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ETNO Reflection Document (RD247)

**Comments on the Commission draft
Recommendation on relevant product and service
markets in the electronic communications sector**

Executive Summary ¹

The proposed draft Recommendation is over-inclusive, i.e. subjects more markets to regulation than would be justified under the 3 criteria test set up by the Commission. As a result, many markets with a more advanced market development risk being subject to inappropriate regulation, impeding investment and stronger growth in Europe. This has been confirmed by a recent independent report of the CEPS e-communications Task Force.¹

- List of relevant markets -

ETNO welcomes the proposed deregulation of **retail calls markets**. The Recommendation should no longer propose regulation of retail markets. Possible wholesale regulation and ex-post control provide appropriate safeguards against potential anti-competitive behaviour also on **retail access markets**.

ETNO supports the proposed sequence of market analysis for **broadband markets** starting from the retail level and covering ULL and then broadband access. Broadband access should be deregulated wherever inter-platform- or LLU-based competition leads to a tendency towards effective competition in the broadband retail market.

The markets for **trunk and** - at least concerning higher bandwidths - **terminating segments of leased lines** and for **transit services** should be removed from the list of relevant markets in view of widespread availability of parallel infrastructure.

ETNO welcomes that the Commission has invited comments in particular on the **mobile access and origination** and **broadcasting transmission** markets. The Commission should opt for the application of general competition law as a rule on these markets and remove them from the list. Deregulation on the mobile access market is in line with the advice of the Commission's economic experts study.

ETNO opposes an extension of the scope of regulation to **sms termination**. There is no market failure at retail level that requires ex-ante intervention in wholesale prices.

The inclusion of **wholesale International Roaming** in the list without an analysis of the three criteria constitutes a breach of the EU regulatory framework.

- Principles for identifying markets for ex-ante regulation -

To ensure harmonised principles across the EU and safeguard against inappropriate intervention at national level, the revised Recommendation should oblige NRAs to **apply the 3 criteria test on each national market** prior to regulatory intervention.

ETNO invites the Commission to undertake more in-depth work on the **definition of geographical markets** according to competition law methodology. The Commission's assessment that it is generally valid to continue to define national markets is being challenged by market realities and the economic expert study.

The proposed interpretation of the '**emerging markets**' concept is not operational. It results in a quasi-automatic extension of ex-ante regulation to new technology- and market developments without taking into account whether these have the potential to create new markets.

¹ BT and TDC do not support this document.

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I. Introduction

ETNO welcomes the possibility to comment on the Commission draft Recommendation on relevant products and services markets.

As we stated in our contribution to the Commission call for input in January of this year, the Recommendation is the key instrument of the EU Regulatory Framework for managing the transition of the e-communications sector towards the application of general competition law in line with market developments.

The Commission's draft Recommendation and the accompanying explanatory memorandum in most parts provide a robust analysis of the complex questions surrounding market definition and the identification of markets susceptible to ex-ante regulation under the EU Regulatory Framework.

Yet, in its current form, the Recommendation would not allow the Commission to fulfil its role of effectively guiding a harmonised implementation of the regulatory framework by NRAs. Despite a first step towards deregulating retail markets, the proposal contains more markets than would be justified when applying the three criteria test set up by the Commission. As a result, markets characterised by a more advanced development of competition, technology and network roll-out in EU Member States risk being subject to inappropriate regulation, stifling innovation and growth on these markets.

ETNO recalls that a narrow list of markets is a strong tool for harmonisation and better regulation as National Regulatory Authorities (NRAs) are obliged to notify if they want to regulate markets that are not in the list. By keeping markets in the Recommendation which are or will be competitive in a large number of Member States, the Commission limits its possibility to act against inappropriate intervention by NRAs. ETNO encourages the Commission to limit the remit of ex-ante SMP-regulation to a small set of wholesale markets and allow for deviations by NRAs where national market circumstances exceptionally require more far-reaching intervention.

Finally, we would like to invite the Commission to state more clearly what are the exact consequences of removing markets from the list of relevant markets that are currently regulated. A deregulation at EU level will only be effective if deletion from the list is followed by immediate deregulation at national level, unless an NRA carries out a timely 3-criteria test on that market at national level and regulation is - exceptionally - approved by the Commission.

II. The 3 criteria and the definition of markets - chapter 2 of the consultation document

1. Application of 3 criteria by NRAs

To ensure harmonised principles across the EU and avoid unwarranted intervention at national level, the revised Recommendation should oblige NRAs to apply the 3 criteria test on each national or sub-national market prior to regulatory intervention.

In its draft explanatory memorandum, the Commission proposes that *“for those markets listed, the Recommendation creates a presumption for the NRA that the three criteria are met and therefore NRAs do not need to reconsider the three criteria. However, it is open to a NRA to assess the three criteria and whether they are satisfied for their specific market if the NRA believes that this would be appropriate.”*

This approach gives little guidance in an area where core principles of the framework are concerned. It does not help to achieve the objective of the Commission to enforce harmonised and proportionate rules in the internal market and is at odds with its horizontal better regulation policy: a national or sub-national market which does not fulfil the three criteria, for instance due to the availability or emergence of competing infrastructure in the local access segment of the network, does not warrant the application of the ex-ante instruments even if SMP would still be found in a current round of market analysis. Ex-ante regulation in such circumstances would lack an economic rationale, be disproportionate and ultimately act to the detriment of consumers. This result does not change from one country, where an NRA happens to carry out the 3 criteria test, to another, where it chooses not to.

To avoid this arbitrary outcome and counter the risk of excess regulation that follows from a failure to apply the test by NRAs, the Commission should oblige NRAs to test the three criteria on all markets they analyse.

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 and can do so in a targeted manner in relation to national circumstances.

2. Interpretation of the 3 criteria

- Measure for the first criterion of high and non-transitory entry barriers

As ETNO has proposed in its contribution to the call for input, the Recommendation should link the first criterion to the possibility of replication of assets. In a one-way access situation, ex-ante regulation was originally introduced to remedy a market situation where control over a non-replicable legacy facility impedes access for competitors to downstream markets, causing substantial harm to consumers. Where entry by an efficient operator is possible, ex-ante regulation can dilute incentives for entry and thereby create a regulatory barrier to the emergence of sustainable competition. To make the first criterion operational, ETNO has proposed a two-stage approach.² 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 conditions.³ The importance of such empirical evidence is also underlined by Cave, Stumpf and Valetti in their economic expert study.⁴ In absence of empirical evidence of replication, this analysis could be complemented with cost analysis based on cost models.

It is inappropriate to look for evidence of “frequent” or “immediate” entry in the context of high and non-transitory entry barriers as Recital 9 of the draft Recommendation suggests. E-communications markets are characterised by upfront investment, economies of scale and scope and often by the presence of a limited number of operators. Entry leading to a sustainable competitive market outcome will therefore always be limited in number and gradual, not ‘frequent’ and ‘immediate’. The wording of Recital 9 is inappropriate and should be amended to not give a *carte blanche* to a further extension of ex-ante regulation.

- Timeframe for assessment of the second criterion

It should be clearly stated that an analysis of the second criterion involves an assessment of market developments beyond the period of the current market review. A prospective analysis can only be achieved in a medium-term perspective. The second criterion should be used to also take into account mid – to long-term developments that would not be taken into account in a prospective analysis of SMP. It then has a clear added value to the SMP-test which already includes the assessment whether a market is effectively competitive in a prospective

analysis. As long as there is a sufficient degree of certainty that the market tends towards a competitive outcome, the development can require some time to reach its full effect.

Against this background, ETNO also encourages the Commission to delete the ‘rule of thumb’ in the explanatory memorandum that *“In general, the later effective competition is expected to materialise in the future, the more likely it is that the second criterion is fulfilled.”*⁵

It is not the timeframe which is decisive but the degree of certainty that the market tends towards a competitive outcome. If the market is expected to achieve sustainable competition by itself, for instance in view of technological developments and judging from experience in other markets, regulatory intervention would only distort incentives for market players and risk to impede this development.

3. The “modified greenfield approach”

ETNO welcomes the proposed ‘modified Greenfield approach’ in dealing with market segments but insists that it should start from an analysis of market failure on retail markets.

We note that the Commission proposes a sequential approach to market analysis, starting with the market most upstream in the vertical supply chain and analysing markets further downstream taking into account measures imposed on that market. The purpose of this sequence to limit regulation to wholesale markets and intervene in as little wholesale markets as possible is welcome. It coincides with ETNO’s comments to the call for input where we observed that

*“certain wholesale markets can be seen as providing ‘basic components’ which other wholesale products that may fall into 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.”*⁶

The explanatory memorandum should recall in this context that the purpose of any regulation eventually is to remedy an identified market failure at retail level. This is also the starting point for the economic expert study for the Commission by Cave, Valetti and Stumpf.⁷ To avoid that NRAs right away focus on perceived problems on wholesale markets, the Commission should clearly highlight that a sequence of market analyses following the ‘modified Greenfield approach’ will only be initiated in the case that, absent regulation, market failure at retail level is present that causes substantial consumer harm.

In addition, we suggest that an explicit assessment of the end-users situation as to choice, price, quality and innovation is introduced when NRAs analyse national markets and impose obligations. NRAs should, in addition to identifying SMP operators and the market problem, be required to demonstrate that the policy objectives of the framework, namely Art. 8 (2) b) Framework Directive will not be achieved unless ex ante obligations are imposed or maintained. Both the Commission Guidelines for market analysis and the Recommendation on relevant markets should include wording to this effect.

Such emphasis on the market outcome for end-users is also in line with the development of EU competition policy as reflected in the Commission’s intention to stronger take into account the results of a dominant firm’s behaviour on consumer benefits in the context of establishing exclusionary abuses under general competition law.⁸ In the field of ex-ante regulation where no proof of an abuse is required for intervention, this link to the interest of end-users is even more adequate to not sanction or impede behaviour that increases end-user benefits.

4. Definition of sub-national markets in line with competition law principles

Different geographical market conditions have to be reflected in regulatory practice. The Commission should in this context encourage the correct application of competition law methodology in the definition of sub-national markets to better focus regulation.

In the present round of market analyses, NRAs appear to not consequently follow the Commission's SMP guidelines with regard to geographical market definition. They largely continue 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.⁹ As a result, NRAs continue to apply disproportionate regulation in areas with higher competition intensity. Where the application of competition law criteria for market definition would lead to sub-national markets but operators are still designated as SMP on the basis of a national market, this limits them in their ability to compete on price, quality and innovation, in turn reducing the benefits the consumer can derive from competition.

In the Commission economic expert study Prof. Cave, Stumpf and Valetti come to the conclusion that

"..where differential network build-out creates clear and persistent divisions in a Member State, so that one area is likely to exhibit SMP in a market, while another does not, there is a good case for reflecting this difference by defining separate geographic markets."¹⁰

It remains unclear against this background, on what basis the Commission concludes that it "continues to see it in general as valid to define a market that spans the Member State"¹¹ ETNO encourages the Commission to no longer include this sweeping statement in the explanatory memorandum. In addition, we propose to the Commission to undertake a more in-depth analysis of the treatment of possible sub-national markets in line with competition law principles in 2007.

5. Cooperation between NRAs and NCAs

On page 12 in the draft Explanatory Memorandum, the text on cooperation between NRAs and National Competition Authorities (NCAs) remains unchanged, stating that

"In practical application NRAs should consult with their [...] NCA and take into account that body's opinion when deciding whether use of both complementary regulatory tools is appropriate to deal with a specific issue, or whether competition law instruments are sufficient."

This cooperation should be strengthened and NCA consultation should be made mandatory. In all Member States, the opinion of the NCA should carry heavy weight in the market analysis procedure, including decisions on obligations. However, such an increased cooperation should carefully avoid that the bodies are 'competing' for regulation as well as double penalty.

Strengthening NCAs would be a small, but significant step towards the overall goal of the framework to eventually replace the sector specific ex ante regulation with competition law only. We think Art 16 of the Framework Directive gives sufficient room for the Commission to include a stronger recommendation of this nature in the revised Recommendation.

III. General Issues - chapter 2 of the consultation document

1. Self-supply

The Commission's approach to self-supply in the context of wholesale market definition seems overly dogmatic and unjustified in view of the purpose of ex-ante regulation to promote competition for the end-consumer. If two services relying on different platforms are in the same market, then normally wholesale inputs to these services should also fall in the same market.¹²

1.1. Example of transit services¹³

In cases where competitors provide the same self-supply services as the incumbent, the Commission suggests analysing whether they have enough capacity and how likely competitors are to provide the services quickly to third parties.

The Commission's view is that these conditions are unlikely to be fulfilled in practice, and that self supply by alternative operators should therefore generally be excluded from the market definition. ETNO does not support this general view as no evidence is given to support it. It is worth noting that in a study carried out for the Commission, Hogan & Hartson and Analysys raise two important reservations against this concept. Firstly, why consider how likely competitors are to enter the market, but not incumbents? Secondly, is it really appropriate to take the view that competitors generally do not have enough spare capacity to quickly provide a commercial product, whereas the incumbent does?¹⁴ Subject to the assessment in each individual case, competitors' self-provisioning should be included in the market definition to take account of all competitive constraints on the largest operator. Otherwise, regulation risks to be upheld¹⁵ even in markets where the incumbent holds insignificant market share such as in many EU markets for transit services - because the market definition is *de facto* provider-specific.

1.2. Example of the broadband access market 16

The most debated issue of NRF implementation in the context of self-supply has been the question of the treatment of existing alternative broadband technologies in the context of market 12 (market 6 of the draft Recommendation).

This was the issue at stake in the analysis of lower quality bitstream in the Netherlands.¹⁷ In such a case of widespread infrastructure-based competition (in this case supplemented by the availability of LLU offers), an identification of a wholesale broadband market susceptible to regulation is not justified, as the three criteria for applying regulation are not fulfilled. 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 market analysis. Otherwise, additional regulation would apply despite an already competitive outcome for the end-user absent regulation, a clearly disproportionate result.

Hogan & Hartson and Analysys rightly identify a "regulatory circularity" in the definition of market 12 which according to the Recommendation includes "*other wholesale access provided over other infrastructures, if and when they offer facilities equivalent to bit-stream access*". ETNO supports the study's findings that because one type of broadband access (bit-stream) is already regulated and the other, in most cases cable, is not, the search for any evidence of direct supply-side substitutability between these different technology platforms may be futile. For as long as access to a technological platform is not regulated and mandatory, there are likely to be few applicants for this service and, hence, there will be no evidence or realistic prospect of customer switching between the two platforms.

Instead of constructing a lack of market power via indirect pricing constraints on a technology-specific wholesale market 'created' by regulation as the EC suggests, ETNO proposes to – based on an analysis of the retail market situation – include the alternative platform (cable) in the assessment of the 3 criteria at national level. In case the three criteria test is not being conducted by the NRA, competitive pressures on the retail market should be taken into account in market analysis to avoid an SMP-designation at wholesale level despite a satisfying outcome for the end-user because of competition at retail level. Otherwise a situation could arise in which technologies by alternative operators attain substantial market shares or even SMP without being regulated, while incumbents using established technologies remain subject to *ex ante* obligations as the relevant wholesale market definition remains unchanged.¹⁸

Should the new Recommendation nevertheless maintain the same approach to the treatment of alternative platforms in the context of the wholesale broadband market, it should at least be clearly stated that any regulation of the SMP-player on the wholesale market should not put him at a competitive disadvantage on the retail market vis-à-vis other, possibly even more successful players based on alternative platforms. Clearly, in case one platform is dominant on the retail broadband market, an access regulation of the other platform competing at retail level would lose all justification.

2. Bundling

We welcome the Commission's acknowledgement that bundling is in many circumstances to the benefit of consumers and not negatively impacting competition.

This leads to another observation in the context of bundling: the move to convergent product bundles will be an important driver for consolidation on the e-communications markets. Regulatory measures that specifically target individual product bundles, whether at retail or wholesale level, are not an appropriate tool to manage this transition. It would decrease efficiency of the market and negatively affect consumer benefits if regulators attempted to artificially slow down the trend of consolidation by perpetuating or specifically devising access regulation to 'assist' operators which are currently only offering a part of the bundle to provide the whole bundle, despite effective competition at the retail market between sustainable and efficient integrated operators or consortia.¹⁹

Regulators and the Commission should observe whether new product bundles emerge as separate retail markets justifying a treatment as new and emerging markets (s. below, 4.).

3. NGNs

Our comments will address the impact of a transition to NGNs or all-IP networks in the context of individual markets where they arise.

4. New and emerging markets

As stated in earlier ETNO positions²⁰, the current EU interpretation of the concept of new and emerging markets is not contributing to the objectives of the NRF to promote innovation and efficient investments in infrastructure as it renders the concept largely meaningless. It is not applied in regulatory practice by NRAs or Commission And has never been invoked in potential fields of application by NRAs. Already the Commission has expressed its opinion that services based on VDSL technology - many of which are still unknown today - do not form a new market in its view.²¹

Under the current Commission approach, an NRA first has to define a separate product and services market, clearly distinguished from existing, regulated markets by an assessment of

demand and supply side substitution according to competition law methodology, before it can identify a new and emerging market. However, in the early stages of the development of a new infrastructure or service, precisely this market definition will be difficult to undertake.²² Uncertainty over future demand and potential suppliers is characteristic for new networks and services and the full potential of new technologies is hardly used and often not visible in the early stages of market development. This could be taken into account by adopting a 'wait-and-see' approach to new market developments as proposed by several observers.²³ Instead, an early, technologically neutral market definition which the Commission requires for emerging networks and services leads quasi automatically to the immediate inclusion of new networks and services in the scope of ex-ante regulation.

The Commission does not discuss other concepts in substance and has repeatedly ruled one of those out explicitly as a policy option for the current review.²⁴ A way to further operationalise the concept of new and emerging markets in order to foster investment and to avoid the difficulties in market definition inherent in the current concept has been developed by academics already in 2005 and further developed 2006.^{25 26}

Next to this more fundamental concern over the current interpretation of the emerging markets concept, we would like to point to a wording error in Recital 5 of the draft Recommendation. The Recital states that if three criteria are not met, emerging markets "should not *in principle* be subject to ex ante regulation". The words 'in principle' should be deleted. If an NRA does not determine that the three criteria are met on a particular market, this market is not covered by ex-ante regulation. Otherwise the criteria for regulating new markets would be less stringent than those for the regulation of existing markets where the three criteria have to be fulfilled.

IV. The list of relevant markets

As explained in more detail in our comments on the call for input, the Recommendation fulfils an important purpose if it can be used as a harmonising and better regulation tool to restrict NRAs' ability to intervene in additional markets than those thought to require regulation in all or most EU markets in the period of application of the second Recommendation (2007 - ~2011).

Accordingly, 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, based on a forward looking analysis of the 3 criteria.

Cave, Valetti and Stumpf adopt a different approach in their study by looking at the markets in a "representative Member State". We believe that the focus on more advanced markets for the purpose of compiling the list of markets seems more appropriate. Over time, less developed markets will display similar characteristics than the markets which are further advanced today.²⁷

The Commission does not explain clearly what its reference point for the application of the 3 criteria at a European level is – whether a representative Member State, a more advanced Member State or - which would make the update of the Recommendation a largely worthless exercise - the least advanced EU Member States. ETNO encourages the Commission to give itself and stakeholders account of this underlying measurement. In doing so, 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 exceptionally fulfilled on their national market.

1. Deregulation on retail markets

1.1. Markets 3 - 6

ETNO welcomes the removal of markets 3-6 in the proposed Recommendation. On these markets, deregulation is already underway in the present round of market analysis in many EU countries and a removal from the list of relevant markets is overdue. Technological developments such as the move to IP-based networks and services further lower barriers to entry in these markets.

Some call for continued regulation of these markets, despite the fact that the 3 criteria are no longer fulfilled.²⁸ Any remaining “safeguard regulation” would, however, be in direct conflict with the EU regulatory framework and the Commission’s principles for identifying markets susceptible to ex-ante regulation. It would deprive consumers of the benefits of unfettered competition on retail markets including demand-driven offers by the largest network operator. Competition law and, where applicable, ex-ante wholesale regulation provide the appropriate safeguard against potential anti-competitive behaviour such as price squeeze and unjustified bundling.²⁹

1.2. Market 1 of the draft Recommendation

On market 1 of the current draft Recommendation (1 and 2 of the Recommendation in force), a forward looking analysis of the 3 criteria equally calls for a deregulation.

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 measures – and ex-post competition law - achieve the objectives of the framework.³⁰ In ETNO’s view, already today competition law would be sufficient to deal with anti-competitive development in retail access markets such as the risk of excessive pricing in areas where only one fixed network infrastructure exists.

Moreover, a forward-looking analysis in particular of the first and second criterion clearly points towards a need for removal of market 1 (1 and 2 of the current Recommendation) from the list of relevant markets.

The Commission concludes that there is no tendency towards effective competition for narrowband PSTN-based access to telephone networks. However, a prospective analysis of tendency to competition should not limit itself to a static assessment of PSTN-based narrowband access. It should also take into account the market and technological developments towards all-IP networks. Furthermore competitive pressures from other platforms which are not part of the market as such, such as mobile, have also to be taken into account when analysing entry barriers.³¹

The Commission states that broadband access does not constitute a substitute for narrowband access as many narrowband customers do not currently envisage upgrading to broadband. However, new business models often driven also by the incumbent operators (such as stand-alone broadband connections) make a switch to broadband more attractive for voice-only customers. Eventually, in the move to all-IP networks consumers will not only opt for IP-based services only where they want internet access or new services, but also to only purchase voice services. Eventually, consumers will be migrated to an IP-network and use it for (IP-) voice telephony and the PSTN will be replaced with IP-based voice solutions also for those consumers which have not opted for an IP-voice product before.

As a result, the relevant wholesale products for ‘voice-only’ customers change. Broadband connections providing VoB or VoIP solutions already start to act as a powerful competitive

constraint on more advanced markets. For broadband services like voice over broadband, wholesale products like LLU, shared access or where applicable, bitstream access are sufficient to remedy any possible market failure at end-user level as they lower market entry barriers and allow the development of effective competition. This is also recognised by the Commission.³²

Therefore, market 1 does not fulfil the 3 criteria both in terms of sufficiency of competition law and in view of market developments to be taken into account in a prospective analysis,.

1.3. The minimum set of leased lines

ETNO supports reduction of the minimum set of leased lines to a 'null set' and concurs with the reasoning of the Commission. The corresponding wholesale markets, in particular markets 13 and 14, are mostly effectively competitive. In some cases, ex-ante access regulation at wholesale level alleviates the need for a retail minimum set.

2. Wholesale markets

The impact of wholesale regulation both in relation to one-way and two-way access situations will become more complex to assess due to the convergence of networks and services and the interaction of regulation and investment in new networks.

With the ongoing transition to IP-based networks, retail services in the e-communications sector will in the future be characterised by multi-product offerings and bundles including consumer access, leading to increasingly broad and potentially overlapping product markets.³³ The Commission acknowledges this development of 'potentially wide-ranging retail markets'.³⁴ It should resist calls for regulation in specific market areas where competition problems are perceived to exist at retail level today.

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 adversely affect other retail services which are already provided in a competitive environment, or pose an obstacle to investment in alternative or upgraded infrastructure.

2.1 Markets 5 and 6: ULL and wholesale broadband services

2.1.1 A consistent approach to regulation of broadband markets

ETNO would like to emphasise that a consistent and proportionate regulatory treatment of broadband markets is key for the development of competition, investment in and penetration of broadband and thereby an important policy issue for the EU economy as a whole.

To understand the challenges to regulation of LLU and wholesale broadband access, it is useful to think of these two markets not as genuine markets but recall that the markets have been created as remedies for regulatory purposes. The markets have been included in the first Recommendation to enable NRAs to intervene in view of a perceived lack of competition at retail level. It is very difficult for these two markets to evolve towards a competitive outcome by themselves, given the specific market definition which moreover relates mainly or exclusively to one platform, the fixed access network (s. above, II. 1. - this has been highlighted by Hogan Hartson and Analysis in the context of self-supply.³⁵)

As a result, the focus of regulators should not lie on promoting competition on these markets, to the benefit of competitors but to impose the related remedies (LLU or bitstream access) in so far as they are still necessary to achieve competition at retail level.

We recall that the “modified Greenfield approach” mentioned in the Recommendation is useful in order to reflect this approach if the appropriate link to the retail level is made. This also requires that inter-platform competition at retail level should be taken into account already at the stage of an assessment of the three criteria for these wholesale markets, or, where this is not the case, be incorporated in market analysis (s. above, II. 1.).

In regulatory practice, in most cases the same alternative operator demands both types of services (LLU and bitstream access) at the same time, but in different geographic areas. In more densely populated areas, a competitor will use LLU whereas in remote areas where investments are much higher he will use bitstream or even resale services. The relationship between the costs of the various options is the main driving force in order to choose amongst those services.

The question whether the products in market 5 and 6 are subject to supply-side substitution³⁶ cannot therefore be separated from the geographic differences that operators take into account when making their investment decisions. Regulation in markets 5 and/or 6 should have the objective of granting access to the non-replicable legacy network element and only to this, to allow market entry for competitors in order to compete at the retail level.

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.

We note in this context that the ‘ladder-concept’, an approach developed in the area of remedies and increasingly criticised by academics and experts³⁷, should not affect and cannot in any way override the 3 criteria in the choice of markets for ex-ante regulation.

To ensure a holistic and more targeted approach to broadband market regulation the Commission should incorporate the above principles in the Recommendation. In addition, ETNO invites the Commission to develop guidance on regional differentiation of regulation for broadband access, both in terms of market definition according to competition law principles and in terms of remedies (s. above I. 4.).

2.1.2. Inclusion of different technologies in the wholesale broadband access market

On the question of the treatment of existing competing infrastructures in the definition of market 12 of the current Recommendation, pls. s. above (II. 1- self supply).

On the question of the inclusion of new and upgraded infrastructure, the explanatory memorandum suggests that advanced technologies, including VDSL, should not be excluded from the market definition notwithstanding the analysis of individual NRAs. This proposal coincides with a trend among NRAs to intervene and enforce access upon owners of new or upgraded infrastructure, irrespective of how immature or promising in terms of its potential for increased competition and new services a new broadband access technology might be.³⁸

The question of inclusion of new technologies in market 12 should be approached from a different angle. NRAs should assess whether a new technology has the potential to deliver a range of new services which belong to another category of products in terms of speeds, price, quality and functionalities. If this is the case, it becomes obvious that an opening up of these networks from the initial phases of their development is likely to hamper innovation on

these platforms and, more importantly, can delay or hold up the investment in these platforms and services in the first place.³⁹

The usual argument behind an inclusion of new technology in the scope of access regulation is the fact that this technology will also be used to provide broadband services that currently fall in the scope of access regulation such as broadband internet access, thereby creating an (at least one-sided) substitution with existing broadband services. However, existing broadband services would only justify the opening up of new networks if existing wholesale products for broadband such as LLU or shared access can no longer be provided, for instance where the physical local loop disappears in the context of FTTx roll-out. Otherwise wholesale products based on the existing technologies, where necessary, would suffice to ensure competition for these services.

For those cases where new access technology completely replaces the existing network, Cave, Valetti and Stumpf make an interesting suggestion of limiting access to the bandwidth needed for the delivering of existing broadband services, leaving access to the high-speed-part of the network to voluntary access agreements.⁴⁰ In all other cases, technologies / access platforms which are newly introduced in the market⁴¹ should not be subject to regulation until they are sufficiently established to allow an assessment of their impact on retail broadband services markets.

2.2 Markets 7 and 8 - leased lines markets

Leased lines are used mostly or exclusively to serve business customers. Competition in the business segment is particularly fierce in many EU markets and characterised by a high degree of self-realisation by alternative operators especially for high bandwidths, including connections to the premises of individual business customers. As concerns smaller bandwidths, the development of xDSL-based broadband access increasingly impacts upon leased lines take-up. This development could lead to an earlier deregulation also in terminating segments than has been envisaged until today.

2.2.1. Trunk segments

It remains unclear why this market is still included in the list.

Trunk segments of leased lines are characterised by the existence of several, sometimes multiple parallel networks in most Member States and geographies. The market is characterised by over-capacity and has seen a sharp price decreases in the past and the largest operators in some countries have less than 20% market share.⁴²

It has been found to be effectively competitive already now by almost half the NRAs that analysed the market.⁴³ The Commission itself spots a tendency towards effective competition, but argues that this is not enough visible “across the EU”.

This conclusion again seems to disregard the fact that the Recommendation allows NRAs to regulate on national or sub-national markets precisely where the development of competition is less advanced and the three criteria are still fulfilled. Here, the Commission’s lack of a coherent approach to measuring the fulfilment of the three criteria plays out in favour of identifying a market for intervention which clearly tends towards a competitive outcome. The Recommendation cannot fulfil its role as a tool for better regulation and harmonisation in this way, but becomes a *carte blanche* for regulation on wholesale markets by NRAs.

The economic expert study⁴⁴ carried out for the Commission finds the market for high-capacity leased lines does in any case not fulfil the three criteria. Low-capacity trunk segments are only considered for further regulation because the study advises a deregulation in

inter-tandem transit at the same time. Overall, the study sharply contradicts the argument for inclusion of the market by the Commission.

2.2.2. Terminating segments of leased lines

In line with the approach adopted by several NRAs and the economic expert study, terminating segments should be separated according to higher and lower bandwidths as these are satisfying different customer demand and are characterised by different conditions of competitions.⁴⁵ Very high bit-rate leased lines are typically characterised by intense competition also in the terminating segment.

Vivid competition in the market for high-bit-rate terminating segments is underpinned by the continuous increases in sales in markets for leased circuits which can be attributed exclusively to competitors. It can also be observed that in most Member States the prices charged by the incumbent for leased circuits have dropped significantly in recent years.⁴⁶

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. As a consequence, at least high bit-rate terminating segments should be deregulated and no longer included in the list of relevant market.

2.3 Markets 2 - 4 – Interconnection in the fixed public telephone network

2.3.1 Call termination

ETNO has highlighted its general approach to a regulatory regime for efficient and reasonable termination regulation in earlier ETNO positions which we would like to refer to.⁴⁷

We expect that some form of regulatory supervision will continue to apply in the medium term. The move to IP-based networks has not so far and is unlikely for some time to result in a change of charging mechanism for the termination of calls between networks. Any possible transition to a new charging mechanism in the transitional should be left to market parties' negotiations and their ability to find appropriate technical and commercial solutions.

2.3.2. Call origination

This market is likely to undergo greater changes than call termination in the move to all-IP-based networks in view of 'always-on' connectivity provided by today's broadband connections. As the voluntary take-up and - in the future - migration of customers to all-IP-access solutions continues, traffic origination for narrow-band connections, whether for calls of internet dial-up internet, will play an increasingly smaller role. If the market is kept in the Recommendation, competitive constraints from broadband voice services at retail level will increasingly have to be taken into account by NRAs in the analysis. Equally, call-by-call and pre-selection obligations will lose significance during the relevant timeframe for this Recommendation because users will use 'multiple accounts'. Commercial agreements over exchange of IP-traffic can be expected to remove the need for regulation in this area when the next revision of the Recommendation is due.

2.3.3. Transit services

It is worth recalling that the transit market had to be covered in the first Recommendation as it was contained in Annex 1 of the Framework Directive. Arguably, the 3 criteria were not

fulfilled at the time 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 networks exist for the provision of transit services and the market is characterised by over-capacity. The share of requests for interconnection addressed at incumbent operators which concern transit is increasingly insignificant.⁴⁸ Deregulation has been already proposed in the current round of market analysis by a number of NRAs.⁴⁹ Entry barriers are not high and non-transitory as is shown by multiple entry which has taken place.

It is the particular understanding by the Commission of the issue of self-supply as mirrored in the veto decision on the Austrian transit market⁵⁰ and discussed above that may lie behind the inclusion in the current draft list of relevant markets. Yet even based on the same narrow understanding, in the economic expert study Stumpf finds that at least a part of transit services, inter-tandem transit, should be deregulated. In an EU perspective, ETNO does not see any justification for keeping the market in the list.

2.4. Mobile wholesale markets

European mobile markets were characterised by infrastructure competition from the outset. The Commission has recognised in earlier reports that the highly competitive mobile markets have brought about a sharp decrease in prices for popular services such as calls and SMS.⁵¹

Because of an overall competitive structure, mobile markets will deliver low prices, consumer choice and innovative and quality products also in new market segments where take-up by consumers is still less advanced. Against this background, ETNO in principle cautions against any regulatory intervention in individual segments of mobile markets. In particular,

- The proposed extension of regulation to sms-termination is unjustified as competition on retail markets is highly developed and differentiated.
- Mobile access and origination should be deregulated in line with the findings of the Commission's economic expert study.

2.4.1. Market 10: mobile access and origination

- **An important role for the Recommendation**

Before showing that the three criteria are not fulfilled for this market, ETNO would like to welcome the specific request for input by the Commission and underline the crucial role of the Recommendation in the context of this particular market.

We earlier referred to (de-)regulation on the mobile access and origination market as the 'litmus test' for the capacity of European regulators to adequately deal with markets under the NRF which have a market structure common to many non-e-communications industries and which are not marked by legacy advantages for a former monopolist operator.

Yet some regulators and the ERG⁵² seem to favour the introduction of a system of administered access-based competition as devised for the opening up of fixed monopoly networks also on mobile markets, imposing massive direct and indirect regulatory costs upon the industry. In a recent Art.-7-notification, the Commission strongly criticised such an access regime proposed by an NRA, the notification was subsequently withdrawn.⁵³

These trends underline why the decision whether to maintain the market for access and origination in mobile networks on the list of relevant markets matters in particular.

The Commission is not in all cases in the position to veto unjustified regulation on this market within the given short timeframes under Art. 7, especially if complex concepts such as oligopolistic dominance are involved as in this market. By removing the market from the list it would require NRAs to first carry out the three criteria test on the mobile access market if they intend to set up a regulatory access regime. Then the far-reaching decision to subject the mobile sector to access regulation – resulting in stakeholders that rely on this regulation, making it in ETNO's experience very hard to dismantle the regime once it is put in place – would at least be subject to the appropriate test, namely whether ex-ante regulation is justified at national level. As a consequence, the Commission would have an effective veto power over any regulation taking place on the market. This would be a more acceptable outcome in view of better regulation principles as intervention, if any, would be better justified.

This would not exclude intervention by individual NRAs due to national market circumstances and would promote good regulatory practice.

- **The three criteria**

It is surprising that market 10 (15) still appears in the draft Recommendation given the Commission's own analysis in the explanatory memorandum and the findings of the economic expert study.

In its explanatory memorandum, the Commission finds that the market is effectively competitive in most Member States.⁵⁴ This finding alone should lead to a deletion of the market from the list.

As highlighted earlier, the mobile market has been characterised by sustainable infrastructure competition from the outset. Existing barriers to entry have been overcome by a number of players making replication of mobile network infrastructure the norm. Spectrum constraints in mobile telephony have been relaxed over the past decade and entry barriers are likely to decrease further in the future, with additional spectrum being made available.^{55 56} Even more than a tendency towards effective competition, the existence of effective competition in the large majority of Member States has been established, meaning that the second criterion is not fulfilled from a European viewpoint.

In recent years mobile markets have seen the entry of new players and numerous new business models at wholesale level have evolved without regulatory intervention. Entrants usually negotiate their network access based on a service-provider or MVNO model and often have a strong brand and consumer base (such as Virgin in the UK or Aldi in Germany). The trend towards co-operation of mobile network operators (MNOs) with retailers is likely to continue in most national markets. Economies of scale of their network and excess capacity act as incentives for MNOs to enter into such arrangements.

In its explanatory memorandum, the Commission does not evaluate the third criterion with regard to mobile access. ETNO maintains that also the third criterion is not fulfilled in all but exceptional cases. In a multi-platform environment, competition law can effectively rein in abuses of market power resulting from a single or joint dominant position and protect consumers against excessive pricing or other abusive behaviour. The specificities of some fixed local access networks and network effects in two-way-access situations that single out these areas in difference to other sectors of the economy are absent for access and origination in a multi-platform environment. MNOs are not monopolist providers of a network.⁵⁷ It is worth recalling that in the US access regulation in the fixed network was largely abolished based on the existence of two parallel infrastructures.

Finally, the explanatory memorandum should not create the impression that the absence of MVNOs is in itself a sufficient reason for regulatory (or competition law) intervention. To justify wholesale regulation on mobile markets, regulators should prove a market failure on retail markets that justifies intervention in the related wholesale market. Absent SMP on the retail market, not granting access to a new entrant cannot have an anti-competitive effect.⁵⁸ NRAs which decided not to intervene in the market have referred to vivid competition in the mobile retail market. The Commission should therefore underline that any intervention at wholesale level must be justified by substantial consumer harm on retail markets absent regulation.

Should competition problems be perceived which exceptionally require ex-ante intervention, NRAs have the ability at any time to define relevant markets outside the list. In any case, competition authorities could intervene under general competition law.⁵⁹

2.4.2. Market 9: termination for voice calls and sms

- **SMS**

ETNO encourages the Commission to fully take into account specificities of both sms and mobile voice calls when analysing the need for ex-ante regulation, such as the larger proportion of mobile-to-mobile traffic for sms in comparison to voice calls.

Sms-termination is not a direct substitute for voice termination and vice-versa from the perspective of the operator requesting termination of a particular short message or call. Substitution between the two services at retail level which could affect market definition at wholesale level via pricing constraints from the other product is not discussed by the Commission. The Commission refers instead to a “similar market failure” as a reason to include both services in the same market. As under the NRF markets are defined according to competition law criteria, the ‘market definition’ appears more like a market clustering.

In ETNO’s view, the sms-termination market does not justify inclusion in the Recommendation.

The Commission does not explain which negative impact the alleged market failure in wholesale sms-termination has on the consumer. Sms are provided largely on a symmetric basis, i.e. between mobile operators, on an overall fiercely competitive market. Tariffs for data services are part of the service bundle offered to the customer, putting pressure on prices in view of a competitive end-user market. Regulation should not intervene in specific wholesale arrangements of an industry characterised by a competitive retail market.

In the current round of market analysis, most NRAs have accordingly limited their market analysis strictly to voice call termination and have not identified competition problems for sms-termination.⁶⁰ The Finnish NRA has even explicitly refused to extend the scope to SMS and other data communications.⁶¹

The French regulator who has proposed a detailed regulation of sms-termination has identified an unchanged price for single sms as a competition problem at retail level.⁶² It did not judge sufficient that targeted tariff packages for heavy users allowed for low retail prices and brought down overall prices for sms because less price-sensitive customers paid slightly higher charges. However, these are features of healthy competition which do not justify intervention by NRAs in tariff structures.

- **Voice calls**

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 a singling out of a specific competition problem 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, and 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 market and technological progress 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 should be monitored at European and national level.

2.4.3. Wholesale International Roaming

Market 11 should be removed from the draft list of relevant markets. Its inclusion in the draft Recommendation, coupled with a lack of analysis of the three criteria on the part of the Commission, is surprising and shows a worrying disrespect for the principles of the EU regulatory framework in force on the part of the Commission.

Recent regulatory analysis of market 17 shows that the market does not fulfil the 3 criteria for sector-specific regulation as it has, beyond showing a tendency towards effective competition (2nd criterion), already been found to be effectively competitive by all NRAs that have analysed the market so far.⁶³

The Commission states that a decision on an inclusion of the market in the Recommendation has to be taken in the light of other initiatives such as the Roaming regulation proposed to EU Parliament and Council in July 2006. ETNO reiterates for all eventualities that the inclusion of a market in the Recommendation is governed by the framework and accordingly by the three criteria not by political decisions around a possible Roaming regulation. An inclusion in the list without fulfilment of the three criteria would constitute a permanent and deliberate breach of EU law by the Commission.

2.5 Market 12 – broadcasting transmission services ⁱⁱ

ETNO welcomes that the Commission has specifically asked for input on market 12 (in the following: market 18). The market has raised particularly complex questions in NRF implementation. An analysis of the market context for broadcasting transmission services clearly shows that market 18 should no longer be included in the list.

ⁱⁱ KPN does not support the removal of market 18 from the Recommendation

2.5.1 Market 12 is a only a part of audiovisual markets

The first particularity of this market comes from the fact that it is just a small part of a larger group of markets that do not systematically fall into the framework for electronic communications, but into the media and audiovisual world.

Few NRAs have issued a market analysis on market 18. And for legal reasons of competency, most of them have just focused on some isolated platform-segmented parts of it. But, when reviewing the need for regulation of this market, the European Commission should take into account all other types of existing regulation and European policies in this field. The absence of any contribution on this market in the economic study published by Commission, as well as the very few numbers of market analysis finalised by NRAs demonstrate the serious difficulty of considering this market in an isolated manner.

Audiovisual markets are indeed mainly composed of a value chain dealing with media contents and advertising contents, where media companies act as the central actor. This is relevant when reviewing the need for regulation of market 18 as there is considerable buyer power (s. below). For some parts of the market such as terrestrial broadcasting, it can even be viewed as a retail market with content providers as powerful buyers, merely purchasing a transmission or distribution service as an end user (comparable to an end-user purchasing a leased line). What can be seen in practice where NRAs have analysed the market is that the sale of transmission capacity is regulated without considering whether other wholesale channels could be an alternative. This is not in line with the Regulatory Framework prescribing that wholesale measures have to be considered before taking any retail measures.

The market is strongly related to the highly competitive media markets where broadcasters and content providers have abundant choice in different transmission and distribution platforms. The analysis of market 18 cannot avoid starting from the analysis of the audiovisual market and cannot ignore the regulatory environment that is already imposed on it.

2.5.2 The market does not fulfil the three criteria

All recent intra-platform mergers in Europe have been approved by both European and national competent authorities based on the fact that competition between cable, DSL, satellite and terrestrial broadcasting was strongly increasing in the short- or mid-term. In view of emerging platforms such as xDSL broadcasting transmission (and others such as DVB-T) in addition to several existing platforms, the structure of the market is tending towards effective competition.

In that context, ETNO is wondering which competition problem the European Commission is trying to solve by suggesting an *ex ante* regulation on this part of the global audiovisual set of markets.

Also it is unclear what sense there would be to regulate *ex-ante* markets reduced to single platforms. Even for individual technical platforms, competition is able to develop independently from any *ex-ante* measure. Unlike mass-markets of telecommunications, transmission services are indeed markets where customers (private and public broadcasters) are few, and often bigger than the technical broadcaster. The countervailing buyer power of customers has even been recognized by some competition courts in countries where *ex-ante* regulation was however introduced for terrestrial broadcasting.

On terrestrial broadcasting services, these customers, especially when having the control of their frequencies, are indeed able to organise competition for their technical transmission service. And where some competition problems were found, competition courts were able, years before regulation, and when customers asked for it, to impose remedies such as ac-

cess offers. Unlike other telecommunication sectors, competition authorities might moreover have a longer and better knowledge of this market and the global media markets than NRAs, which often do not have the competence over the audiovisual side of the market.

Also on other platforms, there is no reason to maintain market 18 in the Annex for retail purposes as described above. Content providers can purchase retail transmission services on a market where IP-technology and digitalization leads to abundant availability of capacity.

Care should be taken that deletion of market 18 from the list is not contradicted by introducing a form of regulation of broadcasting transmission services on markets 12 or 11, which would be as inappropriate as in the current context of market 18, and even aggravated by the current treatment of the market.

Finally, at least technical terrestrial broadcasting services are services with no network externality: covering an area does give any advantage in covering another area. Persisting barriers to entry are hence very doubtful to exist *per se*, unless they are artificially introduced either by the customers, or by other regulatory provisions, in which case it seems strange to solve them by adding an additional contradictory regulatory provision rather than removing the first one.

As a result, the three criteria are not fulfilled on market 18 as defined in the draft Recommendation, even if it were limited to individual platforms. The market should be removed from the Recommendation.

2.5.3 What goals for ex-ante regulation of specific technical platforms?

For the eventuality that the Commission should nevertheless decide to keep the market in the list with regard to specific technical platforms, it should take into account that the market conditions of market 18 differ very much from member-state to member-state. In some countries the competition between platforms is fierce while in other countries the opposite is true.

If the market 18 was left to cover only wholesale markets of terrestrial broadcasting, where no bottleneck of access exist, the Commission should first clearly indicate the reasons for a specific regulation of this market, while at the same time it recognises the right for other actors in other platforms to merge. Then it should set the goals that *ex-ante* regulation wants to reach, ask NRAs to demonstrate that these goals are not already met by the market, and issue a guidance to NRAs to ensure that no other regulatory or legal provision (spectrum management, type of licence allocation, national DTT planning, allocation of digital dividend, etc.) prevents their achievement.

Endnotes

- 1 CEPS e-communications Task Force Report, "Last call for Lisbon, June 2006, p. 33 ff
- 2 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..
- 3 This benchmarking approach has been explicitly endorsed by the US Courts, cf. De Streef, "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. 16.
- 4 Martin Cave, Ulrich Stumpf and Tommaso Valletti attach great importance to this empirical analysis of entry in their report "A Review of certain markets included in the Commission's Recommendation on Relevant Markets subject to ex ante Regulation", cf. p. 6 f.
- 5 SEC(2006) 837, Commission staff working document on a draft Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services (second edition), p. 11
- 6 ETNO Reflection Document in reply to the European Commission call for input - Recommendation on relevant markets, RD 236, p. 17
- 7 Cave, Stumpf, Valetti, id., p. 1
- 8 DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, December 2005, p. 4 ff.
- 9 Cf. pt. 59 of Commission SMP-Guidelines, s. fn. 4 "[...] 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."
- 10 Cave, Stumpf, Valletti, p.30
- 11 Commission Staff working Document, p. 14; 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." 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.
- 12 Cave, Stumpf, Valletti, p.31
- 13 S. also below, discussion on market 4
- 14 Hogan & Hartson and Analysys, Preparing the next steps in regulation of electronic communications - A contribution to the review of the electronic communications regulatory framework, Final Report For the European Commission, p. 112
- 15 Hogan & Hartson and Analysys, p.113
- 16 S. also below, discussion on markets 5 and 6
- 17 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
- 18 Hogan & Hartson and Analysys, p.113
- 19 As one of many examples in Europe, Vodafone entered into the fixed market by cooperating with BT in the UK while BT is adding mobile elements via its 'Fusion' service.
- 20 ETNO Reflection Document on a draft ERG common position on remedies under the EU Regulatory Framework, RD 233
- 21 Serious doubts letter by the Commission on the German market 12 notification, SG-Greffe (2005) D/206128, and market 12 remedies notification, SG-Greffe (2006) D/204686
http://forum.europa.eu.int/Public/irc/info/ecctf/library?l=/germany/registeredsnotifications/de20050262/2005_206128_enpdf/_DE_1.0_&a=d;
- 22 The Commission explicitly recognises that the assessment of the three criteria may be impossible at an early stage of market development. ETNO encourages a similar acknowledgement concerning the assessment of market boundaries for new services.
- 23 Indepen report for the BRT, "Restoring European economic and social progress: Unleashing the potential of ICT", p. 9 f and 59 ff. Baake, Kamecke, Wey; "Efficient Regulation of Dynamic Telecommunications Markets and the New Regulatory Framework in Europe", Berlin 2005
- 24 See, e.g., speech by Viviane Reding The Review 2006 of EU Telecoms rules: strengthening competition and completing the internal market, Oct. 27, p. 8
- 25 Baake, Kamecke, Wey; "Efficient Regulation of Dynamic Telecommunications Markets and the New Regulatory Framework in Europe", Berlin 2005
- 26 ETNO has argued that highspeed-broadband services can form a newly emerging market in view of changing consumer preferences, cf. ETNO Reflection Document 236 in reply to the European Commission call for input - Recommendation on relevant markets, January 2006
- 27 An exception to this rule could be cases where specific features such as market size may lead to a different development. These specific cases should, however, not impact on the Recommendation as a whole.
- 28 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
- 29 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 Streef "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..

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

31 End customers easily switch to mobile access without any additional costs which is reflected in the raising number of mobile-only households across EU-member states.

32 SEC(2006) 837, Commission staff working document on a draft Commission Recommendation, p. 33

33 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.

34 SEC(2006) 837, Commission staff working document on a draft Commission Recommendation, p. 27

35 S. above, fn. 13

36 M. Cave (Cave, Stumpf, Valetti, p. 76 f) has understandable difficulties to give a clear-cut assessment on this issue.

37 CEPS e-communications Task Force Report, "Last call for Lisbon, June 2006, p. 13 ff.; Oldale, Padilla (2004); from state monopoly to the "investment ladder": competition policy and the NRF, p. 72

38 ERG (03) 33rev2, Common Position, p. 15; Cf. 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>

39 ETNO's comments on the review Communication comment in more detail on the Commission observations on regulation and investment; on the interaction between investment in new networks and regulation see inter alia 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

40 Cave, Stumpf, Valetti, p. 31

41 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

42 Figures reported by ETNO Members in market analysis on market 14

43 Inter alia in the Netherlands, Austria, Finland, Hungary, Czech Republic, Slovenia, Sweden

44 Cave, Stumpf, Valetti, discussion of leased lines on p. 76 - 77

45 This approach has been taken, for example, by Ofcom in the UK and Opta in the Netherlands

46 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

47 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;

48 For example, 0,2% of IC requests to Deutsche Telekom concern 'double transit' services (source: Deutsche Telekom)

49 For example in Portugal, Austria (s. below fn 49) as well as, partly, in the UK

50 Decision of Commission in case AT/2004/ 0090: Transit services in the public fixed telephony network in Austria

51 COM(2006) 163 Final, Communication from the Commission regarding the outcome of the Review of the Scope of Universal Service in accordance with Article 15(2) of Directive 2002/22/EC

52 Cf. for instance European Regulators Group and Independent Regulators Group Response to the call for input On the forthcoming review of the EU regulatory Framework for electronic communications and services Including review of the Recommendation on relevant markets, p. 21 on oligopolistic markets

53 Notification by the Polish NRA UKE, withdrawn on May 22, s. original notification at http://www.uke.gov.pl/uke/index.jsp?place=Lead08&news_cat_id=161&news_id=1040&layout=1&page=text

54 SEC 2006(837) Commission Staff working Document - Consultation on a draft Recommendation, p. 41

55 Cf. Cave, Stumpf, Valetti, p. 81

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 Cave, Sumpf, Valetti, p. 91

58 Cave, Sumpf, Valetti, p. 92

59 A need for regulation was identified in Slovenia, Spain, and Ireland (NRA decision on market 15 in Ireland was overturned by the Appeals Court)

60 An exception constitutes the French NRA who adopted regulation of sms termination, notification available at http://forum.europa.eu.int/Public/irc/info/ecctf/library?l=/france/registerednotifications/fr20060413/march_16bis_sms&vm=detailed&sb=Title

61 S. Finnish Notification on market 16 with EC comments, available at <http://forum.europa.eu.int/Public/irc/info/ecctf/library?l=/suomifinland/registerednotifications/fi20060403&vm=detailed&sb=Title>

62 S. above, fn. 59

63 For an overview, cf. Cullen international at <http://www.cullen-international.be/documents/cullen/prindex.cfm>