barriers to entry** in all of the four calls markets are low. The conclusion drawn by PTS is based on the existence of regulation in other markets. PTS argues that the carrier (pre) selection (“CPS”) obligation imposed in the retail access markets and the wholesale obligations imposed in the fixed wholesale markets (call origination, transit, and termination) imply that there are no significant barriers to enter the notified retail calls markets. This is, according to PTS, evidenced by the fact that there are around 40 operators in the Swedish market providing telephony services, including new operators which entered the market in 2004.”²⁸*

While ETNO challenges that the described wholesale instruments all need to remain in place²⁹, the existence of wholesale regulation for current markets 3-6 lowers entry barriers to a level where any sector-specific ex-ante control of retail tariffs would no longer be justified.

It is sometimes being argued that the potential of a price squeeze applied by an operator which is still dominant on both wholesale and retail levels, required further monitoring of retail tariffs under a sector-specific regime.³⁰ However, as argued above, any such concerns can be dealt with in the context of wholesale regulation and general competition law respectively. An inclusion of retail markets merely to prevent price squeeze would run contrary to the third criterion of the Recommendation, sufficiency of competition law.

2.1.2 Market definition

Questions of market definition in the context of markets 3-6 have been discussed in a number of national market analysis procedures. These relate to on the one hand whether IP-telephony and/or Voice over broadband offers should be part of markets 3-6. On the other, the possible substitution between fixed and mobile calls has been brought up by individual operators in national market analysis procedures.

Both these questions will arguably gain in importance in the timeframe governed by the next Recommendation. For ETNO these developments are significant because both the advent of IP-telephony and the increased pressure by mobile services on fixed call markets will continue to further increase competition.

Above, we have concluded that there is no need for sector-specific intervention in markets 3-6 as defined today. Any wider market definition including additional services would lead to the finding of an even more competitive market outcome on the broader retail market. It is therefore important to underline that however retail call markets are defined, there is no longer a justification to include them in the list of relevant markets. The Recommendation will accordingly not have to take a definite position on market definition for retail calls markets as these will not enter the list of relevant markets.

However, the question of market definition in retail call markets remains relevant for regulation of corresponding wholesale markets. In order to prepare our reasoning on wholesale regulation below, ETNO would like to submit the following observations on market definition:

- VoIP -

In Art.-7 procedures for markets 1-6 and 12, the market definition in the context of Voice over IP or voice over the internet differs considerably in different EU Member States.

In a recent case, the Commission has accepted a market definition according to which Voice over broadband services defined as VoIP services offered by a broadband provider who exercises control over the broadband connection formed part of markets 3-6.³¹ At the same time, the regulator concluded with the consent of the Commission that no specific remedies would be imposed on the VoIP products of the dominant operator in the market.

ETNO supports the approach that no regulatory obligations should be imposed on VoIP offers, irrespective of the company entering this innovative market. Entry barriers in this market area are largely absent and the first of the criteria for ex-ante regulation is not fulfilled. The conditions for competition vary considerably from traditional PSTN telephony, *inter alia* in that the incumbent is often a follower in the VoIP market segment. Also, nomadic use is a distinctive feature of many VoIP services allowing the use of VoIP over any broadband access.

Whether as a separate, new market or as part of the voice calls market, ETNO maintains that VoIP-services should not be subject to regulatory intervention as they form a market (segment) characterised by high dynamism, low barriers to entry and intense competition.

- Fixed-mobile substitution -

ETNO Members have made different observations as to the degree of substitution effects between fixed and mobile calls on the markets they operate.

If one recognises competition effects between fixed and mobile telephony, they are in many, especially mature Western European markets relatively new. Only since the first half of 2004, can it be observed that a continuing increase in mobile call minutes coincides with a decrease of fixed line calls volumes. The trend that users abandon fixed line connections in favour of mobile calls can moreover be expected to concentrate on certain groups of customers.

For markets with specific features, for example an exceptionally low fixed line penetration, substitution effects may be far more significant. Generally, NRAs should always take into account national specificities when analysing retail markets in view of devising proportionate wholesale

regulation. This equally applies to possible fixed-mobile substitution effects.

The described pressure by mobile offers on fixed call markets only underlines the intense competition on retail calls markets.

To conclude, the advent of new services, such as VoIP and VoB, and mobile telephony clearly illustrate the power of technology to transform markets, introduce greater competition, and render existing SMP regulation for voice calls inappropriate.

2.2 Markets 1 - 2

2.2.1 Need for regulation

The deregulatory potential for markets 1 and 2 has not been seized by regulators so far but is increasingly becoming a realistic possibility.³²

In the business market(s) (corporate clients), replication has taken place at the infrastructure level. Alternative operators use fibre, terminating parts of leased lines or ULL for delivering their services to corporate clients. The market is highly competitive. Deregulation of retail access offers in this field is paramount to allow established operators to fully compete on these markets so that business customers can reap the full benefits of competitive access and services offers by all players in the market place.

In the business as well as in the residential markets, old (PSTN) technology is declining: customers choose to access voice offers over Voice over broadband and Mobile. Access to voice services is provided over different platforms (cf. for example cable telephony), further increasing the competitive pressures on the access market.

Additionally, parallel to the situation for markets 3-6, wholesale regulation already allows market entry in the fixed access market using the access lines of the fixed network. The corresponding wholesale market is market 11, local loop unbundling.

Local loop unbundling has gained considerable ground since the release of the last Recommendation. From January 2003 to October 2005 the total number of unbundled lines (EU 15) has risen by more than 4.3 million or more than 350%.³³ In view of the steady and rapid take-up of ULL, the analysis of the three criteria the field of fixed access should focus on the availability of local loop unbundling as a wholesale product rather than on the current take-up of ULL for assessing whether wholesale regulation will be sufficient in this field.

As outlined previously, to pass the criterion "high and non-transitory entry barriers" a market should be characterised by circumstances which make the replication of the service or facility in question uneconomical for a competitor. In fixed access, however, entry strategies exist and are successfully implemented by entrants throughout the EU.

Even if one would adopt a less restrictive definition of high and non-transitory barriers to entry and would conclude that market 1 and /or 2 as currently defined pass the first criterion, the 2nd criterion would not be fulfilled. A tendency towards effective competition on the *retail* fixed access market is clearly visible. The development of access markets has been very dynamic in the past years also due to changes in technology (s. above). In the timeframe of the validity of the next list of relevant markets (2007 - 2009), several operators will have built out their networks to the customer's premises or at least to the local loop, providing for increasing competition even in the presence of entry barriers which they have overcome.

2.2.2 Market definition

ETNO observes that the number of customers leaving their fixed subscription to adopt mobile is still limited in a number of countries. Competitive pressures from mobile on fixed access can, however, be observed to a different degree on different markets. Some markets, such as the Finnish market, show particular features which could be taken into account at national level. Also, some markets in new Member States have shown extraordinarily high figures of churn from fixed to mobile and high number of 'mobile-only' households, pointing towards stronger competitive pressures from mobile on fixed operators on those markets.

As laid out above for markets 3-6, any wider market definition in the fixed access market would only increase the need for a deregulation in the context of the review of the Recommendation.

2.2.3 Art. 19 Universal Service Directive no obstacle to deregulation

Art. 19 Universal Service Directive (USD) foresees that in order to impose obligations for carrier selection and carrier pre-selection, a market analysis on the market for the provision of connection to and use of the public telephone network at a fixed location has to be carried out.

ETNO would like to stress that this does not preclude the deregulation of markets 1 and 2 as retail services markets in the context of the Recommendation. While Art. 19 (1) USD refers to Art. 16 (3) Framework Directive and therefore to markets included in the Recommendation, it is clearly not the aim of Art. 19 USD to prolong *retail* regulation indefinitely on retail access markets. The Directive ensures that the *wholesale* obligations of providing carrier pre-selection and call-by-call are in place as long as there is SMP on the end-user market for access.

If current markets 1 and 2 (or any differently defined access markets in their place) do not fulfil the 3 criteria, an inclusion in the list of relevant markets susceptible to ex-ante regulation would be in breach of the framework.

ETNO proposes that in the revised Recommendation the Commission clarifies that the obligations of CPS and call-by-call are imposed under

market 8 (call origination), subject to the finding of an SMP-position on the retail access market (Art. 19 USD). Markets 1 and 2 should no longer appear in the list of relevant markets.

As a direct result of Art. 19 USD, NRAs will then nevertheless have to analyse the corresponding end-user access market(s) in view of determining whether an operator has SMP on the market. If the three criteria are not fulfilled on the national or regional market, no imposition of remedies would result from the SMP-finding as the market – not included in the Recommendation – is subject to the sole application of competition law.

3. Market 7 – the minimum set of leased lines

[Connected call for input question:

“Should the minimum set of leased lines (see Art 18 of the Universal Service Directive) be retained, modified, or withdrawn?”]

ETNO believes that there is no need for regulation of the minimum set of leased lines in its present form. The corresponding wholesale markets, in particular markets 13 and 14, are effectively competitive or, where this is not the case, subject to access regulation.

ETNO questions whether the rationale for taking over a minimum set of leased lines from the old ONP framework into the current EU Regulatory Framework still exists.³⁴ As competition in this sector is intense but demand is at the same time constantly declining, ETNO sees no need or justification for further regulating this retail market. The provision of Art. 18 USD is not in line with the economic approach to market regulation of the Framework Directive as it does not allow for an application of the three criteria to this market area and leads to the application of all obligations without proportionality test. It should be abolished as soon as possible.

Another drawback of the current provisions becomes evident if one considers the development of technology. In case of an SMP-finding for all or parts of the minimum set of leased lines, these lines have to be provided in line with mandated standards from the EU list of standards. In a full-NGN environment the provision of services according to these mandated standards will be impossible. SMP designation in these markets therefore risks blocking innovation by mandating outdated standards.

If the Recommendation refers to the minimum set – which may not be required as the Directive itself foresees ex-ante regulation on the market – the Commission should clearly identify the reason for the inclusion (i.e. not the fulfilment of the 3 criteria but a legal obligation) in the main text of the Recommendation.

III. Wholesale markets

As an introductory remark, ETNO would like to underline that any regulation of wholesale markets must be justified in the light of the competitive situation on retail markets. This principle of the EU Regulatory Framework is reflected in the current Recommendation on relevant markets.³⁵

As laid out above, in the timeframe of the next Recommendation, retail offers will move further away from minute-based tariffs for calls or internet access to increasingly complex and flexible IP-based service bundles. These service bundles will also show different characteristics according to the different customer groups targeted, requiring a far more granulated analysis of possible market failures at retail level which could require wholesale regulation.

Special care should be taken to ensure that wholesale regulation, by providing low-cost access to assets in order to remedy a perceived market failure in one market segment, does not have a detrimental effect on other retail services which are already provided in a competitive environment or adversely affects efficient investment in alternative or upgraded infrastructure, a declared objective of the NRF.

Also, it should be taken into account that certain wholesale markets can be seen as providing 'basic components' which other wholesale products that may fall in a different relevant market rely upon. This suggests a sequence of analysis in the context of the Recommendation and at national level which starts from markets that can be seen as building blocks for 'higher level' wholesale products. As laid out below (1.1.1) for the relationship between LLU and other forms of wholesale access, availability of basic wholesale products can alleviate the need for regulation of more complex wholesale products or product bundles.

Textbox 1 - Indirect pricing constraints

In the context of defining relevant wholesale markets susceptible to ex-ante regulation in the light of competition at retail level, we would like to specifically address the stance taken by the European Commission on the issue of "**indirect pricing constraints**" in the field of wholesale access (e.g. EC decision on Dutch notification for market 12).³⁶ In this decision as well as in previous procedures, the Commission doubted whether it was sufficient that offers over an alternative platform were putting a pricing constraint on broadband services at the retail level for this fact to be considered for the purpose of market definition for wholesale broadband access.

ETNO maintains that the definition of markets susceptible to sector-specific regulation at wholesale level should always start from an analysis of competition on the relevant retail market. This corresponds to fundamental

principles for access to infrastructure developed under EC law.³⁷ If the existence of alternative platforms results in sufficient competition behind entry barriers, either the first (depending on how narrow it is interpreted) or the second criterion for the application of sector-specific regulation is not fulfilled on the upstream wholesale market and no regulation should apply at wholesale level.

The same applies if an alternative platform competes with the fixed network at retail level and in addition the fixed network operator provides a (potentially regulated) wholesale input such as local loop unbundling. This was the case for lower quality bitstream in the Netherlands. In such a case, an identification of a wholesale broadband market susceptible to regulation is not justified, as the three criteria for applying regulation are not fulfilled on this market. If, as OPTA, a national NRA does not apply the three criteria at national level, it has to take into account pricing constraints by the alternative platform at retail level in its SMP-assessment, as otherwise additional regulation would apply despite a competitive outcome for the end-user, a result prohibited by the EU regulatory framework.

To summarise, on wholesale markets which are 'created' by regulation such as market 12, the pricing constraints from alternative platforms should already be taken into account in the assessment at national level whether ex-ante regulation should apply (3 criteria test). If this test is not being conducted by an NRA for whatever reason competitive pressures on the retail market should nevertheless be taken into account to avoid an SMP-designation at wholesale level despite a satisfying outcome for the end-user because of competition at retail level.

1. Fixed access and leased lines markets

- The market for local loop unbundling is likely to justify *ex-ante* regulatory scrutiny in a number of national and/or regional markets in Member States for some time.
- The market for broadband access should be deregulated except in those circumstances where competition on retail broadband markets is not emerging on the basis of alternative platforms and/or LLU. If the market is kept in the list of relevant markets, this should be supplemented by firm Commission guidance on regional differentiation of regulation for broadband access.
- The market for trunk segments of leased lines should be removed from the list of relevant markets in view of widespread availability of parallel infrastructure.
- In the field of terminating segments of leased lines, there is scope for deregulation of higher bandwidth connections.

1.1 Local loop unbundling, market 11^b

1.1.1 Relation to market 12

As laid out in earlier ETNO positions, ETNO proposes an alternative approach to broadband regulation. ULL should be considered a sufficient remedy for broadband access in areas where the network, up to the local loop, but not the last mile itself, has been replicated by competitors.³⁸ Such a focus of access regulation to non-replicable legacy assets targets the identified market failure and promotes investment where replication is feasible.

As clearly shown by the example of broadband access, interdependence between the current markets 11 and 12 exists. It is important that interdependencies between the markets are recognised by the Commission and NRAs when carrying out market analysis and deciding on potential remedies on those markets.

As a result, whenever retail broadband markets are competitive on the basis of full or shared unbundled access, market 12 should no longer be analysed for the purpose of ex-ante regulation as it fails the three criteria test in the given geography. There are then no major barriers to entry in this market (ULL-based competitors have overcome existing entry barriers) and there is a tendency towards effective competition, leading to a competitive market outcome at retail level.

1.1.2. Market definition

At the same time, the unbundled local loop can itself serve as a wholesale input for operators wishing to provide broadband services via bitstream access. LLU products also play a specific role as wholesale inputs for narrow-band markets and constitute the single most important wholesale input for competition in narrow-band access services on the copper access line. Should wholesale regulation be needed in view of the competitive situation for narrow-band access services at retail level, it is difficult to imagine a substituting wholesale product forming a common market with LLU for the provision of these services. Against this background, the market for local loop unbundling is likely to justify *ex-ante* regulatory scrutiny in a number of national and/or sub-national markets in Member States for some time.

LLU has specific characteristics as it requires a physical unbundling typically applicable for the copper wire. Hybrid access technologies consisting of fibre and copper or wireless access solutions do not – in contrast to the copper loop – allow direct access to the naked line but only offer a predefined electrical interface or a data-stream with a guaranteed bandwidth at the access node. We will therefore address such solutions in

^b TDC does not support this and stresses that the access markets should be defined in a technological neutral manner to fully reflect whether entry barriers are present or not.

the context of market 12 and argue that they should not be covered by an ex-ante regime and not fall under the scope of the list of markets in the Recommendation.

In this context, ETNO suggests that the Regulation on unbundled access to the local loop, EC/2887/2000 is repealed. In the future, more and more markets will be characterised by inter-platform competition, alleviating the need for mandated access to a specific network on those markets. The Regulation unnecessarily limits the flexibility of regulators to react to the emergence of sustainably competitive market outcomes and as such could create a conflict with the provisions of the Framework Directive requiring a market analysis before any imposition of proportionate regulatory obligations.

1.2 Wholesale broadband access, market 12

1.2.1 Scope of Market 12 - new technologies as a trigger for deregulation, not as new subject of access regulation

The definition of market 12 in the first Recommendation has been criticised for a very narrow approach to market definition. It is seen as targeting a specific remedy rather than accurately describing an economic market. ERG guidance on market 12 moreover suggests a multiplication of remedies no longer linked to remedying a specific market failure.³⁹

At the same time, ETNO Members are very concerned with actual and potential over-regulation resulting from an extensive interpretation of the scope of market 12 with regard to new access technologies. Arguably, the regulatory treatment of broadband access will more than any other aspect of the regulatory regime determine the future course of e-communications markets between innovation and technology-based competition in and an extension of legacy regulation to new and emerging market areas potentially stifling incentives for the introduction of new networks and services.⁴⁰

There are several signs for a bias of regulators towards intervention, irrespective of how immature or promising in terms of its potential for increased competition a new broadband access technology might be:

- The ERG common position on bitstream access potentially includes all emerging broadband access technologies in the scope of market 12, including new wireless technologies such as Wimax.⁴¹
- Certain NRAs include wholesale broadband products based on fibre and satellite technology in the scope of market 12, in one case even before services based on the new technology are being offered to the end-user.⁴²

Under the NRF, markets susceptible for ex-ante regulation are being defined according to competition law methodology and should be defined in a technologically neutral way. ETNO firmly believes that this does not alleviate the need for assessing the impact of regulation on the

development of new technologies, investment and ultimately the spreading of innovative services and platforms to the benefit of the end-consumer.

The explanatory memorandum to the last Recommendation notes

“The fact that an obligation is applied to an SMP undertaking with regard to a specific type of infrastructure (e.g., metallic local loops) does not imply that a parallel obligation will be applied when networks and infrastructure are upgraded, for example to deliver (or be capable of delivering) new services. Where new types of infrastructure are used to provide existing services, any regulatory intervention (in respect of that new type of infrastructure) would depend on a revised market analysis. Indeed, encouraging efficient investment in infrastructure and promoting innovation are explicit objectives for regulators.”⁴³

So far, however, guidance on how to assess the potential of new access technologies for increasing competition is missing at European level. Instead, discussions around “next generation regulation” seem to focus on how legacy price and access regulation can be perpetuated even as platform competition becomes more and more a reality in some markets, and a possibility in others.

A first step towards focusing regulation on remaining non-replicable assets in order to allow for innovation-based competition would be clear guidance in the Recommendation that NRAs need to carry out a thorough analysis if the 3 criteria for sector-specific regulation are met on their broadband access markets, taking into account regional specificities.

As we have argued under “principles” above, this would ensure that, fundamentally different conditions of competition can be reflected and functioning competition between platforms and/or on the basis of access high up in the network (LLU) is not distorted by intervention on a broadband access market which does not fulfil the criteria for sector-specific intervention.

Against this background and in view of the dynamic market and technological development in broadband, ETNO encourages the Commission to:

- Include clear guidance in the Recommendation that access obligations on technologies / access platforms which are newly introduced in the relevant market⁴⁴ are not subject to regulation until they are sufficiently established to allow an assessment of their impact on retail broadband services markets.
- Oblige NRAs to assess the three criteria on – if appropriate regionally differentiated – broadband markets in order to ensure that the impact on conditions of inter-platform and LLU-based competition is recognised by NRAs.

1.2.3 Newly emerging broadband services markets - consequences for wholesale regulation

ETNO calls on the Commission to take into account the fact that broadband services such as multiplay (triple and quadruple-play) services or other new and emerging services (e.g. transmission of high definition TV over IP) could fall under the EU Framework provisions on new and emerging markets.⁴⁵

As retail services, these services should of course not be subject to any ex-ante regulatory intervention in the first place.

If one is prepared to think beyond the popular judgement that television and broadband already exist and therefore triple play is not “new” as a service, an assessment of the characteristics of emerging markets gives some reason to further investigate whether (a) new and emerging market(s) may be developing in the field of multi-play broadband services.

For example, multiplay services allow users to access services over one infrastructure, formerly provided over separate platforms to separate terminal devices, by using (an) identical terminal device(s). Already in this respect, they do not only constitute a bundle of already existing services but offer the added feature of being accessible over one terminal device.

Moreover, the combination of audiovisual services with broadband internet in particular (potentially combined with the feature of mobility) allow for new interactive applications which normal broadcasting transmission services do not offer.

ETNO invites the Commission to approach the analysis of the highly dynamic broadband markets with an open mind to finding new emerging broadband services markets. A thorough analysis of new broadband services and service-bundles is necessary before any corresponding wholesale regulation is envisaged. If service offers constitute new or emerging markets and they are provided over new or upgraded infrastructure, in principle no sector-specific regulation should apply at wholesale level (Recital 15 of current Recommendation on relevant markets).

1.3 Terminating segments of leased lines, market 13

In line with the approach adopted by some NRAs, ETNO encourages the Commission to investigate whether terminating segments of different bandwidth are satisfying different customer demands and characterised by different conditions of competitions.⁴⁶ Very high bit-rate leased lines are typically characterised by intense competition. As a consequence, at least high bit-rate terminating segments should be deregulated and no longer included in the list of relevant markets.

Vivid competition in the market for high-bit-rate terminating segments is verified by the continuous increases in sales in leased circuit markets which

can be attributed exclusively to competitors of the incumbent. Furthermore, it can be observed that in most Member States the prices charged by the incumbent for leased circuits have dropped significantly in recent years.⁴⁷

The market is characterised by substitution options on the demand side as well as overcapacities on the market for high-bit-rate transmission paths. In addition to the transmission route network, there are often numerous networks of alternative providers. Accordingly, a carrier can fall back upon several providers of transmission paths to select the most suitable offer.

1.4 Trunk segments of leased lines, market 14

The market should be deregulated as soon as possible. It has been found to be effectively competitive already in the current round of market analysis on a number of national markets.⁴⁸

Trunk segments of leased lines are characterised by the existence of several, sometimes multiple parallel networks. The market, characterised by overcapacity, has seen a sharp price decreases in the past and the largest operators in some countries have no less than 20% market share.⁴⁹

Potential remaining bottlenecks for certain geographies as had been observed in the context of the first Recommendation⁵⁰ would not justify leaving the entire market in the list. NRAs may signal exceptional need for regulation if three criteria are fulfilled for certain routes.

2. Fixed Interconnection markets 8, 9 and 10

- The market for transit services should be removed from the list of relevant markets in view of widespread availability of parallel infrastructure.

2.1 Call origination

ETNO expects that some form of ex-ante regulatory supervision would continue to apply in the short-medium term to local call origination (cf. above on possible carrier selection obligations under market 8).

However, the potential for deregulation in view of the changing economics of interconnection in an environment that is increasingly 'all IP' should be closely monitored at European and national level. For example, a call-by-call or CPS-obligation does not make sense in an environment where fixed voice is provided on a full-NGN, because users will take and use multiple accounts. Commercial agreements over exchange of IP-traffic can be expected to remove the need for regulation in this area when a next revision of the Recommendation is due.

2.2 Fixed termination

The case of fixed termination underlines that a market based approach with competition law concepts may not be best suited to address two-way access situations such as termination. The narrow market definition has led to a quasi-automatic finding of dominance on the markets for termination on individual networks.⁵¹

ETNO has highlighted its general approach to a regulatory regime for efficient and reasonable termination regulation in earlier ETNO positions, referring therein to a study on appropriate remedies under the New Regulators Framework carried out by Case Associates for ETNO in 2003.⁵²

ETNO expects that some form of regulatory supervision will continue to apply in the medium term. Potential for deregulation should be monitored at European and national level in the context of the move to IP-based transmission. In an NGN context, with users being “always online”, market definition and need for regulation for termination will have to be revised.

2.3 Removal of market 10 from the Recommendation

A removal of the market for transit services from the scope of sector-specific regulation is overdue.

Most probably, the 3 criteria were not fulfilled for this market when the first list of markets was conceived. The market had to be covered in the Recommendation as it was contained in Annex 1 of the Framework Directive and the Commission has already earmarked transit services as a potential candidate market for deregulation in the explanatory memorandum to the current Recommendation on relevant markets.

Similar to the situation on market 14, multiple backbone networks exist and the market is characterised by over-capacity. The share of requests for interconnection addressed at incumbent operators which concern transit is increasingly unimportant.⁵³ Deregulation has been already proposed in the current round of market analysis by a number of NRAs.⁵⁴ The Commission has – in ETNO’s view – wrongly vetoed deregulation of the transit market in one case.⁵⁵ The proposed deregulation was based on the fact that the market for transit services was found effectively competitive, mainly because of substitution effects by direct interconnection between OLOs. Arguably, an application of the three criteria on the market would have led to a deregulation both by the Commission and the NRA, i.e. even if the Commission believed SMP still existed, the cumulative existence of high non-transitory entry barriers and the absence of competition behind entry barriers would be difficult to argue for market 10.

3. Mobile markets

- Markets 15 and 17 should be removed from the list of markets as they do not fulfil the 3 criteria.
- No new mobile markets should be identified for ex-ante regulation. In particular, data services are provided in a fiercely competitive environment and do not justify an intervention by regulators.

Mobile markets were characterised by infrastructure competition from the outset. Highly competitive markets have brought about a sharp decrease in prices for basic services such as calls and SMS.

Because of the overall competitive structure, mobile markets will deliver low prices, consumer choice and innovative and quality products also in those segments which currently are still characterised by relatively high prices and lower take-up by consumers, such as advanced mobile data services.

3.1 Mobile access and call origination, market 15

In ETNO's view market 15 should be removed from the list of markets. This market has been characterised by sustainable infrastructure competition from the outset. The barriers to entry are modest ⁵⁶ and replication of mobile network infrastructure is the norm.

Market 15 was included in the original Recommendation to enable a smooth transition to the new framework and the Commission as in the case of transit, has already earmarked market 15 as a candidate for deregulation in the explanatory memorandum to the current Recommendation on relevant markets. Had the 3 criteria test been applied properly, this market would not have appeared on the list in the first place, and should be taken out in the revised list being a market not characterised by high non-transitory entry barriers.

The market for mobile access and origination found to be effectively competitive in virtually all Member States. This is attributable to the vivid competition in the mobile retail market that was used by all regulatory authorities as a reference. Currently, in a number of Member States numerous new business models at wholesale level evolve without regulatory intervention - evidence of the fact that the competitive pressure on mobile markets alone achieves a satisfying outcome for the consumer.

Should competition issues be perceived, NRAs have the ability at any time to define relevant markets outside the list and in any case competition authorities could intervene under general competition law.⁵⁷

Against this background, ETNO believes that the market for access and call origination is a crucial test for the ability of the existing framework to allow the transition to general competition law on markets that are characterised by high concentration, high innovation and effective competition behind entry barriers.⁵⁸

3.2 Mobile termination, market 16

3.2.1 Need for regulation – reoccurring debate

As in the case of fixed termination (see above), mobile termination underlines that a market based approach with competition law concepts may not be the best suited to address two-way access situations such as termination. The narrow market definition has led to a quasi-automatic finding of dominance on the markets for termination on individual networks.

Without entering into much detail, ETNO notes that the majority of arguments for the sole application of competition law on the market brought forward in the debate on the inclusion of market 16 in the context of the first Recommendation are still valid. Mobile communications essentially involve a demand for a service package, when seen from an end customer perspective. This package includes network access, call origination and call termination. The overall mobile market is characterised by effective competition which makes singling out specific competition problem rather problematic. Also, end customers choose their mobile network operator not just based on the rates for outgoing calls but to a certain extent also on the cost of incoming calls. End customers therefore have an effective way to exercise significant indirect competitive pressure on the prices for mobile call termination. In the past, this aspect has not been taken sufficiently into account by the Commission services, thus the question of a valid market definition remains unanswered.

Increasing opportunities for end customers to switch to alternative products offering some degree of mobility, such as VoIP or W-LAN, only add to the competitive pressure exercised by the end customer. Thanks to increasing technical progress using NGNs, for instance, market entry barriers are increasingly being removed and existing competition bolstered further.

ETNO expects, however, that some form of ex-ante regulation will apply to the market in the medium term. Potential for deregulation of market 16 in view of the move to NGNs should be monitored at European and national level.

3.2.2 No extension to data termination

Any extension of market 16 to data communications (e.g. SMS, MMS, instant messaging) is not justified. Mobile data services are still a new innovative services segment where regulatory intervention risks undermining incentives for innovation and investment.

The services mentioned are also provided largely on a symmetric basis, i.e. between mobile operators, on an overall fiercely competitive market. In that, the underlying economics differ from fixed-mobile voice termination. Tariffs for data services are part of the service bundle offered to the customer, putting pressure on prices in view of a fiercely competitive end-user market.

Most NRAs have accordingly limited their market analysis strictly to voice call termination. The Finnish NRA has even explicitly refused to extend the scope to SMS and other data communications. This echoes the position of the EU Commission in the present Recommendation on relevant markets.

3.3 Wholesale International Roaming

ETNO would welcome a removal of market 17 from the list of relevant markets.

Recent regulatory analysis of market 17 has shown that the market does not fulfil the 3 criteria for sector-specific regulation as it has, beyond showing a mere tendency towards effective competition (2nd criterion), already been found to be effectively competitive.

The ERG has collected data from questionnaires in numerous European countries. Even if the NRAs have to carry out the market analysis separately for each national market, the ERG's extensive analysis leads one to believe there is unlikely to be any need for regulation.⁵⁹ The ERG has pointed out in its joint report detailing the analysis of the national market for 'Wholesale International Roaming' that effective competition does exist in the national market for international roaming, especially given the discount contracts coupled with existing traffic management options.

The Finnish NRA has notified the results of the market analysis for market 17 to the EU Commission. Ficora found the national market for international roaming effectively competitive and thus did not impose any obligations on operators. Also, the French NRA concluded that no single or joint SMP under the criteria established by the European Court of Justice for joint dominance and introduced in the Commission Guidelines could be established. These first results support the analysis conducted and the position taken by the ERG.

Recent market developments point to the competitive dynamics of the market. The negotiation of discount contracts that are as attractive as possible was a major reason for setting up alliances such as the FreeMove alliance between Orange, Telefónica Móviles and Telecom Italia Mobile or the Starmap Mobile Alliance (incl. O₂, Amena, Bouygues, Telenor). Within this framework, discount contracts were concluded at group level, i.e. when calculating the discount, the entire traffic routed to the various national subsidiaries in Europe and the USA is included. Such agreements are concluded both with individual foreign network operators as well as with other groups.

These incentives to conclude commercial discount agreements, the associated price reductions and the resulting effective competition would be significantly hampered by regulatory intervention.

Despite political pressure to act on International Roaming tariffs, the Commission should therefore not be tempted to take action and intervene in the dynamic development of competition in this field. Recent new tariffs

and customer discounts clearly indicate that competition at wholesale level has an ever-growing impact on retail price levels.

4. Broadcasting Transmission, market 18

ETNO underlines, also with regard to market 18, that the need for applying ex-ante regulation to any area of e-communications markets should be critically assessed in the context of the review. Any specific features of business models on market 18, for example the highly concentrated buyer structure in the case of terrestrial broadcasting, should be taken into account before applying any ex-ante regulation.

ETNO hasn't at this stage taken any definitive position on regulation and market definition in the context of market 18 and reserves to provide further input to the debate on that market at a later stage of the revision process.

Endnotes

¹ For example, the acquisition of Skype by e-Bay, the move by Microsoft and Google into VoIP services and the acquisition by BSkyB of the UK broadband provider Easynet.

² Cf. presentation by Fabio Colasanti, Director-General of the Directorate-General Information Society and Media, "The EU's Regulatory Framework for the communications industry", Nov. 2005, slide 4, available at <http://www.ofcom.org.uk/event/presentations/colasanti.pdf>; ETNO research, see ETNO presentation at NRF implementation workshop, 28.11.2005, available from ETNO upon request.

³ Cf. further references in Indepen, "i2010 – responding to the challenge", study carried out for the DTI, September 2005.

⁴ Pt. 114 of Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services ('SMP guidelines') 2002/C 165/03,, 11 July 2002.

⁵ De Streel, "The European Regulation for Electronic Communications: Assessment and proposal for review", forthcoming submission to the Commission call for input on the forthcoming review of the EU Regulatory Framework for e-communications networks and services, p. 12

⁶ So-called 'type I errors' (false condemnation)

⁷ So-called regulation type II errors (false acquittal)

⁸ For example by interference with market mechanisms of price formation, distortion of market signals to invest that either inhibit new investment or promote inefficient technology choice, disincentive to incur in cost saving and productive efficiency, etc.

⁹ For a recent discussion of the three criteria, cf. Commission comments in Case NL/2005/0247: Wholesale Broadcasting transmission services, to deliver broadcast content to end users in the Netherlands SG-Grefe (2005) D/205996

¹⁰ This test has been proposed by Prof. Martin Cave in the context of remedies, cf. Cave "Encouraging infrastructure competition via the ladder of investment", 2005, p. 7 ff..

¹¹ This benchmarking approach has been explicitly endorsed by the US Courts, cf. De Streel id, p. 16.

¹² Cave, id., p. 18

¹³ Cf. fn. 9, p. 8 of Commission's Serious Doubts letter

¹⁴ De Streel, id. p. 16

¹⁵ Recital 27 of the Framework Directive.

¹⁶ § 10 (2) of the German Telecommunications Act

¹⁷ In the context of market 18, s. Ofcom "Broadcasting Transmission Services: a review of the market, Final statement" available at http://forum.europa.eu.int/irc/Download/k9e7A8JbmRGspfT012oUDsRiod-fbTmBwu4SilqMSFEoELIZ3IHmd2rhMqS-Z-qw6NF3C-Ev_V/Final%20statement.pdf

¹⁸ Commission comments pursuant to Article 7(3) of Directive 2002/21/EC; CASE NL/2005/0281: Wholesale broadband access in the Netherlands, SG-Grefe (2005) D/206588

¹⁹ Cf. pt. 59 of Commission SMP-Guidelines, s. fn. 4

²⁰ ERG (05) 70 rev1, p. 117 f.

²¹ Cf. p. 15 of the Explanatory Memorandum to the Commission Recommendation on relevant markets, COM (2003)497

²² Cf. fn. 9 above, p. 9 of the Commission Serious Doubts letter

²³ Cf. Dobbs I.M. and Richards P. 2005, Output restriction as a measure of market power, *European Competition Law Review*, Vol 10. on the applicability of the HMT in a multi-product setting and the associated relationship of market boundaries to market power when services are differentiated.

²⁴ Cf. ECTA presentation “Revision of the Remedies Paper: ECTA comments” at the ERG public hearing on a revised Common Position on remedies, Brussels, 12.01.2006, chart 7

²⁵ The possibility of price squeezes and predatory pricing are common fields of application for general competition law and have been applied also on telecoms markets in the past, note, for example, respective remarks by Phillip Lowe, General Director DG Competition, at the Commission’s public Hearing on the call for input on January 24 2006; cf. De Streel “A New Regulatory Paradigm for European Electronic Communications: On the Fallacy of the ‘Less Regulation’ Rhetoric.”, ITS Conference, Berlin 2004, p. 8, who also discusses whether competition law can sufficiently deal with exploitative abuses..

²⁶ Cf. p. 16, 17 of the explanatory memorandum to the Recommendation C (2003)497

²⁷ For the international calls market for non-residential and residential customers combined

²⁸ SG-Greffe (2005) D7202801, p. 3

²⁹ Art. 19 (1) Universal Service Directive (carrier selection and carrier pre-selection) for public available telephony services would continue to apply. For this purpose, a market analysis of retail markets would still be carried out, though no longer leading to a regulation at retail level, s. below 2.2.3.

³⁰ Cf. ERG (05) 70 rev1, p.50

³¹ Cases FR/2005/221 to FR/2005/0226: Retail fixed narrowband access and calls markets in France

³² In a presentation at the CEPS Task Force on Nov. 30 2005, the Deputy Director of Finnish regulator Ficora indicated that a deregulation on the fixed access markets (1-2) was feasible but that these markets might be kept in the Recommendation if “a majority” demanded it.

³³ CoCom 03-03 Annex final wholesale access; CoCom 05/34

³⁴ Recital 28 of the Universal Service Directive only states concerning the minimum set of leased lines that “it is considered necessary to ensure the continuing application of the existing [ONP] provisions...”

³⁵ Commission Recommendation on relevant product and services markets COM (2003)497, Explanatory Memorandum, p.7.

³⁶ Commission comments pursuant to Article 7(3) of Directive 2002/21/EC; CASE NL/2005/0281: Wholesale broadband access in the Netherlands, SG-Greffe (2005) D/206588

³⁷ Cf. Advocat general Jacobs, opinion on *Bronner*. „It may therefore, for example, be unsatisfactory, in a case in which a competitor demands access to a raw material in order to be able to compete with the dominant undertaking on a downstream market in a final product, to focus solely on the latter’s market power on the upstream market and conclude that its conduct in reserving to itself the downstream market is automatically an abuse. Such conduct will not have an adverse impact on consumers unless the dominant undertaking’s final product is sufficiently insulated from competition to give it market power.”

³⁸ Cf. ETNO Reflection Document RD233 (2006/01) on the revised draft ERG Common Position on the approach to appropriate the ladder of investment

³⁹ Cf. in detail ETNO Reflection Document RD233 (2006/01) (fn 38), p. 2-3

⁴⁰ On the interaction between investment in new networks and regulation see a recent paper by Arthur D Little, “Deregulation of the Telecom Sector and its Impact on the Overall Economy”, January, 2006, available under http://www.adl.com/industries/time/order_telecom_dereg.php

⁴¹ ERG (03) 33rev2, Common Position, p. 15

⁴² Agcom market analysis on market 12 in Italy, Case IT/2005/0253; BNetzA analysis of market 12 in Germany, cf. final Commission comments on German notification on market 12, available at <http://forum.europa.eu.int/Public/irc/info/ecctf/library?l=/commissionsdecisions&vm=detailed&sb=Title>

⁴³ Commission Recommendation on relevant product and services markets COM (2003)497, Explanatory Memorandum, p. 15

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- ⁴⁴ Irrespective of the existence of a new and emerging market within the meaning of Rec. 27 of the Framework Directive and Rec. 15 of the Recommendation on relevant markets COM (2003)497
- ⁴⁵ As contained in Rec. 27 Framework Directive and Rec. 15 of Commission Recommendation on relevant markets
- ⁴⁶ This approach has been taken, for example, by Ofcom in the UK and Opta in the Netherlands
- ⁴⁷ Cf. ONPCOM02-08 on leased lines prices, p. 5- 9 and COCOM04-45, Working Document Subject: Draft Commission Recommendation on the provision of leased lines in the European Union Part 2 – Pricing aspects of wholesale leased line part circuits, Annex 3, p. 16 - 19
- ⁴⁸ *Inter alia* in the Netherlands, Finland, Austria
- ⁴⁹ Figures reported by ETNO Members in market analysis on market 14
- ⁵⁰ Commission Recommendation on relevant product and services markets COM (2003)497, Explanatory Memorandum, p. 28.
- ⁵¹ Cf. final Commission comments on German notification on market 12, available at <http://forum.europa.eu.int/Public/irc/info/ecctf/library?l=/commissionsdecisions&vm=detailed&sb=Title>
- ⁵² ETNO Reflection Document on the revised draft ERG Common Position on the approach to appropriate remedies in the ECNS regulatory framework”, January 2006; CASE Associates, “remedies Under EU regulation of the Communications Sector“, June 2003, p. 27 – 30;
- ⁵³ For example, 0,2% of IC requests to Deutsche Telekom concern ‘double transit’ services
- ⁵⁴ For example in Portugal, Austria (s. below) as well as, partly, in the UK
- ⁵⁵ Decision of Commission in case AT/2004/ 0090: Transit services in the public fixed telephony network in Austria
- ⁵⁶ In mobile markets spectrum availability is sometimes put forward as the proof that there are high entry barriers, but this needs to be assessed over the correct timeframe. ETNO expects that more spectrum will be made available to the market, so spectrum should not simply be thought of as a barrier to entry without suitable analysis. New technologies also mean that availability of spectrum now needs to be looked at over a wide range when defining markets.
- ⁵⁷ A need for regulation was identified in Slovenia and Ireland (NRA decision on market 15 in Ireland was overturned by the Appeals Court)
- ⁵⁸ A comparable situation to today’s mobile markets could in the future arise in fixed or converged local access markets
- ⁵⁹ ERG Common position on Wholesale International Roaming ERG (05) 20 Rev 1