

RECOMMENDATIONS

COMMISSION

COMMISSION RECOMMENDATION

of 17 December 2007

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 communications networks and services

(notified under document number C(2007) 5406)

(Text with EEA relevance)

(2007/879/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ⁽¹⁾, and in particular Article 15(1) thereof,

Whereas:

- (1) Directive 2002/21/EC establishes a legislative framework for the electronic communications sector that seeks to respond to convergence trends by covering all electronic communications networks and services within its scope. The aim of the regulatory framework is to reduce *ex ante* sector-specific rules progressively as competition in the market develops.
- (2) The purpose of this Recommendation is to identify those product and service markets in which *ex ante* regulation may be warranted in accordance with Article 15(1) of

Directive 2002/21/EC. The objective of any *ex ante* regulatory intervention is ultimately to produce benefits for end-users by making retail markets competitive on a sustainable basis. The definition of relevant markets can and does change over time as the characteristics of products and services evolve and the possibilities for demand and supply substitution change. With the Recommendation 2003/311/EC having been in force for more than four years, it is now appropriate to revise the initial edition on the basis of market developments. Hence, this Recommendation replaces Commission Recommendation 2003/311/EC ⁽²⁾.

- (3) Article 15(1) of Directive 2002/21/EC requires the Commission to define markets in accordance with the principles of competition law. Competition law principles are therefore used in this Recommendation to set product market boundaries within the electronic communications sector, while the identification or selection of defined markets for *ex ante* regulation depends on those markets having characteristics which may be such as to justify the imposition of *ex ante* regulatory obligations. The terminology used in this Recommendation is based on terminology used in Directive 2002/21/EC and Directive 2002/22/EC; the Explanatory Note to this Recommendation describes the evolving technologies in relation to these markets. In accordance with Directive 2002/21/EC, it is for national regulatory authorities to define relevant markets appropriate to national circumstances, in particular relevant geographic markets within their territory.

⁽¹⁾ OJ L 108, 24.4.2002, p. 33. Directive as amended by Regulation (EC) No 717/2007 (OJ L 171, 29.6.2007, p. 32).

⁽²⁾ OJ L 114, 8.5.2003, p. 45.

- (4) The starting point for the identification of markets in this Recommendation is the definition of retail markets from a forward-looking perspective, taking into account demand-side and supply-side substitutability. Having defined retail markets, it is then appropriate to identify relevant wholesale markets. If the downstream market is supplied by a vertically-integrated undertaking or undertakings, there may be no (merchant) wholesale market in the absence of regulation. Consequently, if the market warrants identification, it may be necessary to construct a notional upstream wholesale market. Markets in the electronic communications sector are often of a two-sided nature, in that they comprise services provided over networks or platforms that bring together users on either side of the market; for example end-users that exchange communications, or senders and receivers of information or content. These aspects need to be taken into account when considering the identification and definition of markets, as they can affect both the way markets are defined and whether they have the characteristics which may justify the imposition of *ex ante* regulatory obligations.
- (5) In order to identify markets that are susceptible to *ex ante* regulation, it is appropriate to apply the following cumulative criteria. The first criterion is the presence of high and non-transitory barriers to entry. These may be of a structural, legal or regulatory nature. However, given the dynamic character and functioning of electronic communications markets, possibilities to overcome barriers to entry within the relevant time horizon should also be taken into consideration when carrying out a prospective analysis to identify the relevant markets for possible *ex ante* regulation. Therefore the second criterion admits only those markets whose structure does not tend towards effective competition within the relevant time horizon. The application of this criterion involves examining the state of competition behind the barriers to entry. The third criterion is that application of competition law alone would not adequately address the market failure(s) concerned.
- (6) The main indicators to be considered when assessing the first and second criteria are similar to those examined as part of a forward-looking market analysis, in particular, indicators of barriers to entry in the absence of regulation, (including the extent of sunk costs), market structure, market performance and market dynamics, including indicators such as market shares and trends, market prices and trends, and the extent and coverage of competing networks or infrastructures. Any market which satisfies the three criteria in the absence of *ex ante* regulation is susceptible to *ex ante* regulation.
- (7) Newly emerging markets should not be subject to inappropriate obligations, even if there is a first mover advantage, in accordance with Directive 2002/21/EC. Newly emerging markets are considered to comprise products or services, where, due to their novelty, it is very difficult to predict demand conditions or market entry and supply conditions, and consequently difficult to apply the three criteria. The purpose of not subjecting newly emerging markets to inappropriate obligations is to promote innovation as required by Article 8 of the Directive 2002/21/EC; at the same time, foreclosure of such markets by the leading undertaking should be prevented, as also indicated in the Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications and services⁽¹⁾. Incremental upgrades to existing network infrastructure rarely lead to a new or emerging market. The lack of substitutability of a product has to be established from both demand and supply-side perspectives before it can be concluded that it is not part of an already existing market. The emergence of new retail services may give rise to a new derived wholesale market to the extent that such retail services cannot be provided using existing wholesale products.
- (8) As far as barriers to entry are concerned, two types are relevant for the purpose of this Recommendation: structural barriers and legal or regulatory barriers.
- (9) Structural barriers to entry result from original cost or demand conditions that create asymmetric conditions between incumbents and new entrants impeding or preventing market entry of the latter. For instance, high structural barriers may be found to exist when the market is characterised by absolute cost advantages, substantial economies of scale and/or economies of scope, capacity constraints and high sunk costs. To date, such barriers can still be identified with respect to the widespread deployment and/or provision of local access networks to fixed locations. A related structural barrier can also exist where the provision of service requires a network component that cannot be technically duplicated or only duplicated at a cost that makes it uneconomic for competitors.

⁽¹⁾ OJ C 165, 11.7.2002, p. 6.

- (10) Legal or regulatory barriers are not based on economic conditions, but result from legislative, administrative or other state measures that have a direct effect on the conditions of entry and/or the positioning of operators on the relevant market. An example of a legal or regulatory barrier preventing entry into a market is a limit on the number of undertakings that have access to spectrum for the provision of underlying services. Other examples of legal or regulatory barriers are price controls or other price-related measures imposed on undertakings, which affect not only entry but also the positioning of undertakings on the market. Legal or regulatory barriers, which can be removed within the relevant time horizon, should not normally be deemed to constitute an economic barrier to entry, such as to fulfil the first criterion.
- (11) Barriers to entry may also become less relevant with regard to innovation-driven markets characterised by ongoing technological progress. In such markets, competitive constraints often come from innovative threats from potential competitors that are not currently in the market. In innovation-driven markets, dynamic or longer-term competition can take place among firms that are not necessarily competitors in an existing 'static' market. This Recommendation does not identify markets where barriers to entry are not expected to persist over a foreseeable period. In assessing whether barriers to entry are likely to persist in the absence of regulation, it is necessary to examine whether the industry has experienced frequent and successful entry and whether entry has been or is likely in the future to be sufficiently immediate and persistent to limit market power. The relevance of barriers to entry will depend *inter alia* on the minimum efficient scale of output and the costs which are sunk.
- (12) Even when a market is characterised by high barriers to entry, other structural factors in that market may mean that the market tends towards an effectively competitive outcome within the relevant time horizon. Market dynamics may for instance be caused by technological developments, or by the convergence of products and markets which may give rise to competitive constraints being exercised between operators active in distinct product markets. This may also be the case in markets with a limited — but sufficient — number of undertakings having diverging cost structures and facing price-elastic market demand. There may also be excess capacity in a market that would normally allow rival firms to expand output very rapidly in response to any price increase. In such markets, market shares may change over time and/or falling prices may be observed. Where market dynamics are changing rapidly, care should be taken in choosing the relevant time horizon so as to reflect the pertinent market developments.
- (13) The decision to identify a market as susceptible to *ex ante* regulation should also depend on an assessment of the sufficiency of competition law to address the market failures that result from the first two criteria being met. Competition law interventions are unlikely to be sufficient where the compliance requirements of an intervention to redress a market failure are extensive or where frequent and/or timely intervention is indispensable.
- (14) The application of the three criteria should limit the number of markets within the electronic communications sector where *ex ante* regulatory obligations are imposed and thereby contribute to the aim of the regulatory framework to reduce *ex ante* sector-specific rules progressively as competition in the markets develops. These criteria should be applied cumulatively, so that failure to meet any one of them would indicate that a market should not be identified as susceptible to *ex ante* regulation.
- (15) Regulatory controls on retail services should only be imposed where national regulatory authorities consider that relevant wholesale measures or measures regarding carrier selection or pre-selection would fail to achieve the objective of ensuring effective competition and the fulfilment of public interest objectives. By intervening at the wholesale level, including with remedies which may affect retail markets, Member States can ensure that as much of the value chain is open to normal competition processes as possible, thereby delivering the best outcomes for end-users. This Recommendation therefore mainly identifies wholesale markets, the appropriate regulation of which is intended to address a lack of effective competition that is manifest on end-user markets. Should a national regulatory authority demonstrate that wholesale interventions have been unsuccessful, the relevant retail market may be susceptible to *ex ante* regulation provided that the three criteria set out above are met.
- (16) The process of identifying markets in this Recommendation is without prejudice to markets that may be defined in specific cases under competition law. Moreover, the scope of *ex ante* regulation is without prejudice to the scope of activities that may be analysed under competition law.

- (17) The markets listed in the Annex have been identified on the basis of these three cumulative criteria. For markets not listed in this Recommendation national regulatory authorities should apply the three-criteria test to the market concerned. For the markets in the Annex to Recommendation 2003/311/EC of 11 February 2003, which are not listed in the Annex to this Recommendation, national regulatory authorities should have the power to apply the three-criteria test in order to assess whether, on the basis of national circumstances, a market is still susceptible to *ex ante* regulation. For markets listed in this Recommendation a national regulatory authority may choose not to carry out a market analysis procedure if it determines that the three criteria are not satisfied for the particular market. National regulatory authorities may identify markets that differ from those listed in this Recommendation, provided that they act in accordance with Article 7 of Directive 2002/21/EC. Failure to notify a draft measure which affects trade between Member States as described in Recital 38 of Directive 2002/21/EC may result in infringement proceedings being taken. Markets other than those listed in this Recommendation should be defined on the basis of competition principles laid down in the Commission Notice on the definition of relevant market for the purposes of Community competition law⁽¹⁾ and be consistent with the Commission Guidelines on market analysis and the assessment of significant market power⁽²⁾ whilst satisfying the three criteria set out above.
- (18) The fact that this Recommendation identifies those product and service markets in which *ex ante* regulation may be warranted does not mean that regulation is always warranted or that these markets will be subject to the imposition of regulatory obligations set out in the specific Directives. In particular, regulation cannot be imposed or must be withdrawn if there is effective competition on these markets in the absence of regulation, that is to say, if no operator has significant market power within the meaning of Article 14 of Directive 2002/21/EC. Regulatory obligations must be appropriate and be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Directive 2002/21/EC, in particular maximising benefits for users, ensuring no distortion or restriction of competition, encouraging efficient investment in infrastructure and promoting innovation, and encouraging efficient use and management of radio frequencies and numbering resources.
- (19) This Recommendation has been subject to a public consultation and to consultation with national regulatory authorities and national competition authorities,
- HEREBY RECOMMENDS:
1. In defining relevant markets appropriate to national circumstances in accordance with Article 15(3) of Directive 2002/21/EC, national regulatory authorities should analyse the product and service markets identified in the Annex to this Recommendation.
 2. When identifying markets other than those set out in the Annex, national regulatory authorities should ensure that the following three criteria are cumulatively met:
 - (a) the presence of high and non-transitory barriers to entry. These may be of a structural, legal or regulatory nature;
 - (b) a market structure which does not tend towards effective competition within the relevant time horizon. The application of this criterion involves examining the state of competition behind the barriers to entry;
 - (c) the insufficiency of competition law alone to adequately address the market failure(s) concerned.
 3. This Recommendation is without prejudice to market definitions, results of market analyses and regulatory obligations adopted by national regulatory authorities in accordance with Articles 15(3) and 16 of Directive 2002/21/EC prior to the date of adoption of this Recommendation.
 4. This Recommendation is addressed to the Member States.
- Done at Brussels, 17 December 2007.
- For the Commission
Neelie KROES
Member of the Commission

(1) OJ C 372, 9.12.1997, p. 5.

(2) OJ C 165, 11.7.2002, p. 6.

ANNEX

Retail level

1. Access to the public telephone network at a fixed location for residential and non-residential customers.

Wholesale level

2. Call origination on the public telephone network provided at a fixed location.

For the purposes of this Recommendation, call origination is taken to include call conveyance, delineated in such a way as to be consistent, in a national context, with the delineated boundaries for the market for call transit and for call termination on the public telephone network provided at a fixed location.

3. Call termination on individual public telephone networks provided at a fixed location.

For the purposes of this Recommendation, call termination is taken to include call conveyance, delineated in such a way as to be consistent, in a national context, with the delineated boundaries for the market for call origination and the market for call transit on the public telephone network provided at a fixed location.

4. Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location.

5. Wholesale broadband access.

This market comprises non-physical or virtual network access including 'bit-stream' access at a fixed location. This market is situated downstream from the physical access covered by market 4 listed above, in that wholesale broadband access can be constructed using this input combined with other elements.

6. Wholesale terminating segments of leased lines, irrespective of the technology used to provide leased or dedicated capacity.

7. Voice call termination on individual mobile networks.
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