



I/ERG Opinion

on the draft Recommendation on relevant markets

1. Introduction

I/ERG welcomes the opportunity to comment on the draft Recommendation on Relevant Markets and the accompanying draft Explanatory Memorandum.

In this document I/ERG presents the common position of the members of I/ERG on the draft second edition of the Recommendation on Relevant Markets and the accompanying draft Explanatory Memorandum. I/ERG would like to draw the attention of the Commission to the fact that, given national circumstances, NRAs might individually have stronger views than those expressed in this document. This latter is the result of discussions and consensus within the I/ERG. I/ERG recalls that in its contribution to the public consultation last autumn it provided detailed comments which remain relevant (in particular concerning methodological principles).

This document deals with the following issues:

- Flexibility
- Application of the three criteria test
- Horizontal issues
 - Self supply
 - Next generation networks
 - Price and margin squeeze
- Comments on specific markets
 - Markets that have been deleted from the list
 - Markets that have been retained on the list
- Transition issues

Globally, I/ERG is of the opinion that the Commission should take account of the need for flexibility required by most NRAs. Indeed, given national circumstances, some markets deleted from the list may still meet the three criteria test at a national level. In such cases, the affected NRAs should be assured that they will be able to intervene, in accordance with the Regulatory Framework and with competition law principles, without an excessive burden of proof being placed upon them, for the purpose of driving markets to effective competition. Similarly, some markets retained on the list may already have been found to be competitive in some Member States.

In such cases, affected NRAs should be assured that they will not be required to carry out a market review in respect of these markets.

2. Flexibility

Given the large differences in competitive conditions across EU Member States, I/ERG asked in its response to the public consultation last autumn for a more extensive list of markets combined with the possibility to declare at national level, where applicable, that a market does not meet the three criteria and therefore does not warrant ex ante regulation (downwards flexibility).

Since the Commission proposes a relatively short list, I/ERG considers it very important that the Recommendation and the Explanatory Memorandum emphasise the fact that some markets which have been removed from the Recommendation, may still meet the three criteria test at national level and therefore may warrant ex ante regulation in specific circumstances (upwards flexibility).

The wording in the Explanatory Memorandum on the markets for retail fixed communications and for trunk segments of leased lines are clear examples of such an approach which is appreciated by I/ERG. Therefore, should the Commission pursue the deletion of the wholesale markets for transit and broadcasting transmission services, the I/ERG would request similar assurances.

3. Application of the three criteria test

In the consultation I/ERG has asked for clarification on the application of the three criteria test. I/ERG notes that new texts provide some more clarity on how and when to apply the three criteria test, but still in a rather broad manner.

I/ERG welcomes the statement that NRAs do not need to apply the three criteria test to markets which are on the list. However they may do so in order to decide at the national level that a specific market which is not on the list does warrant ex ante regulation.

In the context of a short list of markets, it is of paramount importance that NRAs have a clear view on the burden of proof they face when proposing to regulate a market that is no longer on the list. I/ERG would appreciate some more discussion on the burden of proof in such situations. In this context I/ERG reiterates its view that the burden of proof for regulating markets which are not on the list of Relevant Markets should be symmetric to the burden of proof for not regulating markets which are on the list.

Furthermore, the proposed texts still do not provide clarity on what should be considered a deviation from the Recommendation and what should not, as proposed by I/ERG in its input to the public consultation.

4. Transition issues

I/ERG welcomes the statements in the text that existing regulation can only be withdrawn on the basis of a market analysis. The withdrawal of a market from the list of Relevant Markets, however, does not remove an NRA's finding of SMP on that market. Therefore I/ERG considers it necessary that the Commission clarifies on what basis an NRA may withdraw regulation.

In the view of I/ERG there could be two ways to withdraw regulation without showing the existence of SMP:

- to conclude that the three criteria are not met anymore for the market at national level, or
- to conclude that wholesale regulation is sufficient according to article 16 USD (in case of retail markets).

I/ERG would welcome a confirmation of this in the Explanatory Memorandum.

I/ERG would appreciate clarification of which markets on the new list are considered to be identical to the markets on the current list. As discussed at the NRA/NCA consultation meeting of 12 September 2007 these markets do not need to be analysed as soon as possible, but according to the normal timeframe.

Furthermore, I/ERG would like to see reflected in the Explanatory Memorandum that, where an NRA has found effective competition in a market in the first round of market analysis, and where this market is still on the list, the NRA is not obliged to perform a full-fledged market analysis for that market again. Instead, the obligation should be to keep the market under review and carry out a formal market analysis only if there appear to have been fundamental changes to the market which would call into question a previous finding of effective competition. This is in line with the discussions at the NRA/NCA consultation meeting of 12 September 2007.

5. Self supply and indirect pricing constraints

I/ERG reiterates that guidance on complex substantive issues like self supply and indirect pricing constraints are better placed in the Guidelines on market definition and SMP assessment. I/ERG calls for a review of these Guidelines and is willing to provide input into this process.

I/ERG appreciates that the Commission recognises that vertically-integrated operators can provide a competitive constraint on a certain wholesale product through competition on the retail market. I/ERG, however, does not see why such an indirect pricing constraint may only be taken into account when assessing whether an incumbent has SMP on the wholesale market.

In accordance with economic theory I/ERG is of the opinion that the purpose of defining a relevant market is to analyse the different competitive constraints in relation to a particular product. This assessment should take into account all the

relevant constraints (including indirect constraints). This approach is consistent with the SSNIP-test.

6. Next generation networks

I/ERG welcomes the statements in the Explanatory Memorandum on the emergence of next generation networks. We especially appreciate the fact that specific wholesale products such as duct sharing, access to dark fibre and mandated backhaul and new forms of bitstream access are mentioned as possibly appropriate remedies to facilitate investment in fibre infrastructure.

I/ERG would welcome some more argumentation on how, for instance, wholesale products like duct sharing and access to dark fibre can be classified in the context of the Regulatory Framework.

7. Price and margin squeezes

I/ERG considers the current text on margin squeeze is unclear and deals with the wrong issues. It is not fully in line with ERG's own published views on the subject, as set out in the Common Position on Remedies (ERG(06)33).

Although the prevention of margin squeeze is a concern, in the vision of I/ERG the foremost concern is that the removal of (most of) the retail markets from the Recommendation severely weakens NRAs ability to remedy margin squeeze through retail pricing measures. Therefore I/ERG asks for clarification on the ability of NRAs to remedy margin squeeze problems through wholesale price regulation in case retail pricing measures are no longer considered appropriate.

The fact that an obligation of accounting separation can also cover non-SMP markets may help in detecting margin squeeze, but does not necessarily prevent the margin squeeze itself.

Although it has been shown that competition law can deal with some margin squeeze ex post, it should be made clear that in cases where the three criteria are met, ex ante regulation is by definition more effective to remedy margin squeeze than ex post regulation. Moreover, in this context, competition law is intended to prevent margin squeeze as an exclusionary abuse, while ex ante regulation seeks the more ambitious goal of promoting competition by facilitating entry into those markets meeting the three criteria. This means that competition law cannot go as far as ex ante regulation. For instance, as the ERG has stated previously (for example in the ERG Common Position on Remedies - ERG(06)33), there can be situations where an SMP player, relying on its economies of scope and scale (often a legacy of its incumbency), sets margins which permit it - but no other competitor - to operate profitably at the downstream level. The I/ERG is not aware of any case law where an abuse of a dominant position has been found in such circumstances. This means that there could be circumstances where new players are unable to enter markets profitably, which competition law could not necessarily address. While this may sometimes be because the market is a natural monopoly, in other circumstances the

dynamic benefits arising from entry could significantly outweigh any static efficiency losses. The same applies where the test is applied to services which are not considered "essential" from a competition law perspective (and, where, therefore, intervention on competition law grounds is not possible), but where those services are nonetheless subject to ex ante regulation (and where, therefore, NRAs will be the ones applying the margin squeeze test).

Furthermore I/ERG considers close cooperation between NRAs and competition authorities (including the Commission) on margin squeeze issues of utmost importance, especially given the possibility that competition authorities may be confronted with more margin squeeze cases in the future. The prevention of conflict between both regimes is necessary. I/ERG would like to see this reflected in the Explanatory Memorandum.

8. On markets deleted from the list

- Wholesale markets (ex 10, 14 and 18)

I/ERG wants to point out that the deletion of markets 10 and 14 was not considered during the consultation and therefore no opportunity was given to discuss the merits of this proposal.

I/ERG has previously argued that decisions to remove markets from the list of Recommended Markets should be wholly based on objective analysis. I/ERG considers that the level of analysis in the proposed Explanatory Memorandum is not sufficient to justify a general finding that the three criteria are no longer met in the whole European Union. In fact, it appears that the three criteria are met in most Member States in relation to these markets. In its response to the public consultation last October, the I/ERG made the point that a revision of the list of markets should take into account evidence from past notifications (which not only contain detailed (and forward-looking) SMP analyses but also incorporate assessments of the three criteria at national level), and that these notifications (which have been reviewed and supported, in most cases, by the Commission), together with an evaluation of the impact of imposed remedies on competitive conditions, should be key factors in determining which markets to remove and which to retain. The Commission does not appear to have conducted this analysis, and the I/ERG does not therefore believe that the Commission has provided an adequate justification for deleting these markets from the list.

I/ERG considers that the markets which the Commission proposes to delete (ex 10, 14 and 18) are subject to large disparities across Europe in several respects (competitive conditions, characteristics of platforms, deployment of parallel networks, and for broadcasting transmission services also national legal provisions on must-carry and facility sharing).

Markets 10 and 14

I/ERG is aware that given these disparities it is difficult to adopt an harmonized approach on the transit and trunk markets. However, the Commission's conclusion that these markets do not generally warrant ex ante regulation is much too optimistic.

Although alternative infrastructure has been built to compete with the incumbent on parts of the network, there is no guarantee of replication on other parts of the network where traffic is less dense. Collectively, however, these “thin routes” may account for a significant volume of traffic in a number of Member States. But the commercial case for additional infrastructure investment to cover any of these routes is likely to be low. This means that competitors will have no option but to rely on the incumbent’s network for a significant volume of traffic for the foreseeable future. In these Member States, in the absence of regulation, there would be adverse consequences for competition (and, consequently, significant consumer detriment) not only for the provision of fixed telephony and retail leased lines, but also for mobile telephony and retail broadband services.

Concerning market 10, the Commission has based its decision on the availability of infrastructure for the geographical transport, but does not seem to have analyzed the most important function of the market, namely the connection between operators. The transit market is fundamental for market entry on the retail markets for fixed and mobile calls, as it allows operators to exchange traffic with all other operators based on *one* interconnection agreement with the incumbent. Hence, the deletion of market 10 can have a very negative impact on future competition.

Market 18

In the broadcasting transmission services market, the Commission’s argument relies too much on an assumption of inter-platform competition at wholesale level. Although inter-platform competition may be emerging at the retail level, at wholesale level these platforms may be perceived by content providers as complements rather than substitutes, as generally a content provider may not be able to reach a sufficient volume of consumers via any one platform. Content providers therefore often have a commercial imperative to achieve access to as many transmission platforms as possible. Some have countervailing buyer power; others do not.

I/ERG is therefore of the view that the conclusion that this market does not generally meet the second criterion should be better considered. I/ERG recognises that market power will reside in different segments of the transmission “market” in different Member States, but does not see this as an objective reason for stating that broadcast transmission markets are no longer considered susceptible to ex ante regulation.

While I/ERG strongly supports the Commission’s desire to reduce the regulatory burden and to target regulation where it is needed, we do not believe that the deletion of markets in the absence of objective analysis, supported by a clear evidence base, is the proper approach. Indeed, unless the Commission is able to adduce such analysis and evidence in support of its proposal to delete these markets from the list, they should be retained. The analysis above, together with the fact that these markets are not competitive in most Member States, suggests that if the Commission deletes these markets from the list, many NRAs will be forced to argue for continuing to regulate them nonetheless. As noted in relation to the three criteria above, this would not be so problematic if the burden of proof for regulating markets that are not on the list were the same as the burden of proof for not regulating a market that is on the list. If the Commission nonetheless ultimately decides to delete

these markets from the list, we would ask the Commission at the very least to include the same type of wording as is used in relation to the markets for retail fixed communications and for trunk segments of leased lines. For these markets the Explanatory Memorandum contains wording¹ on reasons why a market that is no longer listed in the Recommendation can at national level still meet the three criteria test (for instance the presence of thin and thick routes for trunk and transit). In case an NRA finds that national circumstances require a different conclusion, it should be open to that NRA to demonstrate that in its country the respective relevant markets for transit, trunk segments of leased lines and broadcasting transmission services continue to meet the three criteria test. The wording in the Explanatory Memorandum should therefore reflect this possibility for all these markets.

In any event, the Explanatory Memorandum should also make clear that, where a market is retained on the list, but has already been found to be competitive in a Member State, the NRA is not required to carry out a full market review of that market just by virtue of its retention on the list.

9. On markets retained on the list

- Market 1

In the public consultation last autumn I/ERG asked for several clarifications on public telephone services provided at a fixed location, and welcomes the clarification provided by the Commission; in particular:

- text dealing with the impact of WLR, CS and CPS, deployment of new infrastructures, LLU, on the provision of access and calls services,
- text on flexibility for calls services, where national circumstances are such that ex ante regulation is warranted, and
- text on the relationship between wholesale regulation and the effectiveness of competition on retail markets.

Given differences in market situations between EU Member States, I/ERG requests some flexibility in the definition of market 1 in order to enable individual NRAs to include broadband connections in this market where it is demonstrated that these connections act as a substitute for narrowband connections.

- Markets 2 and 3

I/ERG welcomes the possibility to adopt adapted boundaries, according to national circumstances, to define origination, transit and termination markets (fixed location). To make this effective it will be necessary that termination/origination is not restricted to include only local call conveyance, as currently indicated. Looking forward, in an NGA context, the transit market may not warrant ex ante regulation if the new Markets 2 and 3 can be defined appropriately.

¹ See second paragraph on page 28 of the draft Explanatory Memorandum on retail calls markets and the second paragraph on page 38 on trunk leased lines.

I/ERG notes that suggestions made to transfer issues dealing with countervailing buyer power (CBP) and SMP assessment in call termination markets to the Guidelines on market definition and SMP assessment, were not taken into account. I/ERG is of the opinion that, given the complexities linked to the impact of CBP in termination markets, this proposal is still relevant.

According to the principle of technological neutrality and given the current developments in NGN, I/ERG suggests to expressly allow a broad interpretation of markets 2 and 3 in order to enable the inclusion of call origination and termination delivered over IP-interconnection where appropriate (as concluded in the ERG IP-Interconnection Report ERG (07) 09).

- Markets 4 and 5

I/ERG welcomes the retention of the LLU market and its enlargement to include fiber loops. (See ERG Opinion on NGA (ERG (07) 16rev2).

I/ERG would welcome some more argumentation on how for instance wholesale products like duct sharing and access to dark fibre can be classified in the context of the Regulatory Framework in the case of fibre-to-the-home deployment.

I/ERG believes that the current formulation of Market 4, referring to the provision of only voice and broadband services, could inadvertently exclude wholesale services which are used for the purpose of providing other retail services (TV services for example). This is despite the fact that the relevant wholesale services may be similar to (or even identical to) the wholesale services used for the provision of retail voice and broadband services. Even if a theoretical case could be made for such a distinction, NRAs should not be restricted a priori to regulating wholesale inputs to those two services only. The limitation in the list of markets risks generating boundary disputes, and it would be preferable to identify a broad upstream market in the list which could be narrowed, if and as appropriate, by NRAs in their market definition exercise. The restriction in the definition of market 4 “for the purposes of providing broadband and/or voice services” should therefore be removed.

Similarly, I/ERG considers that no change is needed in the wording of the current Market 12 (new market 5) as, by definition, it already comprises all kinds of wholesale broadband access products that can be delivered higher in the network (as concluded in the ERG Opinion on NGA). If, however, reference to “virtual network access” is retained, the I/ERG would appreciate clarification on its precise meaning. As argued above in relation to market 4, I/ERG believes that the definition of market 5 should not a priori be restricted by reference to the retail services provided.

A significant number of NRAs have included cable in market 5 based on sound economic evidence and reasoning. I/ERG would like to see recognized more explicitly that cable may be included in the market, where a sufficiently strong indirect pricing constraint exists.

- Market 6

I/ERG agrees completely with the retention of former Market 13 and has no particular comments on the Commission's formulation.

- Market 7

I/ERG welcomes the retention of market 7 in the Recommendation, and note the arguments adduced by the Commission in support of the retention of this market, at the meeting of NRAs and NCAs on 12 September 2007. We welcome the Commission's recognition that the relevant retail market is a broad bundle of services, and that, while spectrum reform may lower barriers to entry, this will not happen in the short term. We also welcome the Commission's acknowledgment that only a limited number of firms have incentives to behave competitively (and that, indeed, many still tend to limit access in some way). Finally, we agree with the Commission's finding that there is no evidence that competition law alone would be effective to address the competition problems in this market. Indeed, even if some NRAs have found this market efficiently competitive, some others have not, and overall, we agree that keeping it in the list creates a regulatory threat that contributes to competitive pressure on mobile markets.

- Market 8

I/ERG underlined in its response to the public consultation that there might be reasons for including both SMS and call termination in a single market, but there might also be reasons for keeping them separate. However, I/ERG is of the opinion that keeping them separate may go against harmonization across Europe. Given the similarity of the economic and regulatory issues associated with call and SMS termination markets, flexibility is required to demonstrate that SMS termination constitutes a relevant market. I/ERG would welcome further articulation of the Commission's position.