



Body of European Regulators for Electronic
Communications (BEREC)
Market and Economic Analysis Expert
Group (MEA-EWG)

02.06.2020

Opinion on the Review of the Recommendation on Relevant Markets, policy field: Digital single market

Dear Ms Caccinelli, dear Mr Infante,

Dear Sir /Madam,

we would like to take this opportunity to comment on the discussed changes to the current market recommendation as well as the introduction of new markets.

The European Local Fibre Alliance (ELFA) is the European voice of local fibre operators. Its members are national associations from Austria, Denmark, France, Germany, Great Britain, Norway, Sweden and the Netherlands. The companies represented within these national associations are the driving force behind the roll-out of extensive fibre networks across Europe. ELFA's goal is to establish fibre as the proper foundation for digitisation and to pave the way towards a comprehensive European digital society and economy. For this reason, ELFA calls for a clear-cut policy commitment to make full fibre networks a reality for all European citizens, businesses and public administrations.

While we concur with the commission's opinion that the revised market recommendation must take account of Directive (EU) 2018/1972 establishing the European Electronic Communications Code [EECC], the market recommendation should adequately reflect and address the market situation of all Member States of the European Union. Furthermore, the recommendation must reflect a balanced

approach with regards to the EECC's objectives. Therefore, the objectives of promoting competition and connectivity must be pursued in a balanced manner without the former distorting competition.

Over the past years, ELFA has promoted solutions negotiated by market participants prior to the imposition of regulatory measures regarding the roll-out of FTTB/H networks.

Consequently, the market recommendation which follows a "one fits all"-approach must be limited to markets which are recommended to be separate markets across all Member States. Introducing new markets or making significant changes to already existing markets would be a rather invasive approach that could distort competition at the national level. Furthermore, said approach would most likely encourage national regulatory authorities [NRAs] to adopt the markets as described in the market recommendation without considering national market conditions. While NRAs theoretically have a degree of flexibility regarding the adoption and implementation of the market recommendation, it should be noted that exactly this degree of flexibility allows NRAs to regulate markets which are not yet included in the recommendation upon their discretion to maintain a competition on a national level in a specific market. However, in practice, NRAs will be more inclined to follow the Commission's market recommendation than to introduce new markets on a national level or explain potential deviations from the market recommendation. This is due to the presumption that the market recommendation identifies all markets that are not fully competitive across all Member States. As a result, NRAs will most likely follow any recommendation, which underscores the importance of the new recommendation. Referring to the recommendation's "one fits all" approach, ELFA maintains that the recommendation should only address the "smallest common denominator" with regards to markets which can be presumed to require regulation in all Member States.

In the following we would like to address several crucial proposals concerning the recommendation.

1. Access to physical infrastructure

ELFA maintains that there is currently no need to add a separate market regarding access to physical infrastructure [PIA-market]. For one, the Broadband Cost Reduction Directive [BCRD] mandated Member States to introduce symmetrical obligations for all market participants. Thus, a separate market regarding the access to physical infrastructure is not and cannot be required under the three-criteria-test. Moreover, introducing a new market would eliminate or at least significantly reduce incentives to invest in FTTB/H infrastructures. In some Member States, e.g. Germany, the BCRD and its partially ambiguous transposition into national law have already

triggered a certain level of scepticism. In our opinion, adding a market regarding access to physical infrastructure would benefit neither connectivity nor competition, as it would jeopardise crucial investment and co-operation incentives without giving market participants on a national level the chance to negotiate terms and conditions.

This is in line with the Summary Report on the targeted public consultation on the Review of the Recommendation on Relevant Markets. The majority of respondents in the Summary Report view existing legislation and regulations as sufficient to ensure access to physical infrastructure. Furthermore, the respondents expressed that it is not necessary to add additional wholesale markets to the list of markets susceptible to ex ante regulation SMP regulation. Establishing a market for wholesale access to physical infrastructure could potentially weaken incentives for operators to co-invest in new network elements. Finally, the respondents contended that appropriate regulation can be administered by Member States and their respective NRA to adhere to their specific national circumstances. Thus, NRAs can assess competitive conditions and, if necessary, regulate physical access.

The Summary Report demonstrates a rather clear consensus that a physical access market must not be added to the list of markets susceptible to ex ante regulation. In ELFA's opinion, the introduction of a separate infrastructure access market will not be required for the foreseeable future given the vast differences considering the national market situations.

During the workshop "Relevant markets susceptible to ex ante regulation" WIK justified the supposed need for introducing a PIA-Market arguing that the demand for physical-infrastructure-access [PIA] through the BCRD has been very limited. WIK stated that the access regulated by the BCRD is not well suited for telecom ducts, because the BCRD pricing has to take into account the impact on the business case of the first mover. This shows that according to the concept of WIK the negative effects of PIA on the business case of the first mover should be completely ignored. The approach completely disregards the first mover's interests and fundamentally damages the general conditions for fibre investments.

Overall, WIK believes that duct access should be the primary access product in a fibre environment. However, ELFA contests that duct access is not suitable to achieve these goals. The roll-out and local availability of ducts is very different in the individual Member States. The segmentation of a "PIA-Market" in the individual Member States would therefore be very different. For example, duct ownership in Germany or Austria (where a lot of municipalities own ducts and

offer them on the market) is significantly more segmented than it is in France. As mentioned earlier, the idea of introducing or recommending PIA as a primary wholesale market across all Member States is fundamentally flawed, as it disregards the realities that exist on a national level with regards to the availability and existing roll-out of physical infrastructures.

2. Wholesale local & wholesale central access

In our opinion, the separation of wholesale local and central access [WLA/WCA] markets has proven to be effective in Germany and other Member States and thus, should be maintained. Merging the two currently separated markets or eliminating one of them may adequately display the current market situation in some Member States but by far not in all Member States. In Germany, both the central and local wholesale access remain important remedies/products, which address very different needs of the competitors. Different business models and customer groups which create distinct market structures. Therefore, the different remedies/products regarding wholesale local and central access cannot be considered substitutable. In Denmark, the NRA has suggested to merge the two currently separated markets. The Danish NRA presumes a sufficient degree of substitution between local and central access. The Danish fibre-utilities believe that centralised fibre products (BSA/VULA) will secure a sufficient level of flexibility and opportunities for differentiation also leading to a higher number of access seekers (service providers) on open access networks due to limitations in capacity.

Moreover, the Summary Report clearly shows contrasting opinions on the question to keep markets 3a and 3b both in the list of market susceptible to ex ante regulation. Some respondents argued that the market for wholesale local access provided at a fixed location should not change because different business models require different types of access. Others stated the possibility of merging the markets in light of VULA access products and the alleged substitutability between access products on both markets. Some respondents indicated that the market for wholesale access regarding very high broadband speeds should be excluded as it tends towards effective competition. Others stated that copper-based services can no longer substitute fibre-based services and thus should be excluded.

The different market situations in the EU Member States as well as the clear and obvious discrepancies in the Summary Report show that changes to the market recommendation cannot be considered to be necessary in all Member States. Copper and fibre access are currently assigned to the same market in most Member States. This is accurate as long as the roll-out of fibre optic

networks is still underdeveloped. It is therefore correct that WIK assigns copper and fibre to the same market depending on the progress of fibre roll-out (chart 34). In this context it is important to reiterate that the level of regulation for copper networks must remain unchanged. This is an essential condition for an orderly migration from copper to fibre optic networks.

For copper networks – at least in some Member States – local loop unbundling [LLU] remains a significant wholesale product with regards to the provision of services to end-users, both businesses and consumers alike. In fibre networks BSA/VULA will likely be significant wholesale products for consumer and business clients. Fibre unbundling or the provision of access to dark fibre will most likely be a wholesale product on which products for business clients will be based. Therefore, the Fibre Unbundling/Access to dark fibre would most appropriately be assigned to the market for dedicated connectivity or the current market for wholesale high quality access provided at a fixed location [market 4].

Thus, the distinction between the current markets 3a,3b and 4 should be maintained.

Some national authorities should be given the opportunity to implement changes on a national level if required. This would ensure competition in those markets that still depend on the separation of the wholesale markets. It would also give Member States the opportunity to analyse, define and regulate markets on a national level, thereby maintaining and strengthening competition.

3. Access for mobile backhaul

WIK considers the inclusion of access to dark fibre for the purpose of mobile backhaul within a wholesale market segment (chart 46). This is apparently aimed to facilitate the connection of 5G base stations with fibre.

ELFA underscores that there is no need to include backhaul in a new market segment for dedicated connectivity or in the market for wholesale high quality access provided at a fixed location [market 4]. In many Member States, fibre networks are still underdeveloped. The expansion of FTTB/H varies across regions and Member States. Consequently, there is no reason to add a new market for mobile backhaul. Due to differing expansion rates and market relevance of FTTB/H networks, the NRAs are best suited to combat emerging market challenges with flexible remedies.

In Sweden, an advanced and unregulated market regarding open access and fibre, local fibre networks and mobile operators have cooperated for a more than a decade now. Therefore, Sweden has one of the fastest and most reliable 4G networks in the world. Renting out back haul (point-to-point) is an important part of the local fibre networks revenue. It has also improved business opportunities through the connection of both households and companies when fibre is rolled out to new mobile masts. Finally, it has increased the competition towards the incumbent.

From ELFA's point of view, the fibre connection of 5G base stations is a functioning market that should not be impaired by regulation. Fibre operators have a strong interest to cooperate with 5G-Network Operators. The connection of 5G base stations is part of their business models. The imposition of regulation on this market segment would distort the existing balance regarding negotiation power. Seeking regulatory instead of negotiated solutions, would most likely cause a significant delay the connection of 5G base stations. In Austria for example, members of VAT are cooperating very closely, when rolling out fibre with subsidies, always taking the mobile operators needs into account and connecting mobile sites, while building their FTTH/B networks.

WIK admitted during its presentation of the study that the connection of 5G base stations is not a problem in all Member States. Therefore, it is not reasonably justified to include backhaul access to 5G base stations in the market recommendation. The decision to impose regulation on this market must be left to the NRAs of the Member States, where a competitive problem with respect to the connection of 5G base stations exists.

As mentioned earlier, ELFA has promoted solutions negotiated by market participants prior to the imposition of regulatory measures regarding the roll-out of FTTB/H networks. Thus, we strongly argue to give operators of emerging FTTB/H networks the opportunity to negotiate solutions regarding mobile backhaul. For instance, in Sweden, the Swedish member of ELFA – Swedish Local Fibre Alliance (Svenska Stadsnätöföreningen) – representing more than 150 local fibre operators, rents out dark fibre to mobile operators through a common purchasing platform (CESAR). In Denmark, the fibre-utilities are planning a technical harmonised fibre product for mobile operators as they upgrade to 5G. In Germany, we refer to the framework agreement between the BREKO Purchasing Group and 5G operator 1&1, which governs 5G base stations connected with fibre.

Imposing regulatory measures on FTTB/H networks under construction, would most likely be to the detriment of fibre-rollout and thus, would not promote but considerably hinder VHC-networks connectivity.

4. Geographical segmentation of Markets

Currently, we do not see any indication for the geographical segmentation of markets in many Member States. This is because fibre roll-out in many states is not yet advanced to a level where copper and fibre-based products cannot be considered to be substitutable anymore.

In general, the geographical segmentation of markets depends on the extent to which different degrees of competition or competitive conditions can be determined in certain geographical segments within Member States. This determination largely depends on which market is being considered.

Regionally segmented markets for active or passive wholesale products do not automatically result in significant differences on the retail level. Differences on the retail level largely depend on the availability of open access wholesale models, on which a comparable level of products and prices can be based. Large wholesale seekers will most likely receive comparable conditions regarding wholesale products and prices, due to their strong position in negotiations. Therefore, they will be able to offer nearly identical products and tariffs to all of their customers.

The question regarding the degree of competition in a certain geographical segment depends on whether an open access provider is operating the market in question. For example, a wholesale market with an open access operator can be more competitive than a market with three network operators who act in a coordinated manner, as has been observed for a long time in the mobile retail markets.

Should you have any further questions, please do not hesitate to contact us at any time.

Yours sincerely,

European Local Fibre Alliance

represented for the purposes of this submission by BREKO, BUGLAS, CMG, Dansk Energi, FCA, Fiberforening, FNCCR, INCA, InfraNum, SSnF, VAT.