

Telefónica response to the QUESTIONNAIRE FOR THE PUBLIC CONSULTATION ON THE REVISION OF THE RECOMMENDATION ON RELEVANT MARKETS

Introduction

Telefónica welcomes this Commission consultation about the list of relevant markets. We think that it is a highly necessary consultation, given the changes that the telecommunications sector is undergoing.

The sector is changing continuously due to technology evolution and increased competition. Competition is highly developed, due to the players of the telecom sector and the competitive pressure of “over the top” players.

Markets have become more complex and varied. For example, for some customers, mobile solutions are very well positioned to provide all the range of communications needs that they demand. Mobile broadband and LTE are exerting competitive pressure over fixed, although the intensity depends on the country and/or geographic area and customer group.

For other types of users, with other requirements of bandwidths and data volumes, fixed solutions will be needed. In the fixed sector, NGAs are starting to be developed in many Member States. In most cases the leaders in NGAs are not the traditional fixed operators, but cable providers and alternative FTTH providers. A key issue in the development of NGAs is that network solutions followed by operators are different in the different countries, and this makes more economically efficient different wholesale products in the different countries.

Competition is developing in many Member States in a geographically heterogeneous way: cable operators, unbundlers and alternative FTTH providers concentrate on dense areas of Member States.

Although it is very difficult that regulated markets can really grasp the realities of commercial markets, due to its continuous evolution, we think that at least they should be able to take into account the competitive pressure of alternative infrastructures in the market definition stage. We develop comments on self-supply and geographic segmentation in this contribution.

We think that all issues make necessary a forward looking and flexible view of the market definition exercise. Some degree of freedom at national level is necessary in order to take

into account different network solutions, degree of competition of alternative infrastructures, geographic differences, etc.

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?*

Access/networks:

- Deployment of NGAs
- Deployment of DOCSIS 3.0 technology that has led to cable leadership in NGAs
- Strong growth of mobile broadband. Full deployment and coverage of 3G.
- Deployment of LTE, that will be developed in a substantial part of Member States when the new Recommendation enters into force.
- The four above exemplifying the replication of copper networks
- In some Member States, preparations for deploying of Vectoring VDSL technology based on copper

Services & devices:

- Growth of data traffic
- Smartphone and tablet adoption. This shows the importance of mobility, and that multi-access devices allowing for network agnostic service provision, e.g. Wifi/Mobile access
- Migration of switched voice to IP voice (both operator's managed IP voice and OTT voice) – This migration is even more strong for texts (SMS being substituted by IM services)
- Development of new platforms for TV and general video distribution (such as web TV)

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?*

The main changes are related to:

Strong competition of cable operators¹. These players have developed their business plan following a vertically integrated model without any regulatory obligation, and are, in some Member States, very strong competitors. Moreover, they are clear leaders in ultrafast speed broadband. This happens because they are first movers in NGAs due to their cost advantage, that allows them to offer very quickly a higher coverage of ultrafast broadband. This may differ between countries, but according to our experience, it happens especially in urban geographic areas of many Member States.

See, also: key findings of the WIK/Liberty Global public policy report "Re-thinking the Digital Agenda for Europe"

The cost of upgrading existing digital cable systems to EuroDOCSIS 3.0 is minimal.

The cost of driving fibre into the network can be significant; ...

In some geographic areas of some Member States, there is also strong competition of local fibre operators. Viability of these networks is explained because these operators build up new fiber networks locally, using a cherry picking strategy that is natural strategy in network industry. And, similarly to cable operators, without any regulatory obligation.

The present framework should find a mechanism to take into account competition of alternative infrastructures in the market definition process.

The fact that the wholesale market definition of markets 4 & 5 excludes self-supply means that it is not possible to have a focused and targeted regulatory framework, that includes the competitive pressure of these alternative infrastructures in the wholesale market (see below comments on self-supply)

Increasing relevance of wireless technologies as an alternative infrastructure to access broadband connectivity services rendering market structures for basic and fast broadband services increasingly differentiated².

¹ See Solon Report – Broadband on Demand: Cable’s 2020 Visión:
<http://www.cableeurope.eu/index.php?mact=Publications,cntnt01,details,0&cntnt01documentid=163&cntnt01returnid=74>

² See for example, a discussion on: “The voice of broadband”:
http://www.broadbandtrends.com/yahoo_site_admin/assets/docs/The_Voice_of_Broadband_Vol7_Issue_8.33784613.pdf

Increasing decoupling of connectivity and communication services, exemplified in particular by the development of OTT services that render managed or switched voice and messaging services, including SMS, market structures completely changed resulting in a decline on the relative value of these services. As a result, OTT business models are directly translated into strong competitive pressure exerted over voice and messaging services. Moreover, as messaging has become incrementally free more people have started to text more than talk hereby exemplifying the relevance of substitution of voice and texts services.

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?*

As long as services are increasingly provided over the top, both the interoperability of them as well as the ability of developers to have access to communications resources via SDK (software development kits) are becoming of increasing relevance to competition and choice for consumers.

Certain device and OS providers can control the interplay between applications and OS/device layers and leverage their power in this areas to benefit the core business whatever it is (phone, manufacturing, cloud services, publicity & distribution, etc.) i.e. becoming communications bottlenecks. Such bottlenecks should be identified and addressed by the appropriate competition analysis in the above mentioned core businesses in order to put communication providers and players in those other sectors on an equal regulatory footing.

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?*

We believe that the starting point for the whole regulatory process to make real economic sense should be the end-user choice of services in the absence of regulation. Years ago it was clear that in the absence of regulation end-users would generally not have choice. But overtime an affirmation like that would be more and more questionable and should be reflected in the regulatory process. To exemplify this, just think about the options consumers now have in some countries over fixed, including cable, and wireless mobile networks, not to mention about services over the top.

For example, there are areas where there is infrastructure competition, fully fledged or based on an upstream wholesale product such as ducts. In these cases, it would in our view be disproportionate that the NRA would be forced to impose a number of several layered remedies downstream just for the sake of complying with a standard list of markets in a way that is not necessary to solve the problem under consideration.

Having said that, the 3CT is generally valid. However, we think that the three criteria test needs to be clear, and more emphasis should be given to NRA and competition authorities role in assessing the second criterion: prospective competition (see comments on next question).

In addition, we think that NRAs have to do more work on the 3CT and undertake it at national level. Usually the markets included in the Recommendation are automatically scrutinised at national level, sometimes without a proper study of entry barriers. We think that all NRAs need to do the 3 criteria test for all markets so that we have proper evidence based market reviews.

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?*

Please see above answer to question 4.

The second criterion is especially important for the period the Recommendation is supposed to be in place. We assume that it will be approved in 2014 and will probably be valid for the period 2014-2020. In that period, technology and markets are going to change radically, and entry barriers will also evolve.

The Recommendation should include guidance about taking into account the dynamic aspects of entry barriers in a way that allows NRAs to take into account technology and market developments.

For example, alternative infrastructures, such as local FTTH providers, cable networks, Wi-Fi networks and other FTTH providers using ducts are growing and providing a huge competitive pressure in areas of several Member States. This should be reflected in the geographic perimeter of broadband markets and leased lines, especially as competitive networks gain critical mass of customers.

Co-investment agreements in certain Member states are being set up. This means that in 1-3 years there is going to be a deployment of parallel networks that allow for competition by several parallel infrastructures. This may depict a different competitive picture, especially for FTTH networks. It is necessary to bear in mind these agreements and their

implementation, as it has a very clear influence for the assessment of entry barriers. This is especially relevant for countries with FTTH solutions and ducts availability up to the building/home.

Substitution of traditional telecomm services by OTT VoIP and messaging is going to diminish the importance of current markets 1 & 2, as well as termination markets.

We think that the Recommendation should include some guidance about the need to take into account dynamic aspects in the forthcoming market review periods. Market Recommendations, market analysis and regulation in general has always been too slow to adapt to these market and technology developments.

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

Legal certainty can be ensured by defining a well-defined list of markets that is **focused on the key bottlenecks of networks** that are the minimum necessary for healthy and sustainable competition to develop. This list should reflect the heterogeneity of network design and competition structures in Member States.

On the other hand, legal certainty can also be improved by ensuring that when sustainable competition at retail level develops due to the existence of infrastructure competition, this competition can be adequately taken into account at market definition level of wholesale markets.

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.*

The geographic scope of many markets has to be adjusted to the realities of network - infrastructure based- competition. That is a key adjustment.

For example:

In some areas with regulated access to ducts, some players are using them to deploy leased lines, including mobile backhaul and FTTH. This is already happening in Member States where ducts are available up to the building.

In areas with infrastructure competition, using or not the SMP operators' ducts, cable operators and alternative fibre providers are developing FTTH.

There should be a clear indication to NRAs that whenever there is deeper competition based on an upstream wholesale product, they should properly analyze downstream markets, with a focus on geographic markets to make a proper SMP assessment on downstream markets. This assessment should be done taking into account geographic differences. See also our comments below on geographic markets.

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.*

Having a precise geographic delineation of markets will imply that SMP assessment is done with rigor. This implies focusing regulation on key inputs and players. It will diminish transaction costs, and allow for a more healthy competitive environment.

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.*

Market 1-

Market 1 is a clear candidate to be removed from the list of relevant markets. There are no entry barriers that prevent companies to enter this market, as there is a set of wholesale products that allows players to compete at retail level. Today, local loop unbundling is enabling competitive offers by several players. This is not to mention cable and wireless competition. Competitive pressure at retail level makes regulation superfluous.

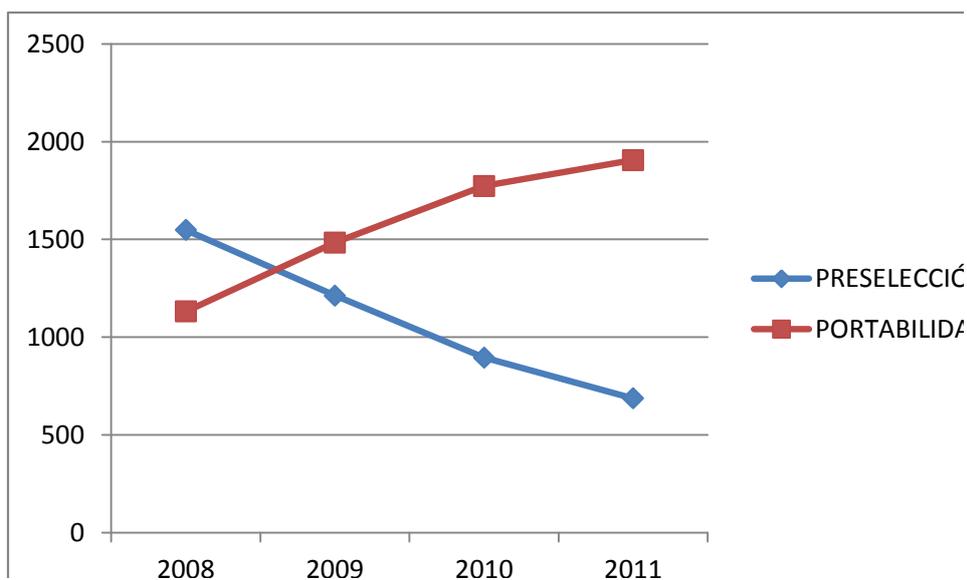
We notice that where there is regulation of the monthly rental of the telephone service, this is many times applied by NRAs in order to have control over RPI, rather than to remedy a competition problem in retail markets.

A possible concern about the removal of this market from the Recommendation could be that incumbent operators can enter into price squeeze practices, especially in the context of bundles. We think that this concern can be overcome, because NRAs can apply, if necessary, an economic replicability test, as is the practice now in several Member States.

Market 2 -

Market 2 (call origination) is another candidate to be removed from the list. There are wholesale products that fulfil the purpose, and we think that today this market is a legacy product that can be classified as the “very first step” of the investment ladder. After 15 years of market liberalisation, we think that it is time to remove some steps of the ladder. We think that it is necessary to remove some remedies, such as preselection, in favour of other remedies that imply more investment by alternative players.

Carrier preselection is in a clear downward trend in many Member States, substituted by alternative offers based on higher value wholesale services. For example, in Spain, the importance of carrier preselection is clearly diminishing. In the period 2008-2011 has decreased by 56%, while fixed portability has increased about 68%. We think that market 2 and preselection can be removed, as its initial role has been fulfilled.



Source: internal analysis based on CMT data.

Market 3 & 7 – call termination on fixed and mobile networks

These markets should be seen with the perspective of the time of application of the forthcoming Recommendation. A recommendation that will be applied from 2014 and last until 2018-2020 cannot ignore the competitive pressures and business models evolution that traditional voice is undergoing.

With this timeframe in mind, voice termination markets should be removed from the Recommendation. If the Commission decides to maintain them in the Recommendation,

at least there should be a very clear message to NRAs that they should perform the 3CT at national level as a first step of market analysis.

The business models evolution is due to the increasing competitive pressures of OTT services over voice and messaging. The strong decrease of MTRs due to the application of the EU Commission Recommendation is also contributing to this trend, by fixing very low and symmetric MTRs. All this is forcing operators to find ways to maintain revenues and remain competitive.

In the fixed sector, termination rates have been very low for years, and business models of operators have led to flat rate packages that include, as a minimum, voice and broadband. It is well known that since several years ago, fixed operators do not sell broadband packages without a flat rate for calls to the fixed network.

If today, any fixed operator would try to raise FTRs, that would place him out of the market. Competing operators and end users will find alternative ways to terminate calls. Customers can very easily switch operator or use VoIP.

The business model of the fixed network evolved years ago, and the mobile network is changing business models as well:

- The growth of smartphones and associated broadband data services, have introduced competitive pressure from OTT players. This is due to the existence of the data broadband service and the WiFi capabilities in smartphones³. Applications such as Skype, Viber, etc. are profiting from this growth. These applications use the mobile network telephone number to establish communications in an easy and transparent way for the customer, but do not use the switched network. The competitive dynamic is moving mobile operators to change retail offers in response to this competitive pressure and to mitigate ARPU decline.
- There is a tendency of households to own SIM of multiple providers. This trend is nourished in particular by cheap (or factually free) prepaid SIM cards.

³ There is a variety of studies about this topic. For example: Analysys Mason - Consumer smartphone usage: voice and messaging trends, August 2012:

- Smartphones are bringing a variety of audio- and text-based communication services into competition for the first time
- Operators will be concerned that the sub-set of users that have already substituted their traditional voice service for a VoIP app will grow
- Almost half of smartphone users use IM or OTT messaging services, presenting operators with some urgent challenges

- Dual-SIM handsets have increasingly penetrated the handset market, making it possible for users to conveniently choose whichever provider is cheapest or best in a particular situation.

Thus, the market has to be defined on a larger scale, including OTT services and – when multiple-SIM handsets are taken into account - other mobile networks. We see a contradiction in the attitude of some parts of the regulatory community who are against any type of limit or blocking of OTT services (net neutrality) one the one hand, but neglects the impact of OTT services on termination on the other hand.

Customers are having more and more options to make and receive calls and texts, and the typical termination bottleneck for call termination is blurring. Competitive pressure is making operators bundle minutes of traffic and messages with broadband offers, and this is a trend that is well underway. To reverse this situation is not feasible, and in case any operator would be tempted to raise termination charges, competition law or the resort to art. 5 of the Access Directive could be used to mitigate an hypothetical problem.

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.*

The impact of the removal of market 1 will be negligible, as there is ample competitive pressure by offers based on wholesale services and alternative infrastructures.

The impact of removal of market 2 will be very small, competition in the fixed retail business today is based on packages of –at least- broadband + fixed voice, that include unlimited fixed calls in the package. The market for international calls has a strong competitive pressure of VoIP solutions. Not to mention the competitive pressure of mobile over fixed voice, that is even stronger than other sources of competition. Removal of this market can have a positive effect, as removing superfluous regulation can increase innovation in tariff offers.

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.*

Telefónica thinks that no further markets need to be included in the list of relevant markets. Inclusion of some additional markets by a few NRAs is not sufficient reason to say that these markets pass the 3CT at EU level.

SMS termination: Retail SMS are in continuous decline, due to the competition of OTT IM solutions, such as WhatsApp, and the use of e-mail and social networks⁴. Smartphones are making that communications habits are changing, and this has had a first and immediate impact on SMS volumes⁵.

An increase of SMS wholesale prices would make users change to alternative solutions at retail level, and this would render any price increase unprofitable. It is even common that today some users still using SMS feel the pressure to adopt a smartphone because most of their contacts are already using IM solutions. The problem of excessive pricing at retail level due to the prices of SMS termination is not feasible.

SMS termination is a market that has never been regulated, and the fact that a few NRAs have done this, does not imply that it has to be considered for its inclusion at EU level. We think that in case of problems, there is still the art. 5 of the Access Directive that can be invoked in case of disputes between operators.

MVNOs: We think that the “old” access and origination market is not a candidate to be included in the Recommendation, because it does not pass the 3CT at EU level. The main reasons are:

I. Presence of high and non-transitory barriers to entry the market

The explanatory memorandum to the last recommendation in 2007, referring to the potential for spectrum trading and additional allocation to new market entrants, stated that “given the uncertainty regarding medium term events, there is no conclusion on the market failing the first criterion.”

⁴ Ovum, The Casualties of Social Messaging, February 21, 2012: “consumers’ increasing use of IP-based social messaging services on their smartphones cost telecom operators \$8.7bn in lost SMS revenues in 2010, and \$13.9bn in 2011. It expects the decline, representing nearly 6% of total messaging revenue in 2010 and 9% in 2011, to continue as the popularity of messaging apps continues to grow.

⁵ On the penetration of smartphones, see Comscore report: In “Big 5” countries, average penetration of smartphones is 55%:

http://www.comscore.com/Insights/Press_Releases/2012/12/EU5_Smartphone_Penetration_Reaches_55_Percent_in_October_2012

Although the situation may differ across the Union, in a number of member states the barrier to entry associated with the spectrum allocation has been lowered as a result of the digital dividend.

In many member states, there have been opportunities of new market entries by new players. Example: in Spain, cable operators have been awarded spectrum, Slovakia: spectrum reserved for new players.

II. No tendency to effective competition within relevant time horizon

The emergence of various types of virtual operators in the majority of member states has led to the strengthening of competition in the downstream market. In Europe, more than 400 virtual operators are present on major member states' markets at this time. The overwhelming majority of them are countries without regulation of MVNOS, so it has been market dynamics that have made MVNOs to develop.

As a result of the different sources of competition, average revenue per minute in major European markets has been dropping by more than 12% each year since 2009 (Bank of America, Merrill Lynch Q1 2012).

III. Insufficiency of competition law

In the Czech market where a mobile access market has been studied, the regulatory authority justified the insufficiency of competition law in this case as follows: competition law, in the view of the CTO, did not provide adequate and timely tools for the fostering of effective competition and fixing potential problems on the market while providing also sufficient degree of regulatory predictability. However, in line with this argumentation, the tools of competition law would be inadequate in all, no matter how competitive, industries.

The identification of competition failures is rather straightforward on this market, especially where a number of MVNOs are already present and information asymmetries are lower.

Other arguments

1. The inclusion of a mobile access market could create uncertainty of some forms of current MVNOs as to what their position is within the new regulatory analysis.
2. OTT technologies present a competitive constraint to which operators react already. The development of the new market, which however rests on the provision of mobile data services, will proceed at different speeds between member states. Regulatory intervention at this time may have unintended consequences for the development of these technologies as well.

As a conclusion, the market does not satisfy the conditions of the three criteria test from a Europe-wide perspective. The majority of member states can demonstrate the existence of effective competition on the mobile access market.

Market Access/call origination on mobile networks	
Market	Competitive?
Austria	Yes
Bulgaria	Not analyzed
Cyprus	Yes
Denmark	Yes
Estonia	Yes
Finland	Yes
France	Yes
Germany	Yes
Greece	Yes
Hungary	Yes
Ireland	Yes
Italy	Yes
Latvia	Yes
Lithuania	Yes
Luxembourg	Yes
Malta	Yes
Netherlands	Yes
Norway	No (SMP)
Poland	Yes
Portugal	Not analyzed
Romania	N/A
Slovakia	Yes
Slovenia	Yes
Spain	Yes (2012)
UK	Yes

Source: Based on Cullen International

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.*

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.*

We cannot identify any market that should be added to the list of the revised Recommendation.

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.*

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.*

No market identified

The case of the market for multinational companies

Connectivity for MNC companies can constitute a transnational market at level 4 (transport) and above of the OSI model. Based on the integration of layers 1 to 3, which are already competitive or regulated in all MEs.

At lower layers, the existence of wholesale services that allows easy provision of services for MNC/MSO depends of the flexibility and quality of the fixed wholesale services offered by the SMP operator in the national market. Today, LLU, BSA and leased lines allows the provision of services for most communications needs.

According to our experience, the needs of the business segment, apart from being complex, tend to be country specific, and many times case specific. So it will certainly be difficult to say whether it deserves a specific delineation at market definition level.

Another important point - that should be looked at jointly - is to take into account that electronic communications and its cost have a relative weight in the package of ICT solutions that companies buy. Electronic communications services tend to be a minor part of the package of ICT services. Today, behavior of business users is dependent more on IT than on price of connectivity and therefore, while analyzing the market, the importance of IT solutions has to be taken into account.

Many times the purchasing decision of an ICT solution will be due to the improvements to the production process, the additional revenues it may facilitate and the cost of the IT solution. The price of connectivity does not play an excessive role in the decision making process by companies.

Players that compete for the final business users are usually players of the wider ICT market, that provide integrated solutions and not only players of the pure connectivity market. Since many years ago, players compete with integrated solutions, that include both electronic communications and IT solutions. And many times IT companies are the strongest competitors in this field.

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

Self-Supply

Telefónica thinks that a key issue to change in the forthcoming Recommendation is the approach to geographic markets and self-supply.

The Recommendation should provide more flexibility for NRAs to include self-supply of alternative infrastructure players in the relevant market.

We think that it is a key issue in order to have a framework more proportional and adapted to competitive realities.

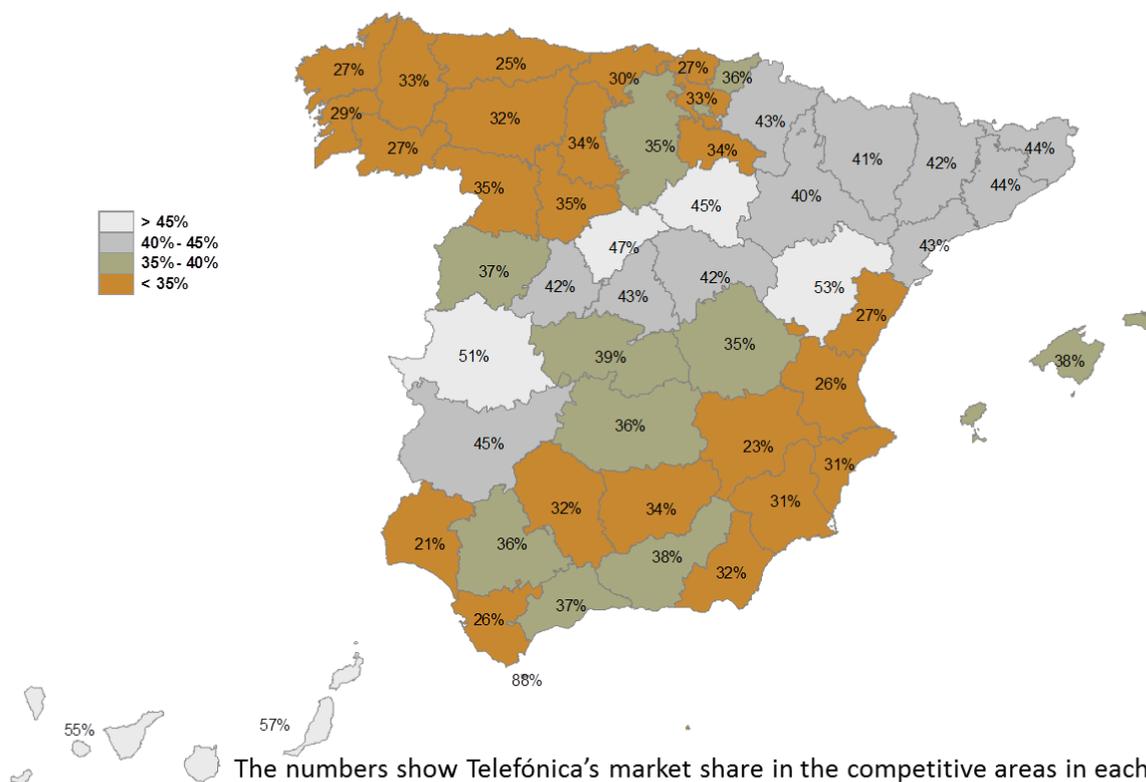
We note that the Commission sustains that self-supply should not be included in the relevant product market, and that the Commission prefers to take it into account in the SMP analysis phase.

We think that perhaps both methods may produce similar results in national markets that are fairly homogenous, and where the SMP analysis phase can be done at aggregated national level without too many geographic variations.

However, in countries where there are substantial variations of market shares depending on the geographical area, the Commission approach makes very difficult to have a sound market analysis that really grasps the realities of SMP.

For example, today in Spain Telefónica market share in the retail BB market is about 47% (September 2012). This market share is higher or lower depending on the geographic area, and it is as low as 21% in some areas, and maximum of 53% in other. Typically the market share in competitive areas is about 30%.

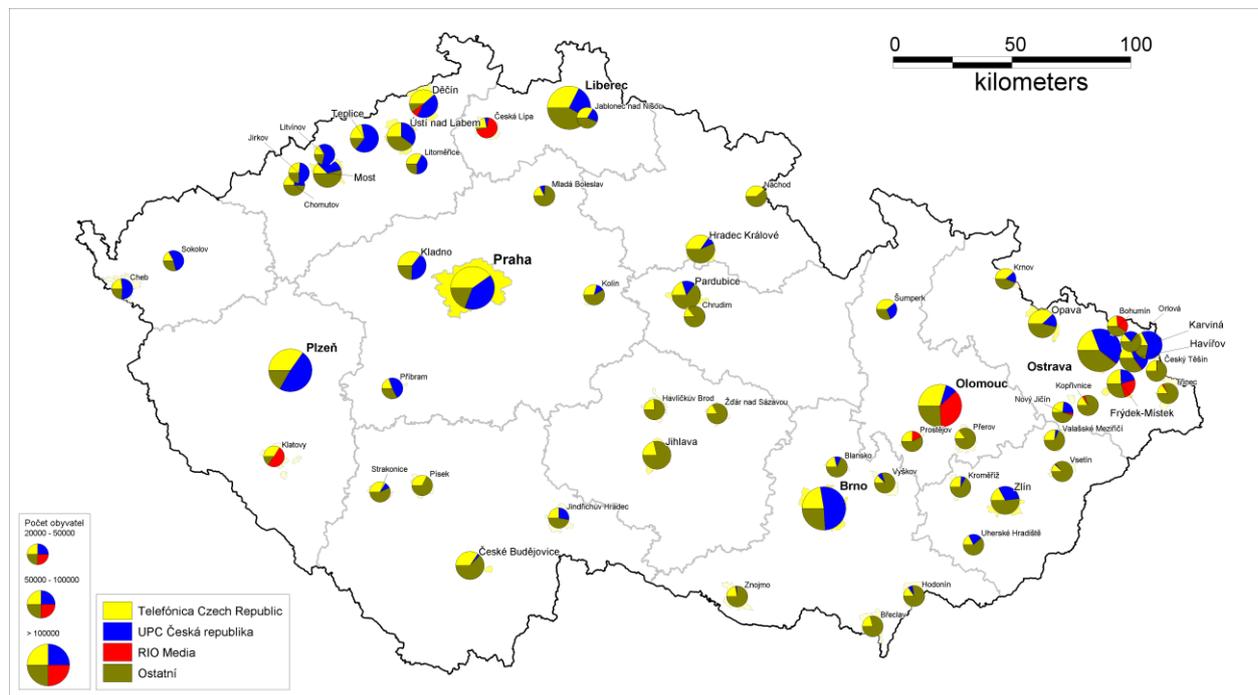
Telefónica retail BB market share in competitive areas (Sept. 2012)



The numbers show Telefónica's market share in the competitive areas in each province (not the whole province).

Competitive areas are defined as in previous CMT reports: local switches with >10.000 lines, 3 or more alternative operators. If one of them is a cable operator, it should have minimum 60% coverage.

In the Czech Republic, the map below shows also the BB retail market shares of the main players in the competitive areas, according to the NRA:



These differences in market share at retail level reflect that competition in those areas is highly developed and they are usually linked to the other criteria that reflect geographic differences, such as the evolution of shares over time, and the existence of differentiated pricing in different areas.

However, these differences cannot be taken into account at market definition level if self-supply of cable operators and unbundlers is not factored in the relevant market. **If you take it into account in the SMP analysis phase, it is not possible to have different SMP status in different geographic areas, because the incumbent operator will always have 100% market share in all areas.**

This would make it impossible to deregulate very competitive areas at retail level. For example, in the recent case of the Czech Republic, the incumbent operator retail market share was 44% in the national market and 28% in the competitive areas defined by the NRA in its first proposal, mainly due to infrastructure competition. But the current approach to self-supply made impossible geographic segmentation.

This approach leads to a situation in which the incumbent operator has a market share at retail level well below 40% in the competitive areas. Retail competition is not based on the relevant wholesale service, but on alternative infrastructure. Despite these facts, the incumbent operator still has SMP on the relevant wholesale market. As a result, the incumbent operator is regulated and has to provide access. At the same time, the incumbent

operator has to compete with players that are better positioned in the retail market with their own infrastructure.

This rigid approach to self-supply makes that especially in countries with large geographic variations of market shares and of infrastructure competition, the SMP is not assessed with the necessary correctness. For example, there are areas where there is a cable operator leader in BB services that is unregulated, and a national SMP operator that is the follower, regulated. The first NGA line that the national SMP operator deploys in those areas is regulated, while its market power is clearly curtailed in those areas.

To illustrate this point:

We have in the EU a variety of cases where geographic market segmentation has been applied: UK, PT. The SMP status varies and is different in different geographic areas in these Member States.

In these cases, self-supply and indirect constraints were taken into account at market definition stage.

In the comments to the Czech case, the Commission said that it did not veto these other market definitions because the result would not have been different.

However, we think that without inclusion of self-supply, it is not possible to have a geographically differentiated SMP status. The definition of a product market that only includes the infrastructure of the national SMP operator, cannot lead to a different SMP status in different areas, as the national SMP operator always has 100% market share in the product market.