



Cable Europe Comments on the Draft Revision of the Recommendation on Relevant Markets

4 March 2014

Cable Europe welcomes the opportunity to submit further comments on the Commission's work in progress on updating the Recommendation on Relevant Markets.

Cable Europe notes that in general the markets in which its members operate have become more and more competitive, with genuinely positive outcomes for consumers being the norm. To a large extent this high level perspective seems to be evident in the Commission's approach. Although the Commission is more suggestive of the inclusion of cable networks in the relevant wholesale product markets this appears to be based on a belief that regulation will be withdrawn. Whilst agreeing with the overall objective of this approach, it runs risks of complicating the market analysis procedure while a more orthodox approach of leaving cable networks outside the product market and considering the impact of Cable in the market analysis procedure would lead to the same outcome.

The general direction of European policy developments, both indicated in this draft and in the Connected Continent Proposal and implemented over the last two years has been well directed in Cable Europe's opinion. It is appropriate for policy makers to recognise both the shifts in the nature of competition across different platforms and across different parts of the value chain. New service providers commonly referred to as 'over the top' or OTT have emerged and made huge changes to the business models of all operators and changed the nature of competition for consumers. Traditional telecom operators have overwhelmingly put fibre much closer to their own customers in order to boost speeds in order to compete with cable DOCSIS 3.0. In the context of ultra-fast networks, competition is being driven, even at this early stage, by intermodal infrastructure competition between fibre-based and cable networks.

This can be expected to become the main form of competition as ultra-fast networks increase their coverage in the next years and formerly service providers, who have announced their own fibre deployment, enter the market as infrastructure-based competitors (e.g. Iliad and SFR in France; Jazztel, Orange and Vodafone in Spain). However, such an evolution requires a regulatory approach that encourages this natural dynamic and does not seek to undermine it.

1. Three criteria test – Consistency and Predictability

Cable Europe is pleased to see stability maintained in the relevant market selection process through the maintenance of the three criteria test and believes that the three criteria test has performed well over time and has been verified by practice.



2. Product Market Definition (Broadband Market)

While technology changes are undeniable, the impact of these technology changes on the relevant elements cannot be predicted or presumed. Current demand and supply conditions continue to see distinct demand for physical and non-physical access and it should not be presumed that a broadened market 4 will ultimately evolve.

2.1 Retail Market

A broadly defined broadband market can be identified at the retail level which is consistent with previous practice and both telecom networks (whether copper or fibre based) and cable networks supply this market together with a range of other platforms.

There is no evidence in the case history of the Article 7 procedures of any break in the chain of substitution in terms of network speeds.

The question of whether bundles, and the popularity of bundled products, is likely to change the product market definition is also being answered on an on-going basis in the market analysis procedure where national regulators consistently finding that separate product markets continue to exist. This finding is consistent even where the prevalence of bundled offers is high. These analyses have been endorsed by the Article 7 reviews to date. Further we see no evidence of competition issues in this space as confirmed in Vodafone/KDG, where the clearance decision did not establish the presence of a bundles market as part of its merger reviews (paras 261 – 265).

Residential and business services (retail level): Cable Europe does not share the findings of the Commission or the published Ecorys Report¹ that observed differences in the competition dynamic of the mass-market and corporate business lead to completely different relevant markets. As such we would caution against including mid SME targeted products within the scope of new market 4 on business services. However, like Ecorys, we do observe that the dynamic of competition in the corporate segment is different than that in the mass market and the competition problems demand differentiated remedies on the incumbent within a single broadband market, possibly such as more surveillance by the NRA (margin squeeze tests etc).

2.2 Wholesale Market

Whereas different platforms clearly compete in the same retail market, this is not the case in either the wholesale local access market or in the wholesale bit-stream access market (the Wholesale Central Access or WCA market).

¹*Future electronic communications markets subject to ex-ante regulation, Ecorys, IDATE, ICRI, 18 September 2013. See p. 25: "whereas no clear segmentation exists between residential customers and non residential customers a meaningful segmentation exists between mass-market broadband products and bespoke connectivity products".*



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From a demand perspective, it is unlikely that access seekers would consider either a wholesale local (ULL or VULA) or a central access service from cable as a substitute of a *nation-wide* wholesale access service provided by the incumbent. In addition, important switching costs between platforms can be anticipated. The empirical evidence from Member States that have mandated access to cable networks confirms these conclusions as wholesale demand has not manifested itself, even to a limited extent.

The evidence to date therefore strongly suggests that direct demand substitution has not evolved and that indirect constraints are not sufficient to put these products in the same product market. This is consistent with NRAs not seeking to have the wholesale market definition changed.

From a supply perspective, it is uncertain that cable operators are able or willing to offer these wholesale services. This means that under a greenfield approach, where market dynamic is analysed absent ex ante regulation, the case for including cable in wholesale access markets is weak.

However, Cable Europe is concerned that the Commission exaggerates the extent to which Cable might, in the future be placed in the product market.

..Given the upgrade of CATV to DOCSIS 3 which is expected to continue, it may become increasingly appropriate to include CATV bit-stream in the relevant product market, especially when sub-national geographic markets have been defined. ...

Cable Europe believes that this text should be deleted. It would be more appropriate for the Commission to stress the impacts of cable operators as a constraint in the SMP assessment rather than confusing the product market definition. Based on the experience to date (where the transition to DOCSIS 3.0 can be considered deployed) NRAs have not put cable in the product market and those NRAs who imposed remedies by other means, discovered that there was no demand for such access products and imposed unnecessary costs and uncertainty on the market.

Cable Europe believes that the current text should be revised to explicitly exclude cable networks from the wholesale access markets.

2.3 Virtual Unbundling

The inclusion of VULA in the Wholesale Local Access (WLA) market is something which is controversial since the Commission's previous practice was that VULA was a temporary mechanism pending transition to physical unbundling². Indeed the European Parliament does not agree with the European Commission on the need of virtual access product as a means for a temporary replacement for wholesale access product, as they have deleted the complete virtual product chapter from the Telecom Single Market draft text.

² UK/2010/1064 and AT/2010/1084



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Moreover, Cable Europe strongly believes in the development of infrastructure competition and, in the context of NGA networks, a VULA product is not coherent with this model. Fibre and DOCSIS deployments will probably geographically match each other across the Union, particularly in populated areas. That is to say that in NGA or ultra-fast network areas there will be at least two competing networks, and probably more than two, if we consider actual and announced fibre deployments by alternative operators (France, Spain, etc.) using regulated wholesale access to ducts.

The question then is if in a modified Greenfield approach, where replicability over copper networks is ensured through ULL and an obligation to provide access to ducts and related passive infrastructure is already imposed on the incumbent, it is likely to observe a competitive outcome as far as NGA services are concerned. Under these circumstances, an additional obligation on the incumbent to provide a VULA service might not always be economically justified, and could also be counterproductive as such remedy would reduce the incentives faced by alternative operators to deploy their own fibre networks. Furthermore, given the risk that NRAs do not get the regulated price of the service right, a regulated VULA could indirectly affect the business case of cable networks by providing subsidized access to their competitors.

We therefore consider that it will be up to the NRAs to decide on a case by case basis whether the market requires the imposition of a VULA product or any other specific remedy.

Cable Europe is concerned that there is suggestive text that Cable networks may in the future enter the WLA market. This is based on a technology (DOCSIS 3.1) which is not deployed in the field yet and whose impact on demand and supply patterns is wholly unknown:

However, from a forward-looking perspective and in view of the different patterns of CATV rollout and upgrade (e.g. to DOCSIS 3.1) in the EU, NRAs should continue assessing their substitutability, with regards to a possible inclusion in the WLA market.

As regards the future evolution of cable networks to a DOCSIS 3.1 standard, there is no technology evidence suggesting that this evolution could support an access product, and any assertions of this kind would be premature given the final specification of DOCSIS 3.1 are still to be trialled in the lab, and no date for commercial deployment has yet been announced.

As a consequence, this text should be removed and any market developments that may or may not happen in the future can be addressed in the next revision of the Recommendation on Relevant markets.



Competition in relevant markets where cable exists is increasing. The exclusion of cable networks from the WLA and WCA markets should be made explicit. Segmenting or restricting markets is likely to undermine competition. It will be up to the NRAs to appreciate on a case by case basis whether the use of a VULA product or any other remedy would be suitable for the market.

Geographic Market Definition

The primary focus of any market analysis must be the potentially dominant entity and its behaviour over the territory. The analysis cannot start with a consideration of how strong or weak a regional operator is as such an approach would greatly distort the analysis.

In the Commission guidance and practice it is clear that it is pricing that acts as a kind of lead indicator or a short-hand to signal that perhaps a fuller consideration of geographic markets should be undertaken.

The number of retail operators will need to be considered but only as a secondary consideration. It may be for instance that many retail operators exist but if there is common pricing by the SMP operator that simply shows that the area is either too small or the competitors too weak or the market too inelastic for this to be any constraint on the SMP operator. On the contrary, very limited retail competition but in a larger or more contestable geographic area may limit the SMP operator's behaviour such that they are constrained and compete differently in that area. The point, as noted in the Relevant Guidance from the European Commission is that where price differences can be observed within a broader market, then there is an examination and a consideration that needs to take place to determine the scope of the geographic market.

Cable Europe is concerned that too much emphasis is being placed on technology changes which may or may not have the predicted impact on demand patterns (and which today are not evident³ and cannot be presumed in the future).

Cable Europe does recognise that the conditions of competition in a geographic area can change quickly either because an NRA initially made an error or because the market evolved faster than expected or did not evolve as expected. In such cases 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 that ability to change remedies rapidly when appropriate. A regulatory regime that segments markets geographically therefore runs a far greater risk of regulatory failure than one which chooses to adjust remedies within a broadly defined geographic market.

³ Very high speed services have not evolved to date and price premiums based on the medium of transmission and/or breaks in the chain of supply have not emerged.



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Cable Europe notes that the draft Explanatory Note accompanying the draft Recommendation retains the text reminding the reader that the mere overlapping of networks in some areas is not enough to conclude on the existence of a segmented market and that variations of remedies can be a preferable means of addressing regional differences:

"The fact that competitors have a supply area which is not national does not suffice to conclude that there are distinct geographic markets. Further evidence relating to demand-side and supply-side substitutability on the relevant market will have to be considered. Regional competitors can indeed exercise a competitive pressure reaching beyond the area in which they are present when the potential SMP operator applies uniform tariffs and the regional competitor is too large to ignore. Moreover, there should be evidence that the pressure for regional price differences comes from customers and competitors and is not merely reflecting variations in the underlying costs.

.....

In a situation where NRAs could not clearly identify substantially and objectively different conditions stable over time in order to define sub-national markets, the existence of geographically differentiated constraints on a SMP operator who operates nationally, such as different levels of infrastructure competition in different parts of the territory, are more appropriately taken into account at the remedies stage by imposing a geographically differentiated set of obligations.."

Cable Europe believes that national markets remain the appropriate scope of market analysis. The new Recommendation should therefore maintain the principles set out in the 2007 Recommendation.

Internal Market Considerations

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 ex-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 and yet regulated access is being imposed nonetheless (Belgium, Denmark).

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 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



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competition driving investment, all to the very great benefit of consumers. Cable Europe can see no instance where regulated access to cable networks for bit-stream 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 insure 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.

Cable Europe believes that the exclusion of cable based 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.