

# Revision of the Recommendation on Relevant Markets - Virgin Media Consultation Response

## Introduction

Virgin Media welcomes the opportunity to contribute to the Commission's consideration of whether and how to revise the Recommendation on Relevant Markets Susceptible to Ex-ante Regulation (the 'Recommendation'). In responding to this consultation, Virgin Media has chosen not to address all of the specific questions raised by the Commission. We have instead focussed on the areas that we consider to be of greatest importance and we will follow up our submission with more detailed representation as the Commission's thinking evolves and its proposals become more tangible.

The Recommendation is central to the overall functioning of the EU Regulatory Framework (the 'Regulatory Framework') for Electronic Communications Networks and Services ('ECNS') — making this review of great importance. As such it is vital that stakeholders are given the opportunity to comment on any potential reforms both at the start of the exercise and as the Commission develops detailed proposals.

The review is also occurring at a critical time. The electronic communications sector and the technologies upon which it is based are at a crucial point in the evolutionary cycle. In addition, there is an increasing focus across the EU on stimulating broadband deployment and take up, underpinned by the Commission's Digital Agenda objectives. The Recommendation will have a material impact on these. Full account must accordingly be taken of any reform of it.

### Approach to the Review

Sustainable private investment is essential to achievement of the EU's objectives as well as to the efficient and successful evolution of the sector. These outcomes will not be realised without the commitment of substantial funds by private operators, which in turn is dependent on stability and certainty in the regulatory regime. Stability is also crucial to underpinning the ongoing technological change and the rapid evolution towards the next generation of products and services. Private parties need to have confidence not only that any prospective investment will not be undermined in the future, but also in the continued feasibility of existing investments.

It is for this reason that we believe that the Commission must in general take a measured approach to the review of the Recommendation. If radical changes are made to the list of relevant markets (including to the markets appearing in that list and the scope and structure of them), or if the Recommendation does not sufficiently reflect market conditions, the prospect of further private investment will be reduced, and investments that have been made to date will be undermined.

The current list of relevant markets and the approach to those has enabled evolution of the sector to occur and advancements to be made. This has lead to positive effects for end users, with consumers benefiting from outcomes that have arisen from the existing Recommendation in terms of choice, price and levels of innovation. Stability is key to such progress continuing. The sector is at a delicate point in its evolutionary cycle: it is vital that the Recommendation generally continues in the same, or a similar form, so that this cycle is not disrupted.



We believe it is particularly important to avoid any radical reform to the structure or scope of the markets relating to infrastructure and broadband access. As outlined above, there is EU wide focus on stimulating broadband deployment – and the criticality of stability and certainty in the regulatory regime to achieving that cannot be over emphasised. It is also of note that the thriving retail broadband environment that exists in many Member States has been brought about by the current form of the Recommendation and the regulatory remedies that have flowed from that. While we would not wish to see regulation being applied or continued in markets where competition is evident, we believe the current approach to the regulation of broadband markets, including the manner in which they are established in the Recommendation, achieves the right balance and should be maintained if the positive consumer outcomes that have resulted to date are to be preserved.

## **Content Markets**

While we consider it vital that the Commission in general avoids any radical reform of the Recommendation or the structure and scope of the markets contained within it, we believe that there is a specific area of the sector that requires particular focus. As technology and markets have evolved, and convergence takes hold, access to content is an increasingly important consideration in the provision of ECNS. Moreover, the traditional distinction between content, networks and services and the parties that operate those, has blurred. The extent to which content is available, and the terms on which that content is provided, are now critical factors in any business case relating to the deployment of networks and the provision of services over them. This makes the availability of content a key factor in the Commission's broadband deployment aims – including the Digital Agenda objectives.

While we recognise that content is currently outside of the scope of the Regulatory Framework as applying to ECNS and hence the Recommendation, we consider that it is now so fundamental to the provision of networks and services that it cannot be considered in isolation and without consideration of this inextricable link. This is all the more important given that this market demonstrates enduring competition problems in certain Member States, whereby dominant players, economic bottlenecks and significant barriers to entry exist.

In the UK, for example, the approach to the regulation of content is not fit for purpose. In contrast to the regulatory approach to ECNS, the content sector is currently regulated through a piecemeal combination of Public Service Broadcasting obligations, licensing, competition law, merger control and various other sector specific regulations. As a result of this fragmented framework, there are inconsistent regulatory obligations which lead to inconsistent incentives on operators. This asymmetry and the lack of coherence and consistency are at odds with the increasing levels of convergence and are intensifying already serious competition problems.

The asymmetric approach to regulation distorts the competitive landscape in the sector. Providers of ECNS often have difficulty accessing content from dominant content providers, whilst conversely face an absolute requirement to carry those providers' content on their networks. This leads to an imbalance when one considers that content providers also provide competing downstream products and services and has lead to a significant distortion in competition caused directly by regulation. This has in particular frustrated high speed network roll out and results, ultimately, in a sub-optimal outcome for end users.

.



We believe that there is an urgent need for the Commission to address the disconnect and inconsistency between the regulation of the ECNS and content sectors and the enduring competition problems existing in the latter. This could for example be facilitated either by expanding the scope of the Regulatory Framework and the Recommendation so that they additionally apply to the provision of content, or by establishing formal links between, coordinating and establishing consistency across, the regulation of ECNS and the content sector. In any event, the regulation of the two sectors cannot continue to be approached on an independent basis.

#### **Review Process**

We consider it vital that the current consultation exercise does not represent the sole or final opportunity for comment. Those stakeholders who will be affected by any proposed changes to the Recommendation should be given the chance to comment on any more detailed proposals that the Commission may develop during the course of the review. In particular, there should be an opportunity to comment on any specific proposals to increase, reduce or amend the scope of markets included in the list. This is particularly important given the material implications of such changes for parties to whom the Framework applies.

We believe that the consultation process should follow that used in the previous review of the Recommendation in which an initial call for input was followed by a consultation on more detailed proposals for reform, once the Commission had considered input received in response to the first exercise.

We look forward to engaging with the Commission as its review of the Recommendation progresses and we would welcome the opportunity to discuss further the points that we have made above.