



## **Cable Europe's response to the Commission's consultation on the Recommendation on relevant markets and services**

8 January 2013

### **Introduction**

Cable Europe wishes to support the Commission's work in updating the Recommendation on Relevant Markets and welcomes this opportunity to participate in this call for input as part of a pre-public consultation process.

Cable Europe wishes to express its desire to further contribute once the Commission has formed an opinion on possible options for reshaping the way markets are chosen or where the Commission is in a position to indicate its views on additions or withdrawals to the list of Relevant Markets. Cable Europe expects that the consultation procedure will follow that used in the previous revision of the Recommendation on Relevant Markets where the initial call for input (in 2005 as part of a call for input on the proposed reform of the Regulatory Framework) was succeeded by a more detailed consultation (in 2006) once an actual proposal was ready to be put to stakeholders. This is especially true where there is a change to the three criteria test or any addition or removal of the markets contained in the list of relevant markets.

**Cable Europe calls for an informed public consultation once the Commission has formed an actual proposal for the Recommendation on Relevant Markets.**

In the current step in the consultation process, Cable Europe wishes to concentrate its response on its main areas of interest and in terms of markets, it intends to comment principally in the context of market 4 - wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location; and market 5 - wholesale broadband access (non-physical or virtual network access including 'bit-stream' access at a fixed location).

In addition, comments on the former market 18 dealing with broadcast transmission are included as well as comments in areas such as the treatment of duct infrastructure and the geographic scope of markets.

As a broad theme, Cable Europe wishes to highlight its fundamental belief that the markets in which its members operate have become more and more competitive with genuinely positive outcomes for consumers being the norm. Where cable networks have been able to compete with DSL operators without regulation constraining the scope for competition, then consumers do even better. Few regulators have had the courage to restrict regulation in broadband access markets and those who have, have been tentative in the extent to which they were willing to restrict regulation. For instance, in the UK, Ofcom chose to geographically segment the extent of Market 5 because the depth of competition was compelling in certain areas. However, with national retail pricing by the



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incumbent, the logic of geographically segmenting the market (and thereby limiting pricing freedom) is not obvious. Price competition would spill-over from the areas with multiple network infrastructures into those areas with only one and the benefits of competition coming from cable can be spread over an even wider populous.

**Cable Europe believes that national markets remain the appropriate scope of market analysis.**

The Commission itself has recognised the increasing scope of competition between cable and other network operators and its call for more relaxed pricing regime in an NGA context could, given that certain prerequisites are met, be appropriate in our view. However, the competition that has developed has done so on the basis of interventions on the existing defined markets. Cable Europe believes that the current practice by NRAs indicates that the evidence supports the continuation of the current Market 4 and Market 5 classifications.

To date, 27 of 27 NRAs have identified SMP in market 4 whilst 21 of 27 have identified SMP in Market 5 (with a partial SMP finding in the 5 of the 6 other markets). As examined in more details below, this in itself shows that these markets continue to evolve differently and a clear distinction should be maintained.

**Competition in Relevant Markets where cable exists is increasing. The existing Markets 4 and 5 remain appropriate and should not be changed. Segmenting or restricting markets is likely to undermine competition.**

Cable Europe wishes to see stability maintained in the relevant market selection process and believes that the three criteria test has performed well over time and has been verified by practice. Any change to the three criteria test would be a significant change to the functioning of the overall Framework and Cable Europe believes it would not be appropriate outside a broader legislative review of the Framework.

**Cable Europe believes that the three criteria test as a basis to select relevant markets should not be changed or adjusted.**

Finally, Cable Europe would plead for a stronger internal market perspective and notes with concern the willingness of NRAs to stretch their interpretation of the regulatory process in order to impose obligations (for either ex-Market 18 and especially Market 5) when it is expedient rather than necessary. Cable Europe has noted attempts by NRAs to use unorthodox market analyses to shoehorn regulation onto cable networks, especially concerning broadband where no cable operator has been declared SMP on any broadband market, yet regulated access is being imposed nonetheless.

Cable Europe believes that this form of regulatory creep must be resisted and a more rigorous adherence to the Relevant Markets maintained. Indeed unless this happens, the Relevant Markets as a mechanism to encourage a harmonised approach to regulation across the single market will be undermined. The



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imposition of wholesale broadband remedies of any hue, including physical access, on cable networks is especially counterproductive as it risks undermining and impeding the competitive capacity of cable operators to bring new products to the market. This competitive dynamic brings a virtuous circle of investment driving competition driving investment, all to the very great benefit of consumers. Cable Europe can see no instance where regulated access to cable networks for bitstream or indeed more rudimentary forms of access can be justified in Europe and calls on the Commission to give strong guidance in the forthcoming revision.

Cable Europe would like to see stronger mechanisms put in place to ensure that once a market is properly identified by the Commission NRAs will not seek to circumvent the definitions in order to inappropriately regulate cable operators.

**The exclusion of cable based bitstream access should be made more explicit in the revised Recommendation. Consistency of application should be maintained across the EU to ensure a single market approach to enable investments to be made in a clear regulatory environment.**



**Question 1: What are the technological developments in the electronic communications sector at the EU level as of 2007 that have an influence on how the markets should be defined in the revised Recommendation from an *ex ante* perspective?**

There are several technical evolutions which have had an impact on the market since 2007.

The biggest changes have occurred in Europe's cable networks. DOCSIS 3.0 certifications were first issued by Eurocablelabs<sup>1</sup> in 2008. At the end of 2010 about 24m households across Europe subscribed to broadband cable internet. A total of 112m households are in technical footprint of European cable operators and can opt to subscribe to the TV, broadband and telephony packages offered by cable operators. This technical reach equals to 50% of households in the European Union<sup>2</sup>. Also, the implementation of DOCSIS 3.0 is currently in full swing across Europe and is proceeding much faster than cable operators expected just a year ago. By the end of 2013, almost all European cable networks will be fully set to the DOCSIS 3.0 standard, enabling their homes to get access to 100-200 Mbps bandwidth and more.

It is clear that these network evolutions will continue. While an important step has been made with the roll-out of DOCSIS 3.0, cable operators will have to invest further, thus responding to their customers' increasing need for additional bandwidth capacity and pressure from competitors on the broadband market. Investment by cable operators has been the catalyst for investment by other operators – notably incumbents and that cycle of investment is set to continue and even accelerate under Mrs. Kroes policy proposal on costing with every expectation that the incumbents within the cable footprint will invest in order to redouble their efforts to achieve equivalent upgrades to their networks. It is the competitive investment of cable networks that is driving the infrastructure based competition dynamic in Europe.

From a network perspective, vDSL was virtually unused in 2007 with one or two exceptions whereas many countries have more than 50% coverage and some have close to 100% coverage today. The reach of FTTH networks has also expanded to reach almost 11% of households in 2011<sup>3</sup>.

These network evolutions are of course driven by changes in retail demand, changes where the continued growth of digitization and content interactivity, the arrival of smartphones, tablets and mobile computing has coincided with mobile evolution facilitated by spectrum availability made possible by analogue switch off of terrestrial broadcasting.

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<sup>1</sup>[http://www.cableeurope.eu/uploads/MediaRoom/documents/pub-56\\_en-070907\\_eurocablelabs\\_first\\_docsis\\_3-0\[1\].pdf](http://www.cableeurope.eu/uploads/MediaRoom/documents/pub-56_en-070907_eurocablelabs_first_docsis_3-0[1].pdf)

<sup>2</sup> Broadband on Demand – Cable's 2020 Vision – Solon Consulting - March 2011

<sup>3</sup><https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/BCE%202011%20Research%20Report%20Final%20-%20Format%20No%20Image%2020121001.pdf>



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The development of LTE has created a new broadband platform which can compete with the existing platforms.

From a services perspective, Over The Top (OTT) operators have revolutionised the delivery of content, whether that content be catch-up TV, Hulu, YouTube or another; the dynamisms in this area since 2007 are notable. Traditional telephony (and SMS) have been revolutionised since the expansion of OTT service and the consumption of content from broadcasting to web browsing have been changed forever. Even the way traditional print content is now delivered requires access to the devices and connectivity that did not exist at the time of the last Recommendation on Relevant Markets Review.

For such progress to continue and to be sustainable, regulatory stability and consistency is an absolute pre-requisite and any changes in the markets defined should be made with such considerations in mind.

Cable networks are participating in this evolution by not only delivering the kind of interactive content but also by making the network speeds available and by introducing new and exciting home-zone retail offerings that sit on the nexus of fixed and mobile network evolutions.

Clearly there have been huge changes in the 6 years since the Commission last consulted stakeholders on the markets which were proposed for ex ante regulation across Europe. However, the impact of these changes on the economic operation of these markets has been less profound. In fact, the incumbents continue to be in a SMP position in most member states in markets 4 and 5; in Market 4, all regulators found SMP while in the related but different Market 5, 21 out of 27 NRA found full SMP with 6 NRAs finding (at least) partial competition. The competitive pressure being exerted by cable networks is being recognised via a call for a lightening of the remedies imposed<sup>4</sup>. However, the on-going regulatory interventions have not led to self-sustaining competition across any of these markets and this is unlikely to change materially over the lifetime of the next Recommendation. Continued regulation of the SMP operators remains appropriate and it is important that these markets continue to be selected for ex ante regulation.

Clearly, these markets are different with different scope for competition and we discuss the detail of these differences in the appropriate questions below.

**Question 2: What are the changes in structure and functioning of the relevant markets (e.g. supply and demand side developments, bundles, convergence, geographic scope), which should be reflected in the revised Recommendation from an ex ante perspective?**

Following from the market changes both technical and economic described above, the functioning and structure of relevant markets has in some cases evolved.

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<sup>4</sup> [http://europa.eu/rapid/press-release\\_MEMO-12-554\\_en.htm](http://europa.eu/rapid/press-release_MEMO-12-554_en.htm)



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## *The role of mobile services*

Many more consumers take mobile broadband subscription than in the past though often as a complement to fixed services, with many more consumers consuming products as part of a bundle of service products now than in 2007.

However, the relevance of these changing factors depends crucially on whether they need to be reflected in any way in the revised Recommendation on Relevant Markets or whether these changes, while important, do not impact in a way that is relevant for regulation.

Cable Europe believes that the trends observed suggest that the broadband and broadcasting markets in Europe have become more and more competitive due to technological as well as economic market evolutions.

It is the deepening of expansion of competition which is the most critical factor since the last revision to the Recommendation on Relevant Markets. The drivers of competition have been many, it is clear that often consumers are not only indifferent to whether the service received is over a cable or fixed network (with Wifi) or over a mobile network, but often they are even unaware how content is being delivered to their device.

## *The role of bundle products*

Consumer propositions have also changed to reflect some aspects of this new technological reality and bundling has become a more prominent feature in markets due to its effectiveness in allowing the creation of better and more tailored products which lower costs for both the supplier and consumers.

However, there is little to no evidence of pure bundling (where the individual components to a bundle cease to be offered separately) in communication markets. It is clear that the transactional costs associated with constructing a bundle by using the individual elements is very limited. From a network operator's perspective, bundling two or more components into one product may drive certain savings particularly in distribution and sales in addition to the ability to improve the quality of the product leading to reduce churn (and thereby reduce customer acquisition costs).

Consumers will opt for a bundle if there are significant transactional costs and therefore savings to be made from a single transaction. In this case, consumers may prefer to purchase the services as a bundle and from a single supplier. However, it should be noted that behind the single supplier several operators may provide the necessary wholesale inputs to construct the retail bundle. The bundle may become the relevant product market *in extremis* but only once certain conditions exist. Those conditions critically require that consumers will not unpick the bundle if there is a price rise in the overall bundle. Normally, the withdrawal of the individual components of a bundle would be required for this condition to take effect.

Not one regulator in the EU in the period since the last review has identified a bundled retail market which requires a corresponding wholesale input for supply.



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The evidence that has been adduced thus far (over the last 10 years) is that in the presence of a small but significant non-transitory increase in price, a sufficient number of customers would “unpick” the bundle and obtain the service elements of the bundle separately.

**Therefore the evidence shows that the service elements constitute the relevant markets in their own right and not a bundle.**

## *Geographic scope of markets*

With regard to geographic segmentation of markets, the competitive pressures introduced by cable networks and by other alternative network operators should be taken into account normally in a national context.

An approach that considers a sub-national market analysis risks missing some broader effects of geographic market analysis. Wholesale access products are normally delivered on a geographically averaged price which allows operators to deliver products across the geography at the same price to end users. According to the memorandum accompanying the Recommendation on relevant markets, “The practice of the Commission is that retail price variations are normally indicative of different geographic markets”. Since there is no evidence for geographically differentiated prices, according to the Commission there is no indication for different geographic markets. In fact, pushing for more geographically segmented markets would likely lead to differentiated prices.

Cable Europe does not want to see an extensive use of geographically segmented markets to isolate competitive and non-competitive areas. In that respect it must be born in mind that by setting a national market and keeping an obligation to provide average wholesale access prices on incumbents, NRAs would be simultaneously achieving two pro-competitive effects: avoiding geographically segmented predatory strategies by the incumbent and ensuring that even locally limited competitive pressures brought about by cable operators and other altnets are uniformly transmitted across the whole market thereby giving scope in the market for the benefits of competition to be available for all and for regulation to be removed.

Competition that exists or potentially exists in more than 50% of the market is likely to move to 100% of the market thereby bringing the benefits of competition to the rural consumers who are unlikely to have offers from alternative operators. Therefore if urban based competition drives prices down then rural based consumers will still enjoy the benefits of that competition. If price de-averaging is allowed (or worse, encouraged via segmented market analysis) and markets become geographically segmented as a result, then the effects of urban based competition will not be felt in rural areas.

In the unlikely event that the conditions or competition are so different that NRAs feel compelled to adjust their interventions, then a range of options open up to that NRA. Cable Europe believes that the best option will always be to maintain a broad geographic market definition and to adjust the remedies imposed. The conditions of competition in a particular area can change quickly either because the NRA initially made an error or because the market evolved faster than



expected, remedies will need to be able to adapt to those needs in a speedy manner. The process of geographically segmenting the market and making separate notifications is a lengthy procedure and does not lend itself to reacting quickly to changed circumstances. If an NRA chooses to vary remedies within a broader geographic market they retain the ability to change such remedies rapidly when appropriate. Consequently, a regulatory regime which segments markets geographically runs a far greater risk of regulatory failure than one which chooses to adjust remedies within a broadly defined geographic market.

Cable Europe is also concerned that the notion of geographic market definitions, especially when applied in an *ex ante* context, that can shift backwards and forwards across physical territories, tends to jeopardize the effective workings of the EU Regulatory Framework when viewed from a single market perspective. Administratively, the number of notifications would increase with greater uncertainty and less harmonisation for operators.

Finally, it is not necessary to go into all the different reasons why many Member States have expressed and continue to express a desire both for social and economic reasons, to maintain a balance to spatial aspects within their State. It is sufficient to note the provisions contained within the Universal Service Directive which gives discretion to NRAs to impose nationally averaged prices to ensure a social divide that does not emerge for basic eCommunications services. The administrative process itself of geographically segmenting markets and making separate notifications is a lengthy and cumbersome procedure.

**Consequently, Cable Europe believes that a regulatory regime which segments markets geographically runs a far greater risk of regulatory failure.**

**Question 3: Can you identify any market bottlenecks which in your view cannot be addressed by *ex-ante* regulation via a revision of the Recommendation alone? How in your view can such market bottlenecks be addressed?**

Cable Europe is very concerned with the suggestion contained in this question that 'relevant markets' might be selected on the basis of being 'bottlenecks'.

In a careful review of the existing Regulatory Framework, Cable Europe can find the word 'bottleneck' used only once and that instance is in the Recommendation on NGA in a colloquial reference to the use of Article 12. The Recommendation on Relevant Markets is the central element of a market review process at the centre of the overall Regulatory Framework. The use of a 'bottleneck' approach to the selection of areas/services/network for regulation suggests that a departure from this aspect of the Regulatory Framework is being considered.

The use of a "bottleneck approach" would signal the end of the "three criteria test" and would signal strongly that the movement from *ex ante* regulation to the field of "normal anti-trust" law is ended. Furthermore such a "bottleneck approach" risk being used to promote "symmetric regulation" where all infrastructure companies would be regulated even without having SMP – just for the mere fact that they



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have their own infrastructure. Such an approach would have a very negative impact on business sentiment in the sector and would likely undermine investor confidence.

Cable Europe therefore feels very strongly that the use of Recommendations to rewrite the legislative basis for economic regulation of eCommunication markets is inappropriate.

Cable Europe feels that if such a 'bottleneck' approach is under consideration for selecting areas that might be regulated that the Commission would have a very strong obligation to consult again with all stakeholders once the Commission has formed a view on how it would like to use such a 'bottleneck' approach.

**Question 4: In your opinion, is the three criteria test, as defined in the Recommendation, an appropriate instrument in defining the relevant markets susceptible to *ex ante* regulation or would alternative means to identify relevant markets be more suitable?**

Cable Europe believes that the three criteria test constitutes a sound economic framework to assess whether *ex ante* regulation is potentially justified in a given market.

Cable Europe also believes that competitive market dynamics will deliver the best outcomes for the industry and for consumer and to that end, Cable Europe supports a transition of sector specific regulation to an *ex post* general competition law based market intervention where appropriate. The three criteria test is an important aspect of keeping that goal in sight and making that transition effectively.

**Question 5: Should, in your view, criteria be added or removed from the list or should the criteria be formulated in a different manner? Should additional guidance be given to the existing criteria?**

No. Cable Europe believes that stability and legal certainty are the most critical aspects to bear in mind in any review such as this.

**The three criteria test should be maintained without change.**

Cable Europe wishes to repeat, again, its belief that a fundamental change to the functioning of the Framework would result from a significant change to the three criteria test or from a significant change to the list of markets. Any such change could have a material impact on the way in which the sector operates – including, but not limited to, investment incentives – and should therefore be consulted with stakeholders once the parameters of such proposed changes are known.

**Question 6: How, in your view, can legal certainty be best ensured in identifying the markets susceptible to *ex ante* regulation?**



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Cable Europe believes that legal certainty can be best maintained by indicating any changes well in advance and for substantial changes to the Recommendation on Relevant Markets to come on the back of strong evidence of changes in the outcomes of NRA market reviews.

The current process for selecting markets is well understood. The criteria used for selecting markets have been validated and proven over time. Therefore, there is no need to change the three criteria test.

By sticking closely to the existing methodology and making decisions on markets which are backed by evidence in the majority of Member States legal certainty for market operators can be maintained. Legal certainty should be promoted by stronger and clearer guidance of the commission and strict adherence to the three criteria test by NRAs and the Commission.

It is important that stakeholders have due notice of any proposed changes and that stakeholders will have an opportunity to comment on those proposed changes.

**To that end, Cable Europe believes that legal certainty will be undermined if there is no further consultation once specific proposals for the Recommendation on relevant markets have been selected.**

Another aspect is the need for operators in the market to feel confidence that once a market is properly identified that NRAs will not seek to effectively sidestep the market definition and SMP process to impose regulation beyond the market.

**Cable Europe would like to see stronger mechanisms put in place to ensure that once a market is properly identified by the Commission, NRAs will not seek to circumvent the definitions and the SMP analysis in order to inappropriately regulate cable operators.**

Before deciding whether or not to intervene on a market the sequence of question and answers ought to be, is there SMP at the retail level and if the answer is yes then can the NRA give access at the highest point (physical access or LLU) in the supply chain and see if that resolves the SMP. If that does not resolve the SMP then the NRA must grant access to wholesale inputs further down the supply chain (bitstream) and then on to resale.

In the explanatory memorandum to the Recommendation on Relevant Markets the Commission highlights this approach as being the modified green-field approach<sup>5</sup>.

<sup>5</sup> *Certain of the markets identified in the Recommendation are interrelated and for NRAs there is a logical sequence for analysing these markets. In general, the market to be analysed first is the one that is most upstream in the vertical supply chain. Taking into account the ex ante regulation imposed on that market (if any), an assessment should be made as to whether there is still SMP on a forward-looking basis on the related downstream market(s). This methodology has become known as the “modified greenfield approach”. Thus the NRA should work its way along the vertical supply chain until it reaches the stage of the retail market(s). A downstream market should only be subject to direct regulation if competition on that market still exhibits SMP in the presence of wholesale regulation on the related upstream market(s). For example, with regard to wholesale broadband access, it is recommended that*



If a remedy exists that resolves the SMP at the retail level, or as soon as a remedy is found on the value chain that resolves the SMP, then the regulator should stop and not make further interventions. Regulation then ceases to be justified (or proportionate). However and again by reference to the modified greenfield approach, it should be noted that the actual broadband SMP operator (the DSL incumbent) has had an access obligation in every instance where some form of cable broadband access has been imposed. An appropriately conducted modified greenfield approach should have stopped once the existence of this alternate access mechanism was taken into account.

Article 8(4) of the Access Directive, as amended, further requires that the obligations imposed on SMP operators be based on the nature of the problem identified, proportionate and justified in the light of the regulatory objectives laid down in Article 8 of the Framework Directive. Article 8 of the Framework Directive then goes on to set out a series of objectives which are inter alia effective competition, promote the internal market, development of the internal market, promote the interest of citizens. It is clear that the remedies proposed (for broadband access on cable) are not based on the problem identified since in no case was the cable operator found to have SMP on any broadband market<sup>6</sup>.

Cable Europe perceives the threat of ad hoc approaches to the regulation of cable networks as evident in certain cases to date. This kind of inappropriate regulation creates legal uncertainty and undermines confidence for the firms involved.

Cable Europe wants to see the Commission indicate a much stronger position on the inappropriateness of regulation on non-SMP networks in order to maintain a single market approach that allows investors to make their investments and plan their business strategies with confidence and, ultimately, to foster the pro-competitive outcomes that have demonstrably delivered substantial benefits to consumers in cable areas.

**Question 7: In your opinion, should the scope of any relevant market(s) identified in the Recommendation be changed? If yes, please explain why, referring to the relevant market(s) concerned.**

Cable Europe does not believe that the scope for any currently existing relevant market should be changed.

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*NRA's first analyse the market for local loop unbundling. Taking into account regulation imposed on that market, the market for wholesale broadband access should then be analysed. If that market continues to exhibit SMP on a forward looking basis despite the presence of LLU regulation (unless the NRA finds that the market no longer fulfils the three-criteria test and excludes it from regulation on that basis), appropriate regulation on the wholesale broadband access market should be imposed.*

<sup>6</sup> In case BE/2011/1228, resale broadband remedies were imposed as an ancillary remedy to a broadcast transmission obligation in an ex-market 18 finding of SMP while in case DK/2008/0862 the Commission comments considered that the cross ownership of the DSL and cable operators justified the access obligation under Article 8 of the Framework directive.



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## Market 4

Current practice is the best indicator of future needs. While certain NRAs have indeed sought to broaden the scope of market 4 to include cable, this invariably invokes negative comments from the European Commission. For instance in the case (PT/2008/0850) where the Portuguese regulator sought to include cable in the defined market 4, the Commission in its decision noted the physical constraints on cable unbundling and the improbability of an economic constraint being imposed on physical access in market 4 coming from cable networks. In that decision, the Commission is very clear that had the market power assessment been impacted by that decision to include cable in the market, they would have moved against the decision:

*For these reasons, the Commission is of the view that cable should not be included in the market definition as its inclusion leads to an overstatement of the competitive constraints on LLU. However, as ANACOM has carried out the SMP analysis both with and without the inclusion of cable, and since the regulatory outcome is not affected, the Commission does not wish to challenge ANACOM's finding this time, but strongly urges ANACOM not to include cable in market 4 in the final measure.<sup>7</sup>*

These comments continued to be reiterated today whenever an NRA suggests inclusion.

Cable Europe notes that 27 out of 27 NRAs have found SMP in market 4. Even though two NRAs have, in the remedies imposed, indicated that a virtual product (VULA – virtual unbundled local access) would be an equivalent to/substitute for, physically unbundled copper loops. Such an analysis does not have any lasting impact on the scope of the existing market.

Both NRAs who used VULA as a remedy in market 4, the UK regulator Ofcom (UK/2010/1064) and the Austrian regulator RTR (AT/2010/1084) had previously opted for geographically segmented markets in Market 5 (bitstream access) leaving them with no mandated NGA access product in certain areas if a rapid migration to vDSL occurred based on existing unbundled local loop access products. It is worth noting that, in the absence of geographic market segmentation, a more orthodox approach to remedy allocation could have been pursued.

However, the Commission in its UK decision makes it very clear that a business as usual approach ought to be established as soon as possible and that this technological change does not impact on the functioning of the market.

*Accordingly, the VULA remedy should be replaced by fibre unbundling as soon as it is technically and economically feasible or should possibly continue to be required in addition to full fibre unbundling.*

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<sup>7</sup> <https://circabc.europa.eu/sd/d/7a3e8aed-3633-45ba-9b96-a1ca182d2ee3/PT-2008-0850-0851>



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In relation to the position of cable in relation to Market 4 and any possible impact coming from either a direct or indirect constraint in this market, the Commission also makes its view clear that nothing has changed in terms of the product scope of market 4:

*For these reasons, the Commission takes the view that cable should not be included in the market definition, as its inclusion would lead to overstatement of the competitive constraints on LLU.*

## *Market 5*

In relation to market 5, one NRA (NITA in Denmark) has imposed remedies on cable networks though importantly has not put cable in the defined market nor designated a cable network as SMP<sup>8</sup>. NRAs have concluded that the market definition of Market 5 is limited to DSL network providers<sup>9</sup> even if remedies have slipped outside the defined market boundaries. It is worth noting that though the relatively recent Belgian case<sup>10</sup> is being challenged, the availability of cable WBA access remedies in Denmark for almost two years has not been met with one request for access and no operator is taking access today.

## *Network speeds*

There is no evidence of any break in the chain of substitution in terms of network speeds. Broadband services provided over copper and NGA networks are viewed as substitutes by end-users.

Even if the two networks may not be directly substitutable from the perspective of any user, they may be part of the same market if they are linked by a chain of substitution. For example, there may be a vDSL network that provides upload and download speeds that lie between those offered by the FTTH network and those available via aDSL. Even though nobody would consider the aDSL connection to be a substitute for a FTTH connection, there may be some customers who would move from FTTH to vDSL in response to an increase in the price of FTTH connectivity above the competitive level, and there may equally be customers who would consider aDSL to be an alternative to vDSL and would switch from one to the other in response to a price increase. In this case, all three types of networks might be part of the same market.

Therefore, Cable Europe sees no grounds for any change to the scope of any market in which it has an interest.

## **Question 8: If the answer to the previous question is yes, please specify the qualitative and quantitative impact of such changed scope on**

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<sup>8</sup> in case DK/2008/0862 the Commission comments considered that the cross ownership of the DSL and cable operators justified the access obligation under Article 8 of the Framework directive.

<sup>9</sup> Or even if more broadly defined that such a definition would not impact the SMP designation. See for example BNetzA's approach in Germany.

<sup>10</sup> In case BE/2011/1228, resale broadband remedies were imposed as an ancillary remedy to a broadcast transmission obligation in an ex-market 18 finding of SMP.



**consumers (users), competition, and development of the internal market. Please provide separate reasoning for each market subject to a new scope.**

N/A

**Question 9: On the basis of the three criteria test carried out at EU level, should any of the markets listed in the Recommendation be removed from the list in the revised Recommendation? If yes, please provide comprehensive reasoning thereof.**

No.

Cable Europe does not believe that any market should be removed from the list of relevant market though it wishes to highlight its fundamental belief that the markets in which its members operate has become more and more competitive with genuinely positive outcomes for consumers being the norm.

**Question 10: If the answer to the previous question is yes, please specify the qualitative and quantitative impact of such removal of markets on consumers (users), competition, and development of the internal market. Please provide separate reasoning for each market you propose to delete from the list.**

N/A

**Question 11: On the basis of the three criteria test carried out at EU level, should any of the markets regulated by NRAs on the basis of national circumstances (such as SMS termination or broadcasting transmission services) be added to the list in the revised Recommendation from an *ex ante* perspective? If yes, please provide comprehensive reasoning thereof.**

No.

In relation to the specifically mentioned broadcasting transmission market (ex-market 18) Cable Europe would make the following observations about the functioning of the market.

At the retail level, the market is characterised by the delivery of radio and television broadcasting and includes free-to-air broadcasting and pay broadcasting, as well as pay platforms and also the delivery or transmission of interactive services.

Radio and television broadcasting including free-to-air broadcasting is an example of a two-sided market where delivery platforms bring together users and providers of content, and in many cases, advertisers too.

As recognised by the Commission, households wish to see (or listen to) content and free-to-air broadcasters produce content but use advertising income and/or state contribution to cover their costs. Advertisers, in turn, seek to reach households. For advertisers a prerequisite, in a free-to-air broadcaster, is that they reach the largest possible number of households. Thus, free-to-air broadcasters



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(which are not vertically integrated) are driven by the commercial need to satisfy the demands of advertisers to sign transmission agreements with any transmission platform that has been chosen by even a small (but significant) number of households. Failure to do this will result in an automatic fall in advertising revenue. In relation to vertically integrated free-to-air broadcasters, their incentives may differ as they may seek to ensure the wide distribution of their own content on their proprietary platforms first, before distributing their content more widely to other platforms.

There is a choice of different platforms available and end-users, depending on their particular circumstance, may receive radio and television broadcasting via terrestrial, cable, satellite or DSL networks.

There is continued evidence of greater platform competition as the transition from analogue to digital delivery platforms occurs. There are few capacity constraints on any given platform. Member States typically have 3-4 competing platforms (terrestrial, satellite, cable and telecom-based).

In addition, the sufficiency of competition law must be interpreted on a broader basis in line with the principle of a modified greenfield approach since the problem of obtaining access to any dominant platform (be they terrestrial or cable, depending on the member state concerned) can be dealt with under provisions outside the Article 7 SMP process. Even without invoking competition law rules, Must Carry Rules have been invoked in some Member States to ensure that broadcasters have access to transmission systems to deliver their content.

Compared to the situation in 2007, the problem of obtaining access to platforms is altogether different with digitisation. Unlike analogue systems there is significantly more capacity on digital systems. Excess capacity and multiple operators have been shown to result in competitive dynamic as these platforms (telecom networks in addition to terrestrial, cable and satellite) seek to obtain as large as possible a share of customers as they migrate from analogue to digital services.

And where there are access problems relating to public broadcast channels or content of public interest, these can be dealt with via other legal measures such as must carry or under competition law. Furthermore, in certain jurisdictions, public service content is "must have" and therefore there are incentives on the platforms to carry the public service content. What has emerged in these jurisdictions is a reliance on the "must offer" regime and other regulatory tools to ensure wide availability of public service content.

Cable Europe is not aware of any negative impacts on consumers in Europe which have resulted from the withdrawal of the broadcasting transmission market. Its re-inclusion in the list of relevant markets would be an unfounded and retrograde step.

Therefore the basis on which a broadcast transmission market was rejected in 2007 remains valid today and the analysis conducted by the Commission at that time has been shown to be robust.



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It is of concern that selected countries continue to impose obligation on broadcast transmission in selected instances where the basis is tenuous at best.

**Cable Europe believes that the European Commission needs to take a stronger position on the exceptional interventions which appear to be driven by an agenda other than concern for competition and consumer welfare.**

**Question 12: If the answer to the previous question is yes, please specify the qualitative and quantitative impact of adding those market(s) on consumers (users), competition, and development of the internal market. Please provide separate reasoning on the impacts for each market you propose to add to the list.**

N/A

**Question 13: On the basis of the three criteria test carried out at EU level, can any other markets be identified that should be added to the list in the revised Recommendation, from an *ex ante* perspective? If yes, please provide comprehensive reasoning thereof.**

No.

**Question 14: If the answer to the previous question is yes, please specify the qualitative and quantitative impact of the relevant market(s) you propose to add on consumers (users), competition, and development of the internal market. Please provide separate reasoning on the impacts for each market you propose to add to the list.**

N/A

**Question 15: On the basis of the three criteria test carried out at EU level, can any transnational market(s) be identified in the revised Recommendation, from an *ex ante* perspective? If yes, please provide comprehensive reasoning thereof.**

N/A

**Question 16: If the answer to the previous question is yes, please specify the qualitative and quantitative impact of the relevant market(s) you propose to introduce on consumers (users), competition, and development of the internal market. Please, provide separate reasoning on the impacts for each market you propose to introduce.**

N/A

**Any other comments:**

Cable Europe would like to make some observations about a possible ducts market. Ducts are not in any of the markets in the current recommendation. It is



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that it was not the Commission's intention in the previous Recommendation on Relevant Market to suggest that ducts are a subset of any defined market even if duct access could have an important role to play in facilitating access competition as a remedy.

It could be that ducts or passive infrastructures themselves may be part of a much broader market for physical access which may include other duct access such as energy water, gas, sewerage and even cable TV ducts. In this context, ducts would not satisfy the three criteria.

The text of the existing explanatory memorandum makes clear that ducts is an ancillary remedy to the primary physical access remedy.

*Where the metallic local loop is shortened and where the access seeker has no infrastructure of its own to replicate the former (longer) loop and where no alternative infrastructure is likely to become available to allow such replication then access to either ducts or alternative network elements must be considered in order to make access to the local loop meaningful. In this context, access to ducts could be an important part of any remedy imposed to address problems associated with physical network access.*

Ducts are therefore an associated facility on which appropriate access obligations can exceptionally be imposed where SMP is found in the underlying [physical access] market. This is clear in the text of the explanatory memorandum and such clarity should be maintained in the next iteration of that document.

Finally, Cable Europe notes that ducts and other passive access remedies do not fall within the scope of the definition of an Electronic Communication Network or Service and to suggest that 'ducts' might constitute a market in themselves is contrary to the scope of the regulatory framework. In any event, where appropriate, such access is adequately dealt with elsewhere in the Framework, notably under Article 12(1) of the Framework Directive as revised.

In the event that the Commission chooses to select any new markets for inclusion in the list of Relevant Markets, Cable Europe expects to have the opportunity to submit its views, opinions and comments and to participate in a full and informed public consultation at the appropriate time.