



EUROPEAN COMMISSION

Directorate-General Communications Networks, Content and Technology

**QUESTIONNAIRE
FOR THE PUBLIC CONSULTATION ON THE REVISION OF THE
RECOMMENDATION ON RELEVANT MARKETS**

Consultation

Publication date: **16 October 2012**

Closing date for responses: **8 January 2013**

This document does not represent an official position of the European Commission, but is intended to stimulate debate on the part of stakeholders and public. It does not prejudge the form or content of any future proposal by the European Commission.

I. PURPOSE OF THIS DOCUMENT

The appropriate identification of relevant markets susceptible to *ex ante* regulation is a key to the overall functioning of the EU Regulatory Framework. It allows the National Regulatory Authorities (hereinafter, "NRAs") to focus their efforts on markets where competition is not yet effective and which are crucial for Europe's competitiveness. Having a list of pre-identified markets helps NRA regulate these markets in a coordinated manner, thereby contributing to the development of the internal market. A stable and pertinent list of relevant markets is also vital for providing the market players with legal predictability and thus stable business planning.

More than four years after the current version of the Recommendation on relevant markets has been adopted, it is appropriate to review the list of relevant markets. The review will allow taking into account major market and technological developments, such as internet-based applications and services, the convergence between different types of networks and services and the development of Next Generation Access networks and services. Revising the list of relevant markets will be instrumental in achieving the objectives of the Regulatory Framework and the Digital Agenda for Europe¹ in terms of fostering competition and the development of the internal market and increasing Europeans' access to fast and ultra fast internet.

Since the aim of the Regulatory Framework is to reduce *ex ante* sector-specific rules progressively as competition in the market develops, the Recommendation is an important tool in adjusting the regulatory policy to rapid technological change and market developments. Moreover, it could be noted that this market-based approach to sector-specific regulation in the EU was successful in opening markets to competition, promoting investments, and bringing about deregulation when appropriate.

The aim of this questionnaire is to consult the stakeholders on the revision of the current list of relevant markets as annexed to the Recommendation on relevant markets (hereinafter, "Recommendation")².

The Commission invites stakeholders and public to submit written comments on the questions raised in this document **by 8 January 2013**.

¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, A Digital Agenda for Europe, COM(2010)245, 26.08.2010.

² 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, OJ L 344, 28.12.2007, p. 65-69.

II. BACKGROUND

II.1 List of relevant markets

The Recommendation comprises the following list of markets:

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
3. Call termination on individual public telephone networks 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
6. Wholesale terminating segments of leased lines
7. Voice call termination on individual mobile networks.

II.2 Problem definition

The definition of relevant markets changes over time as the characteristics of products and services evolve. It is important to assess the impact of market developments on the development of competition in the relevant markets.

More than four years after the Recommendation has been adopted, it is considered appropriate to review the list of relevant markets.

II.3 Legal context

Under Article 15(1) of the Framework Directive³, the Commission shall regularly review the Recommendation. After public consultation including with the NRAs and taking utmost account of the Opinion of the Body of European Regulators for Electronic Communications (hereinafter, "BEREC")⁴, the Commission shall identify the electronic communications product and service markets whose characteristics justify the imposition of *ex ante* regulation, without prejudice to markets that may be defined in specific cases under competition law. In doing so, the Commission shall define markets in accordance with the principles of competition law. NRAs are then required, under Article 16(1) of the Framework Directive, to assess the state of competition in electronic communications markets and to impose *ex ante* obligations in the absence of effective competition, taking into account the markets identified in the Recommendation.

³ 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 (Framework Directive), OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

⁴ See also Article 3(c) of Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications and the Office, OJ L 337, 18.12.2009, p. 1.

Under Article 15(4) of the Framework Directive after consultation including NRAs the Commission may, taking the utmost account of the Opinion of BEREC, adopt a Decision identifying transnational markets, acting in accordance with the regulatory procedure with scrutiny referred to in Article 22(3). Under Article 16(5) of the Framework Directive, in case of transnational markets identified in the Decision referred to in Article 15(4), NRAs shall jointly conduct the market analysis taking utmost account of the Guidelines⁵, and in concerted fashion, shall decide on any imposition, maintenance, amendment or withdrawal of regulatory obligations.

Under Recital 27 of the Framework Directive, an analysis of effective competition should include an analysis as to whether the market is prospectively competitive, and thus if any lack of effective competition is durable.

III. MAIN ISSUES FOR CONSULTATION

III.1. Relevant trends in the electronic communications sector that have an impact on the definition of the relevant markets

In order to be able to assess whether, and if yes to which extent, the current list of relevant markets should be subject to revision, it is crucial to identify the relevant technological and commercial trends including technological developments and convergence in the electronic communications sector (hereinafter, "relevant trends") that have an impact on the definition of the relevant markets, from an *ex ante* perspective.

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?

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?

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?

III.2. Three criteria test

Relevant markets should be defined in accordance with the principles of competition law.

Competition law principles have been used in the Recommendation to set the scope of product markets within the electronic communications sector while the identification and 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* regulation. In order to

⁵ Commission Guidelines on market analysis and the assessment of the significant market power under the Community regulatory framework for electronic communications networks and services, OJ C 165, 11.7.2002, p. 6.

identify the markets that are susceptible to *ex ante* regulation the Recommendation uses the following three cumulative criteria (hereinafter referred to as "the three criteria test"):

1. The presence of high and non-transitory barriers to entry;
2. A market structure which does not tend towards effective competition within the relevant time horizon; and
3. The insufficiency of competition law alone to adequately address the market failure(s) concerned.

The three criteria test is partially based on the Framework Directive. Recital 27 of the Framework Directive stipulates that *ex ante* regulatory obligations should only be imposed where there is not effective competition, i.e. in markets where there are one or more undertakings with significant market power, and where national and EU competition law remedies are not sufficient to address the problem.

The three criteria test has been the basis for the identification of relevant markets for the present (2007) and previous (2003) Recommendation on relevant markets and has continuously been applied by NRAs for the identification of those markets susceptible to *ex ante* regulation, which are not listed in the Recommendation.

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?

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?

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

III.3. Scope of the markets listed in the Recommendation

It should be established, on the basis of competition law principles, whether the scope of the markets contained in the Recommendation should be changed in order to reflect relevant trends in the electronic communications sector from an *ex ante* perspective.

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.

Question 8: If the answer to the previous question is yes, please specify the qualitative and quantitative impact of such changed scope on consumers (users), competition, and development of the internal market. Please provide separate reasoning for each market subject to a new scope.

III.4. Relevant markets listed in the Recommendation

The markets listed in the Recommendation were defined in 2007, according to the three

criteria test carried out at EU level. From an *ex ante* perspective, some of the listed markets may no longer fulfil the three criteria and should therefore no longer be subject to regulation.

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.

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.

III.5. Further markets regulated at national level

Certain markets are not contained in the list of relevant markets annexed to the Recommendation but are nevertheless regulated by certain NRAs (e.g. SMS termination⁶ and broadcasting transmission services⁷). These markets have been defined on the basis of national circumstances by carrying out the three criteria test at national level.

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.

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.

III.6. Markets to be added to the revised Recommendation

It is possible that markets other than those mentioned in III.5 now meet the three criteria test at EU level and are therefore susceptible to *ex ante* regulation.

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.

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.

⁶ SMS termination is regulated in Denmark, France, Poland and Gibraltar.

⁷ Broadcasting transmission services are partially regulated *inter alia* in France, Estonia, Austria, Finland and Sweden.

III.7. Transnational markets

It should be assessed whether any transnational market(s) can be identified at EU level that is/are susceptible to *ex ante* regulation, and should as a result be subject to a Decision under Article 15(4) of the Framework Directive.

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.

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.

III.8. Any other issues

Respondents are invited to raise any other issues relating to the subject of the consultation that they might wish to address in (the reply to) this consultation.

III.9. Responses

Responses to this public consultation should reach the European Commission **by 8 January 2013** at cnect-relevant-markets@ec.europa.eu.

See Annex I for further information on submitting your response.

ANNEX I

Responding to the consultation

The Commission invites the stakeholders (including the NRAs and National Competition Authorities) and public to submit written views and comments on the issues raised in this document **by 8 January 2013**.

Contributions, together with the identity of the contributor, may be published on the website of the DG Communications Networks, Content and Technology, unless the contributor objects to publication of personal or confidential data on the grounds that such publication would harm his or her legitimate interest(s). Please be aware that should your submission contain any confidential information, a clearly marked non-confidential version of the submission must be submitted within the above-mentioned deadline. For more details, please see the Commission's general statement on personal data protection⁸ as well as the specific privacy statement for this consultation⁹.

Please give the name of a contact person in your organisation for any questions on your contribution. Please note that there is no need to provide a hard copy in addition to your contribution provided electronically.

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⁸ http://ec.europa.eu/geninfo/legal_notices_en.htm#personaldata.

⁹ <https://ec.europa.eu/digital-agenda/en/newsroom/all/1030>.