

Introduction

ZON TV CABO (hereinafter designated “ZON”) welcomes this opportunity to share its views in this call for inputs as part of a pre-public consultation process. Besides supporting the Commission’s work on reviewing the Recommendation on Relevant Markets, ZON TV CABO believes that the current economic and social challenges should promote an efficient and thorough Regulatory analysis.

In the present call for inputs, ZON also wishes to express the desire on contributing in an subsequent consultation where the Commission will express its understanding from the inputs gathered. Since the Recommendation on Relevant Markets is a structuring document that has an impact across all Electronic Communications sector as well as on the millions of European individuals, families and companies that benefit from the effects of these services, in the contingency of changing the current three criteria or any change to the markets contained in the list of relevant markets, a reinforced importance on conducting a consultation is perceived.

Cable Operators have contributed, in the markets where they have a footprint, to extraordinarily increase or create competition and innovation. This was a direct consequence of the key role played by infrastructure competition, as ZON always believed and thus, any revisions foreseen in a future Recommendation on Relevant Markets should contemplate a forward looking analysis, preventing consumers welfare endanger and reflect an even more stronger desire to promote competition.

Taking all this into consideration, ZON understands that a European Digital Single Market must conciliate regional differences and avoid segmenting geographic sub-national markets, which would contribute to circumvent regulatory competition objectives and undermine consumer welfare across the European footprint. Besides, a transnational approach should be, at least, envisaged, namely on cross border essential infrastructures such as submarine cables that bring connectivity to ultra-peripheral regions and reduce the existent digital divide.

However, any of these processes are time critical, so directions and recommendations should be pointed out quickly, in order to be effective on the field as soon as possible.

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?

During the last 5 years, confirming Internet potential to change lives, the new technologies, already available in 2007, evolved and became implemented in several European countries, namely in Portugal where ZON's NGA network reaches approximately 3 Million Houses, across all its footprint.

ZON's NGA strategy, contrary to other competitors, namely historical copper one, was based on creating full availability and access for 100% of its customers' base to NGA services, non-discriminating between them (ZON's NGA network is essentially based on cable standard DOCSIS 3.0, using FTTH in new geographical deployments, however, services are exactly the same, regardless of the network technology used). This fact, eliminates the digital divide and is opposite to the NGA strategy carried out by historical operators, which typically use "cherry picking" segmentation (even knowing they have ducts and poles that cover almost all country territory), which can potentially contribute to undermine the European Digital Single Market.

Furthermore, considering the more recent consumer habits that became mainstream, namely (i) virtualization, with cloud computing, (ii) mobility, with a multiscreen content and (iii) all-IP technologies, promoting Over-The-Top solutions, there are challenges that every single operator must address with ambition, but envisaging the present Economic and Financial restrictions.

Nevertheless, DOCSIS 3.0, FTTx and LTE technologies reintroduced a level playing field that Copper based solutions weren't able to create. Even though, ZON's firmly believes that any essential infrastructure as ducts and poles are a key element on this deployment and an equivalent non-discriminatory access (the application of the "Equivalence Principle") must be assured or otherwise all competition achievements and consumer welfare will be surely endangered.

As a result from NGA deployments, broadband hungry services, such as VoD, Live Video, non-linear TV, Streaming and others, have been made available with higher service level requirements, which, in certain cases are at stake, when essential infrastructures aren't made available or are made available at exorbitant prices. This is the current situation of ZON's regional operations (ZON Açores and ZON Madeira) located at the peripheral regions of Azores and Madeira Islands, for which ZON needs to use

capacity in the submarine cable, which is a (natural) monopoly of the incumbent, with prices 50 to 100 times higher than the equivalent capacity in other international cables in the mainland.

European Single Digital Market is an end-to-end strategy to promote the economic growth and the stability of the EU, where digital divide is a target and is intended to be eliminated. Therefore, the new Recommendation on Relevant Markets should, if all European Citizens matter, create a mechanism that imposes obligations on any single essential facility that isn't economically efficient to replicate, such as submarine cables (which, by the way, were built using a strong financial support from the EU).

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?

Considering all the market changes either technical or economic described in Question 1, there were evolutions in the functioning and structure of relevant markets.

a) *Convergence and Network Effects*

Consumers became agnostic (if ever they have been concerned with it) on the mean of delivering the service, as long they have the access to high bandwidth and multiscreen solutions. This reinforced the need of convergent solutions with Fixed and Mobile feeds.

ZON confirms that the market is following the above mentioned trends, which are connected to an infrastructure competition matrix, though requiring a special focus on measures that level Network Effects, namely on services where there are impacts in the revenue flow, e.g. MTR and SMS/MMS termination.

b) *Bundles*

Competition on Electronic Communication Markets has been strengthened by Cable Operators and their DOCSIS 3.0 strategy. This forced historical operators to move to FTTx deployments with significant consumer benefits. However, the deepening of this process is far from arriving to an end. There is still a consolidation process to pave and the dangers to competition, if any misunderstanding of temporary vs permanent advantages is perceived, might spoil all referred consumer benefits, meanwhile achieved.

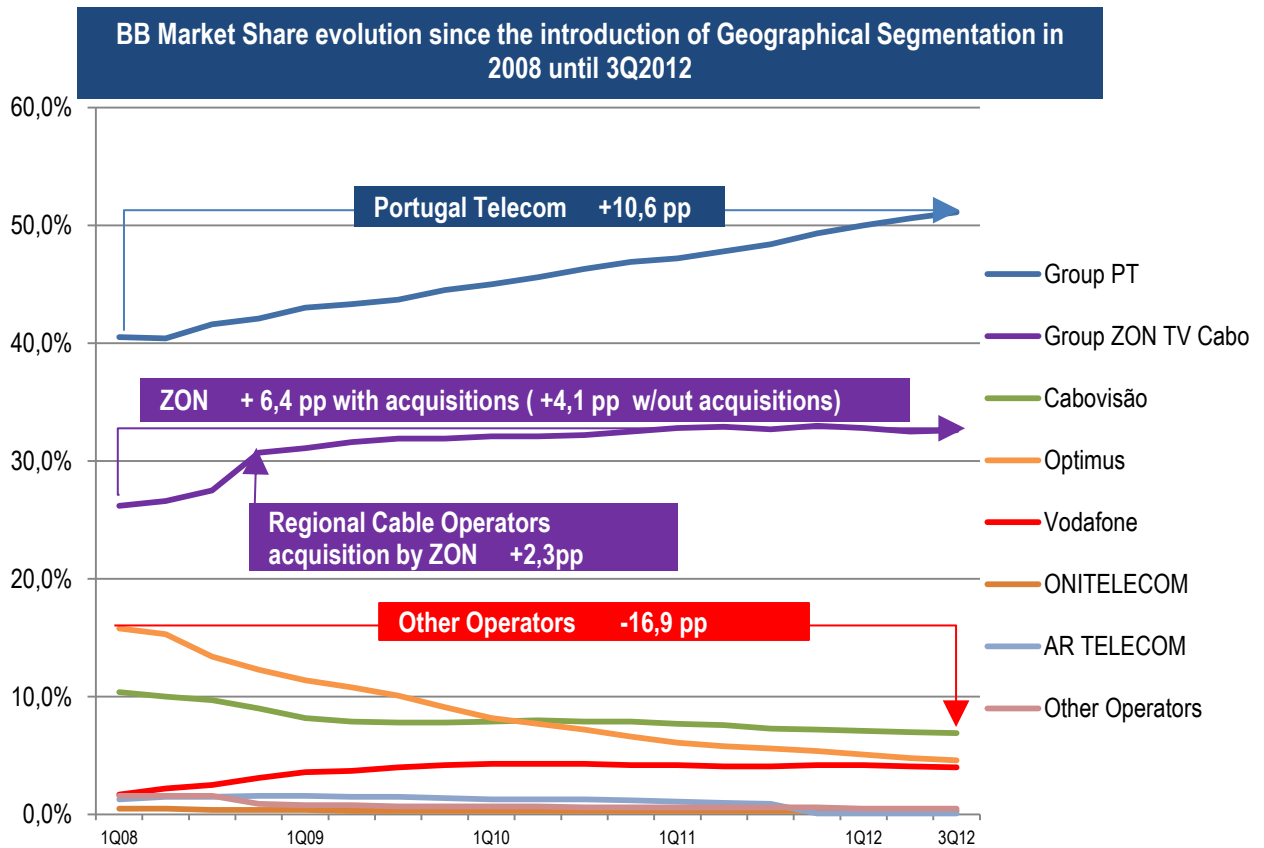
As a result of the above mentioned convergence trend, it is indistinctive to consumers in communication markets whether typical services (Telephony, Internet and Pay TV) are provided in a bundle or separately, focusing exclusively on the cost of acquisition. Jumping from this fact into a conclusion that a relevant market should be created extrapolates a relevance that is undermined when prices increase and a service downgrade is performed, reducing the number of services. Where communication markets are concerned, there is no evidence of pure bundling, resulting on irrelevant transactional costs. In the operator's perspective, there is a focus on saving administrative costs such as distribution, sales, installation and more recently, due to increasing competition, to reduce churn, which, in the end, contributes to reduce customer acquisition costs.

c) *Geographical Segmentation of Markets*

On what concerns geographical segmentation of markets, the competitive pressures introduced by Cable networks and by other alternative network operators should only be considered at a national level. If there is an attempt to capture the effects of competitive pressures by defining geographically segmented markets when demand conditions are still unstable, then this will inevitably create uncertainty in addition to being an extremely troublesome exercise.

There is an enormous risk of setting inappropriate geographic boundaries, with an undesired outcome too significant to ignore and impossible to correct fast enough. Considering market developments, also geographic boundaries mutate, becoming impossible to follow up with the market analysis in due time. ¹

¹ Portugal – since the introduction of geographic segmentation in BB markets in Portugal, in 2008, the historical operator has increased its market share from 40,5% (1Q2008) to an impressive 51,1% (3Q2012) market share, gaining more than 10,5 pp as a result of this structural regulatory decision of identifying competitive and non-competitive markets in the Portuguese Broadband Market.



As it has been promoted by European Commission, by setting a national market and keeping an obligation to provide average wholesale access prices on historical operators, NRAs will be simultaneously achieving two pro-competitive effects: avoiding geographically segmented predatory strategies by the historical operator and ensuring that local competitive pressures created by cable operators and others “altnets” are uniformly transmitted across the whole market, therefore enhancing the market for the benefits of competition to be made available for all and for regulatory measures to be progressively removed.

A particular effect of a geographically averaged wholesale price is that it can act as a common pricing constraint that ensures consumers in rural areas, not exposed to the competitive pressure exerted by “altnets” (who still struggle to remove the barriers to expand their networks), benefit from competitive pressure from “altnets” in urban areas as the historical operator will have to reflect such pressure in a single geographically averaged price. Accordingly, the benefits of competition will be brought to the rural consumers who are unlikely to have offers from alternative operators, if urban based competition significantly contributes to decrease prices (sometimes below what it should be, due to the pressure imposed by the

incumbents, since they can get extra financial resources precisely from rural areas, where prices are higher) .

On the other hand, if price de-averaging is promoted through markets geographically segmented, then the effects of urban based competition will not be driven to rural areas and the digital divide will be reinforced, contrary to European Digital Single Market objectives.

In a geographical segmentation scenario, historical operators will be able to fund urban retail pricing based both on rural retail pricing and wholesale revenues, thus “smashing” their competitors in the urban areas.

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?

Not Answered.

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?

Besides being a well economic framework that allows positive results when applied to market analysis and, subsequent, *ex ante* regulation, the three criteria test has been deeply discussed and its by large the most consensual analysis method.

Knowing that an *ex post* regulation is the main objective aimed by regulatory frameworks, resulting from a competitive market, this method resembles the most appropriate to follow this process.

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?

Not Answered.

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

The present method is, by far, the most adequate to maintain legal certainty. This allows predictability, allowing conscious investment decisions from the stakeholders. Nevertheless, the Recommendation on Relevant Markets has a long and demanding revision path which limits its efficiency, calling for a more agile method of revision, or, even more adequate to the existent differences within the European Single Market, a two stage process should be considered.

Knowing that national markets have different idiosyncrasies, a wide and fulfilling Relevant Markets Recommendation should be defined at the European Union level, covering all Markets susceptible to *ex ante* regulation in the European Union geography. Then, accordingly to the different stages still existent and that are impossible to ignore, NRA's should present at the European level the markets found to be relevant and, therefore able to *ex ante* regulation.

This process would prevent any ad-hoc analysis which is highly procedural demanding and, in some cases might have a precedent effect that is avoidable if every NRA's demonstrate *a priori* which Relevant Markets from the extensive toolbox are most suitable to its area of jurisdiction.

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.

As stated above, the access at a fair price to the capacity in submarine cables, especially the ones connecting to national and peripheral regions, must be addressed, and markets 4/5 are probably the most suitable. Not only capacity prices must be put at the adequate cost plus level but also the access to the dark fiber must be made available once the referred infrastructure is an essential facility and its replicability isn't economically efficient and its construction was performed, mainly, with European Structural Funds.

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.

If the above referred is not done, the competition in certain areas, like Azores and Madeira islands, will no longer be possible. To guarantee the same services all over the country, we must understand that one cannot provide to customers a bandwidth of 10 to 100 times higher than 5 to 10 years ago, and keep paying, at the wholesale level, prices which are pretty much the same of 5 years ago.

After all, the bandwidth improvements were performed under European Digital Agenda objectives, which make ZON proud of its simple but effective contribution to it. However, there is a significant cost impact on regions where a need for submarine cables is verified.

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.

ZON doesn't consider any market should be removed; on the contrary.

However, some markets may be merged, as markets 4 and 5, for instance, since its complementarity is well recognized.

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.

Not Answered.

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.

Yes. ZON believes that former market 15 should be recovered and adapted (access and origination on mobile networks) and also mobile SMS termination should be added.

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.

The MVNO market in Portugal is practically inexistent. ZON launched its MVNO offer in 2008 and more than 4 years after its share is around 1%. The conditions to adequately address the market, especially the enterprises (with the free on net calls by the MNOs) and youngsters (with all you can eat SMS and free tribal calls) are inexistent and considering the rapid convergence of fixed and mobile, this regulatory approach is needed, in order to maximize competition and consumers benefits.

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.

Yes.

a) *Ducts and Poles*

First of all, there is no specific market for Ducts and Poles and, as it is stated in the existing explanatory memorandum, being considered *“Where the metallic local loop is shortened and where the access seeker has no infrastructure of its own to replicate the former (longer) loop and where no alternative infrastructure is likely to become available to allow such replication then access to either ducts or alternative network elements must be considered in order to make access to the local loop meaningful. In this context, access to ducts could be an important part of any remedy imposed to address problems associated with physical network access.”* being an ancillary remedy to the primary physical access.

Therefore, considering its primary objective of supplying a connection of electronic communication network to each household, historical operator’s ducts and poles infrastructures are the most suitable, non-requiring any adaptation, which occurs in other utilities’ networks.

So, the three criteria test is applicable since (1) there are high and non-transitory barriers to entry; (2) there is no tendency towards competition due to high sunk costs and in some cases technical and physical impossibility of replication (3) and finally, the insufficiency of competition law.

Considering the above mentioned, a relevant market correction, that includes Ducts and Poles in Market 4/5, is essential, namely in what concerns EOI “Equivalence Of Inputs”². One of the main bottlenecks that prevents network infrastructure competition from gaining more *momentum* is the discrimination between time and procedural access to ducts and poles, whether it is an historical operator or a competitor.

b) *Submarine Cables*

A transnational analysis has become more and more mainstream in what concerns European Electronic Communications markets. Once the inclusion that results from Digital Divide combat is a priority, any measure that promotes it should be put in place.

If the three criteria test is performed (1) there are high and non-transitory barriers to entry; (2) there is no tendency towards competition due to high sunk costs and in some cases technical and physical impossibility of replication (3) and finally, the insufficiency of competition law.

In addition, most of these infrastructures were built with European Union cohesion funds, which reinforces its welfare objective that is undermined by a discriminatory usage.

Therefore, a relevant market, where applicable, should be foreseen since it is a structural and essential facility, essential for the implementation of the European Digital Single Market.

ZON also considers it is of utmost importance that a further public consultation should be carried out if any new market is included, where an informed opinion can be contributed from all stakeholders.

However and as stated above, any decision must take in consideration the time to market. If it comes too late, the impact of such a decision might be unaddressable due to the damages meanwhile verified.

Question 14: If the answer to the previous question is yes, please specify the qualitative and quantitative impact of the relevant markets(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.

² http://www.anacom.pt/streaming/final_report_oxera_jul2009.pdf?contentId=968163&field=ATTACHED_FILE

a) *Ducts and Poles*

- Users:
 1. Service availability;
 2. QoS;
 3. DTH (Pay TV services provided by satellite) areas can become Cable or FTTH areas in a faster manner (relevant impacts on DEA objectives).

- Competition:
 1. Faster network rollout;
 2. Increases operational efficiency;
 3. Costs reduction.

b) *Submarine Cables*

- Users:
 1. Service availability;
 2. QoS;
 4. Higher bandwidth;
 5. New and better services.

- Competition:
 1. Increases operational efficiency;
 2. Costs reduction;
 3. More and better offers driving competition pressure (consumer benefits).

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.

Please refer to our answer to Question 13.

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.

Please refer to our answer to Question 14.