

PER E-MAIL cnect-relevant-markets@ec.europa.eu

EUROPEAN COMMISSION

DG Communications Networks, Content & Technology
Regulatory Coordination and Markets Unit (B3)
BU33 6/26

CM Groep

Konijnenberg 30
4825 BD Breda
The Netherlands

Tel +31 (0)76 572 70 00
Fax +31 (0)76 520 93 27

Subject: Public consultation on the revision of the Recommendation on relevant markets

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Public consultation

The Commission invites stakeholders to provide input on the review of the lists of product and service markets within the electronic communications sector susceptible to ex ante regulation (Recommendation on relevant markets – 2007/879/EC, hereinafter "**The Recommendation**").

This contribution is submitted on behalf of the CM group of companies ("CM") and focusses mainly on the further markets regulated at national level (question 11 and question 12 of the Questionnaire) and the markets to be added to the revised Recommendation (question 13 and question 14 of the Questionnaire).¹

In this written response we will explain that the markets for wholesale SMS termination services on mobile networks and the market for wholesale SMS origination services on mobile networks should be added to the Recommendation. Regulation of these markets is crucial to sustain and enhance competition on these markets in the interest of end-users.

¹ European Commission, *Questionnaire for the public consultation on the revision of the recommendation on relevant markets*, III.5. Further markets regulated at national level & III.6. Markets to be added to the revised Recommendation, p. 5.

Introduction to CM

In 1999 CM started to build its own high performance SMS platform, which has continuously been upgraded and scaled to anticipate on future growth ever since. The private redundant mobile messaging platform is capable of handling high traffic volumes and has the flexibility to meet customized needs. The variety of mobile business opportunities reflects the variety of clients. For example, CM handles the SMS traffic for M(V)NO's, aggregators, financial institutions, governments and television networks.

CM focuses on high volumes Premium SMS and international Bulk traffic (ca. 180 countries) and has direct connections with all operators in the Netherlands, Belgium and Greece. Furthermore, CM offers Premium SMS solutions in 13 more countries through partner networks.

Over the years CM has grown into a company with a staff of over eighty people, two offices (in the Netherlands and Belgium) and a turnover of 50 million Euro.²

The market for SMS services is increasingly important, innovative and used to be competitive. However, over the past years innovation and competition came under pressure due to developments in various European countries which we will set out below.

SMS market

As mentioned in the Questionnaire, certain markets are not contained in the list of relevant markets annexed to the Recommendation but are nevertheless regulated by NRAs on the basis of national circumstances. For example, the market for wholesale SMS termination services on mobile networks is a market which is not contained in the list of relevant markets annexed to the Recommendation, but is regulated in, among others, Denmark, France and Poland.³ A market to be added to the revised Recommendation is the market for wholesale SMS origination services.⁴ This market is not contained in the list, but is closely related to the SMS termination market.

Relevant trends

Over the last few years the SMS market has been subject to relevant trends.⁵ First of all, the use of One Time Passwords (OTP) via SMS termination has increased and is still increasing. The OTP technology of CM provides an extra layer of security for a transaction or login session. For example, OTP is used to grant employees secure access to a virtual workspace. The user receives an SMS with their temporary personal code after logging in

² www.cmtelecom.com

³ European Commission, *Questionnaire for the public consultation on the revision of the recommendation on relevant markets*, III.5. Further markets regulated at national level, p. 5.

⁴ European Commission, *Questionnaire for the public consultation on the revision of the recommendation on relevant markets*, III.6. Markets to be added to the revised Recommendation, p. 5.

⁵ European Commission, *Questionnaire for the public consultation on the revision of the recommendation on relevant markets*, III.1. Relevant trends in the electronic communications sector that have an impact on the definition of the relevant markets, Question 1, p. 3.

with their username and password. Financial institutions and governments also make use of the OTP technology of CM and are also known as critical infrastructures. Critical infrastructures are chains of similar parties for whom – from a social point of view – it is crucial that they continue to function. Other clients of CM which are qualified as a critical infrastructure are for example: public order & safety and transport. These clients also make frequent use of another relevant trend in the SMS market: the increased use of SMS termination for alerting in case of emergencies. In case of crisis situations and emergencies, a warning notification can be send out immediately via SMS messages and through the SMS platform of CM.

The three criteria test

On the basis of the three criteria test carried out at EU level, both the SMS termination market and the SMS origination market should be added to the list in the revised Recommendation from an ex ante perspective. The SMS termination market and the SMS origination market are not or at least no longer effectively competitive, mainly due to the fact that the mobile operators hold significant market power on their networks. The lack of competition also stems from the fact that there are no substitutes for SMS at retail level.

As to the first criterion, there are substantial barriers to market entry because each mobile operator has a monopoly position on its own network, and thus in the provision of SMS termination and SMS origination. There is not an alternative for the provision of such termination service and origination service on each individual mobile network. It is only possible to reach an end-user via SMS through the network of the mobile operator with whom the end-user has got an agreement and vice versa.

Mobile operators determine the prices and conditions for the SMS termination on their own network. For example, almost all the telecom operators in the Netherlands and Belgium charge monthly connection fees to enter the market as an SMS gateway and connect to their platforms. Large telecom operators in the Netherlands charge up-to 40 times more per month than telecom operators in Belgium. Telecom operators define their own connection fees and consider themselves free to increase such fees unilaterally at any time. SMS gateways have no other option but to pay these increased fees as they are fully dependent on SMS termination by the mobile operators in order to provide their services and honor the contracts with their customers. As a result they are faced with a risk of margin squeeze which cannot be avoided and has materialized in the past. This is a substantial barrier to market entry.

Next to that, several telecom operators (in the Netherlands and in Belgium) have built an SMS Bulk filter which serves as another substantial barrier to enter the market. Before the existence of the SMS Bulk filter, SMS interworking was open and SMS gateways had various alternatives by buying Bulk SMS from other international telecom operators. Nowadays, SMS interworking is closed by these Bulk SMS-filters. The only possibility to send SMS messages

to end-users of telecom operators is to purchase Bulk SMS messages from the specific telecom operator for the prices they determine.

As to the second criterion, in the absence of regulation, the SMS termination rates and the SMS origination rates stemming from commercial agreements do not tend towards cost oriented prices. Each mobile operator has its own commercial agreements and rates. This applies to both termination and origination access rates which are unilaterally set and increased at will by the mobile operators and have to be paid by companies like CM if they want to stay in business.

The same problem occurs in relation to ancillary facilities such as short codes. For example, in the Netherlands, each mobile operator has a different set-up fee for a short code⁶, since the fees for short codes are not regulated. The monthly fee per short code per month range from € 0 per short code up-to € 450. Once again, telecom operators define their own prices and are free to change these unilaterally (in practice upon one month notice). As a provider of a public electronic communication service, companies like CM can also not avoid paying these rates if they want to continue their businesses.

Paid information numbers, on the other hand, are regulated by the Dutch NRA OPTA. OPTA assigns numbers and monitors their usage. The assignment fee and the annual monitoring fee for the assigned numbers are regulated and that way telecom operators are not able to determine their own prices.⁷ Comparing the *monthly* short code fees to the *annual* monitoring fee of the assigned numbers, the short code prices are far from cost oriented. Regulation of the access to the available short codes by the NRA, and the prices thereof is equally necessary.

The above distortions of competition become even more apparent because the dominant wholesale providers are also competing on the retail level, resulting in substantial distortions of competition in for instance public tenders. Since many services know regulated minimum prices, telecom operators cannot give a discount on these services. They often offer a whole package and then give a discount on the non-regulated services, such as SMS. In the Netherlands CM has noticed such behavior for example in the public tender of a large financial institution where telecom operators also participated. This of course, has a negative impact on the competition in Europe.

Another example with regards to rates stemming from commercial agreements that do not tend towards cost oriented prices, are the SMS rates for Bulk SMS. The largest telecom operator in the Netherlands, started changing the SMS rates for Bulk SMS on a quarterly basis over a year ago. Since then, the SMS rates for Bulk SMS have already been increased with approximately 140% over one year and are still increasing. In combination

⁶ **Short code:** a shortened number intended to offer mobile telephone services other than for spoken communication.

⁷ For example: the annual monitoring fee for assigned numbers in tariff class 5 (short information numbers (0900)) is € 56.

with the earlier mentioned Bulk SMS filter, SMS gateways are forced to pay the prices that telecom operators determine.

Price regulation is the main tool of ex-ante regulation, because mobile operators at this moment have got an incentive to raise prices.

As to the third criterion, the competition law based ex post intervention is not sufficient to meet the regulatory objectives, and in particular to achieve regulatory certainty in relation to the conditions under which SMS termination and SMS origination are purchased.

Finally, we like to mention that in 2012 CM had a dispute with the largest telecom operator in the Netherlands and asked OPTA take a decision on the basis of general interoperability requirements.⁸ OPTA decided that it is reasonable that the telecom operator pays CM a fee per originated SMS messages for the transmission of these SMS messages. OPTA determined the fee of € 0.035 per originated SMS message to ensure the interoperability. This dispute has arisen in 2011 when the telecom operators in the Netherlands collectively decided to stop the Premium SMS mobile originated services. Until then, CM - and other SMS gateways – received a small fee per SMS messages for the transmission of these SMS messages.

Since the Premium SMS mobile originated services have stopped, originated SMS messages have become non-transparent and more expensive for consumers. For example, one of the largest Dutch telecom operators states in their terms and conditions that SMS messages send by an end-user to a short code (mobile originated SMS) are charged separately from the SMS subscription that the end-user has got with the telecom operator. SMS messages received by an end-user from a short code (mobile terminated SMS) are also charged separately from the SMS subscription that the end-user has got with the telecom operator. Therefore, maximized (regulated) SMS tariffs would be highly recommended, both for SMS gateways as end-users. Next to that, SMS gateways should receive a minimum fee per SMS message for the transmission of SMS messages.

Impact

Adding the SMS termination and origination market to the list in the revised Recommendation from an ex ante perspective would therefore sustain and enhance competition and would definitely be in the interest of consumer, clients of CM and the development of the internal market. Next to that, end-to-end connectivity can be guaranteed then.

⁸ OPTA/AM/2012/200724 (can be found on: <http://www.opta.nl/nl/actueel/alle-publicaties/publicatie/?id=3645>)

For further explanation, please contact the contact persons mentioned below.

Best regards,

CM Groep

Contact:

Mr. J. van Glabbeek

CEO

E-mail: jvg@cm.nl

Tel.: +31 (0)76 57 27 000

Mw. mr. N.A.M. van Spreuwel

Legal Counsel

E-mail: nvs@cm.nl

Tel.: +31 (0)76 57 27 040