

**Comments relating to the European Commission’s
Questionnaire for the Public Consultation on the
Revision of the Recommendation on Relevant Markets**

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The views expressed herein are the views of the authors of the paper, not those of BRG as an organisation.

This submission addresses a small portion of the questions listed in the European Commission’s “Questionnaire for the Public Consultation on the Revision of the Recommendation on Relevant Markets,” as we wish to highlight some significant policy and structural issues that arise from the consultation—in particular to the question relating to the impact of bundling. The issues and scenarios addressed in this brief note are an outline only and are intended to be ‘what if’ discussion platforms that we hope will assist in increasing the understanding of how bundling could impact electronic communications markets and the regulatory issues arising as a consequence.

The current framework was introduced approximately 10 years ago, when the Commission produced a list of 18 relevant markets in its Recommendation. Most of the relevant markets were linked to the fixed telecommunications infrastructure and services. This was natural, as the liberalisation process had hitherto been primarily focused on the introduction of competition in fixed services. Mobile services were relatively young at the time, as was the premium entertainment services market. A further rationale for the focus on fixed telecommunications networks and services was the need to ensure choice in the provision of the essential fixed telephony market, and subsequently in the broadband market. Importantly also, the three types of services (fixed-based, mobile-based, and premium entertainment) were seen as three separate service areas with little or no overlap.

The picture has changed considerably. Today many customers purchase electronic communications services in bundles of three and even four components.¹ The need to ensure availability and choice of the fixed voice and broadband services remains, but the means of achieving this is complicated by the fact that these services are now very often purchased as part of a bundle, often times including both regulated and non-regulated services.² Further, the providers of these bundles are often not

¹ Bundles are referred to as “triple-play” and “quad-play.” The components are fixed voice, fixed broadband, mobile voice and data, and entertainment.

² Ofcom’s market report (2012) stated that 57 percent of UK consumers now purchase electronic communications as part of a bundle.

traditional fixed telecommunication network operators.³ The trend for bundling is now so strong that it raises doubts about the ability of single-service providers to remain competitive.

If a large portion of customers purchase services in the form of bundles, then it is possible that a market definition exercise could result in bundles (of three or four services) forming a relevant retail market.⁴ If that were the case, regulators would need to address the situation where a retail market (for which there may be limited competition) relies on three or four different wholesale inputs, some of which are currently unregulated.

Policymakers and regulators may therefore face new challenges of how to achieve continuity of choice and availability of the essential fixed voice and broadband services. Should they move to regulate access to the other wholesale inputs to the retail bundle (provided, of course, that these other inputs are characterised by enduring barriers to competition and do not tend towards competition); or should they rely on market forces as market power at the wholesale level is distributed across several providers, and therefore there could be natural incentives to negotiate bilateral access?

Essentially, the next few years could see a radical change to the market dynamics in electronic communications—caused by the impact of bundling. The decisions by the Commission regarding its next Recommendations for relevant markets would be a critical determinant of the direction of that change.

In this paper, we will discuss this challenge in the context of question two of the Questionnaire: the impact of bundling. This raises important issues that need to be analysed in order to understand how bundling may impact on the identification of relevant markets, including:

- Assessing effective competition, which is conducive to efficient market outcomes (from the perspective of allocative, productive, and dynamic efficiency)
- Reviewing the relevant competition paradigm, which appears to be gradually shifting from price-based competition in the provision of homogeneous services to innovation-based competition in the provision of differentiated services

Given the importance of the issues above, we consider that a full debate would be beneficial before considering whether current markets in the Commission's Recommendation should be retained, removed, or amended, etc. We would be delighted to discuss these points in more detail with any interested party.

³ Virgin Media in the UK reported this year that 65 percent of its customers purchased triple-play bundles and 16 percent purchased quad-play bundles; BskyB's 2012 annual report shows that on average its customers purchased 2.7 services.

⁴ Exactly how bundles may impact market definitions is of course not known, as this would require significant analysis and market data.

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?

It would seem that bundling is one of the developments that could have a significant impact on the Commission's Recommendation of relevant markets and on the market definition process.

To illustrate the importance of bundling in the electronic communications sector, we set out below some data from the United Kingdom.

- Ofcom included the following statistics in its Quarter 1 market report in July 2012:
 - 57 percent of UK consumers purchased their electronic communications services as part of a bundle
 - 19 percent purchased a bundle of fixed voice, broadband, and multichannel TV services
 - 27 percent purchased a bundle of fixed voice and broadband.
- Virgin Media reported in October 2012 that 81 percent of its customers purchased triple- or quad-play bundles: 65 percent purchased triple-play, and 16 percent purchased quad-play.
- BskyB reported in its 2012 annual report that its customers purchased an average of 2.7 services. Given that BskyB only has three sets of services (fixed voice, broadband, and multichannel TV), this suggests that the vast majority of its customers consumed bundles.

Presently, the Commission's Recommendation includes only one retail market, other retail markets being excluded due to them being competitive (or tending towards being competitive), albeit in many cases the finding of competition is premised upon upstream wholesale regulation. If consumer behavior is now changing such that the majority of consumers purchase electronic communications services in bundles of two, three, or four products, then it may be necessary to redefine retail markets and include markets for service bundles. Retail products for which the standalone markets have been found to be competitive in the past (due to upstream wholesale regulation) may be part of service bundle markets for which there is little or no competition (if the other retail services cannot be replicated due to the existence of enduring bottlenecks).

Determining whether strong uptake of service bundles represents a market change that needs to be reflected in the next Recommendation would to a certain extent depend on the Commission policy for the sector. That is, a continuation of present focus on reducing barriers to competition in the provision of fixed voice and broadband markets to ensure choice and value for money for consumers could result in a substantial increase in regulation. Regulation could be extended to services presently unregulated in most member states (primarily mobile access and entertainment services⁵) so that other providers can replicate the bundles offered. This policy enables a combination of service and infrastructure competition and embraces the principles of the 'ladder of investment.'

On the other hand, a policy focusing more on platform/infrastructure competition, where operators could typically negotiate commercial access to each other's wholesale inputs, could arguably result in a reduction in regulation. A potential consequence of this policy could however be a dramatic

⁵ If these services are found to rely on wholesale inputs characterised as enduring bottlenecks.

reduction in the number of providers of electronic communications services,⁶ if the provision of fixed voice and broadband services only were no longer competitive against providers of triple- and quad-play bundles.

Presently, of the services in triple- and quad-play bundles, only the provision of fixed voice and broadband is regulated (primarily at the wholesale level). This could create an uneven playing field between platform operators, as providers operating mobile or entertainment platforms already have access to the fixed wholesale inputs, whereas there are no regulated wholesale inputs for mobile and entertainment (call termination for mobile would not be a relevant input, as that is used by other providers, not by the mobile operator itself, to send calls to mobile customers). To create a more level playing field, there would appear to be two options: reduce/remove regulation on fixed voice and broadband, or introduce regulation on mobile and/or entertainment.

A discontinuation of current interventions for access to fixed voice and broadband wholesale services would be a controversial change. Some competitors may simply not be able to survive such a move. But the alternative of potentially extending access regulation to mobile (mobile virtual network operator access) and/or entertainment (some kind of content resale?) would also be likely to attract much controversy.

Another trend in the market is the increase in differentiated service offerings—for example, different internet access speeds and different levels of contention. Consumers increasingly look for ‘tailored’ service to meet their specific needs.

To meet customers’ needs for differentiated and tailored services, network operators seek to use technologies that can be adapted (for example, through ad hoc software programming), offering flexibility.

In this increasingly complex context, ex ante intervention must not jeopardize the development of services differentiation and innovation-based competition. The challenge for national regulatory authorities when determining whether to intervene and when designing ex ante remedies (while retaining objectives of protecting consumers, promoting competition, and preserving the level playing field) would be to challenge preconceptions about technologies and market scenarios to ensure that any interventions would not distort the providers’ ability to offer service packaging or service differentiation, which are clearly popular with consumers.

Therefore, the Commission and NRAs would need to consider carefully whether existing market boundaries are appropriate or need to be redefined in order to support differentiation, whether as technical features or service bundling.

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⁶ Only those providers controlling a bottleneck would be in a position to enter into bilateral access negotiations.