**Introduction**

Liberty Global is the leading international cable operator offering advanced video, voice and broadband internet services to connect its customers to the world of entertainment, communications and information.

Liberty Global operates next generation hybrid-fibre-coaxial (HFC) networks that pass 33.3 million homes serving 19.6 million customers in 13 countries, including 11 in Europe and employing 22.000 people worldwide. Liberty Global also operates a DTH platform in central Europe. Our cable consumer brands comprise UPC, Unitymedia, Kabel BW, Telenet, and VTR, and our DTH brands are UPC Direct, freeSAT and focus sat.

UPC operates cable networks in Western Europe (Netherlands, Austria, and Ireland) and Central & Eastern Europe (Poland, Hungary, Romania, Czech Republic, and Slovakia) under the brands Unity Media kabel bw in Germany, Cablecom in Switzerland and Telenet in Belgium.

UPC is a long term industrial operator in Europe, investing and driving innovation whilst ensuring healthy competitive dynamics as the most reliable challenger to incumbent telecommunications operators.

UPC plays a leading role in the growth of digital services in Europe and to continue its investment in hybrid fibre co-axial (HFC) networks. This investment results in innovative digital TV services including video-on-demand, high definition TV, and digital Video Recorders, in addition to Next-Generation broadband internet services with down-stream speeds in excess of 100 Mbps.

UPC is committed to achieving the European Digital Agenda objectives. Our company vision simply stated is “Connect, Discover, Be Free”.

Our market-leading broadband internet, voice and video services and innovative product bundles empower millions of people to discover and experience the endless possibilities of the digital world, and we’re constantly striving to enhance and simplify their lives through meaningful innovation.

Further information can be found at http://www.lgi.com/

This response is provided by Liberty Global BV on behalf of itself and the other companies in its group (together LGI).

**Contact person for any questions on your contribution.**

**Chris Hutchins**
**Vice President European Policy**
**chutchins@lgi.com**
**+32 739 14 34**

**Liberty Global B.V.**
**Avenue des Arts 41**
**B-1040**
**Brussels Belgium**

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**LIBERTY GLOBAL RESPONSE TO THE PUBLIC CONSULTATION ON THE REVISION OF THE RECOMMENDATION ON RELEVANT MARKETS**

Liberty Global welcomes the opportunity to respond to the Commission's questionnaire on the revision of the Recommendation on relevant markets of 2007. Appropriate identification of relevant markets susceptible to ex ante regulation is key to the overall functioning of the EU Regulatory Framework on electronic communications.

Having a list of pre-identified markets helps National Regulatory Authorities (NRAs) to regulate these markets in a coordinated manner, thereby contributing to the development of the internal market. A stable and pertinent list of relevant markets is also vital for providing market players with legal certainty and thus stable business planning.

In terms of our response, **we would highlight the following points:**

**The objective of the Regulatory Framework is to reduce ex ante sector specific rules**

We recall that the major principle underpinning the Regulatory Framework is that ex ante regulation should be rolled back when it is no longer needed. It is appropriate, therefore, to identify as clearly as possible the circumstances in which ex ante regulation is justified and to translate this into a set of criteria for identifying relevant markets.

Only where national and Community competition law is considered insufficient by itself to redress market failures and ensure effective and sustainable competition, should markets be identified for potential ex ante regulation. In our view, administrative intervention into telecoms markets is a sanction of last resort, justified only in narrowly defined circumstances.

The starting point for the definition and identification of markets is a characterisation of retail markets, taking into account demand-side and supply-side substitutability, before proceeding to identifying the relevant wholesale markets. As market analyses carried out by NRAs have to be forward-looking, these are defined prospectively and must account for expected or foreseeable technological or economic developments.

In order to identify markets that are susceptible to ex ante regulation, the Commission formulated three criteria, to be applied cumulatively, so that failure to meet any one of them would indicate that a market should not be identified as susceptible to ex ante regulation.

The application of the three criteria should limit the number of markets within the electronic communications sector where ex ante regulatory obligations are imposed and thereby contribute to the aim of the Regulatory Framework; namely to reduce ex ante sector specific rules progressively as competition in markets develops.

**The revision of the recommendation must reflect technological transition and innovation**

Where infrastructure competition is working, competition on downstream markets is largely free from abusive practices and there is an absence of high market entry barriers. In the context of the revision process, this competition means that the Commission is no longer regulating for liberalisation, rather regulating for technological transition. This requires specific regulatory adjustments to boost investment in infrastructure and protect past investments.

**The scope of existing markets is largely appropriate for the next review period**

Nevertheless, given the development of competition, the revised recommendation should carefully consider the need to reduce the number of markets based on careful analysis.

In our view, the three criteria test provides a robust and proven mechanism for this assessment. However, additional EU guidance on the application of the 3 criteria test across the community would be helpful in avoiding inconsistencies.

**Market conditions do not give rise to the need to add additional markets**

The intensification of platform competition and the evolution of convergence mean that the likelihood of access or distribution bottlenecks developing is far reduced. As a result, the case for adding new markets is absent.

**National markets remain the appropriate level of market analysis**

Retail markets will continue to be national in character, as very few examples exist of geographically differentiated pricing.

Moreover, we consider that geographically segmenting wholesale markets is more transparent than geographically segmenting remedies.

**Innovation of and investment in platforms is essential in order to remain competitive**

Technological convergence means, for example, the line between linear television and internet content are blurring, resulting in more content becoming available to consumers than ever before. In this environment, it is imperative to continue to invest and innovate to remain the consumer's service provider of choice.

**The number of TV distribution platforms has grown substantially due to the development of digital technologies such as IPTV, Mobile TV and OTT (over-the-top)**

With new players entering the broadcast market, and with the proliferation of fixed and wireless devices, the trend is toward a sharp decline in the market share of any single platform, suggestive of the need to consider broader market definitions in general.

**Continued public consultation**

In order to ensure legal certainty, it is essential that stakeholders have the opportunity to respond to proposed changes to the list of relevant markets, in keeping with the procedure followed in 2003 and 2007.

We look forward to contributing to this process further during 2013 and would encourage the Commission to consult publicly on a draft amended Recommendation in the interests of both NRAs and market players, and to ensure good administrative practice.

## III. MAIN ISSUES FOR CONSULATION

### III.1. Relevant trends in the electronic communications sector that have an impact on the definition of the relevant markets

**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?

**The world has changed since the last recommendation was issued in 2007 with consumers benefitting from technological developments and increased competition resulting in a wider variety of services and platform which deliver them.**

**In the intervening period, the level of infrastructure competition has also intensified on a large scale, driven in the main by investments from cable operators, and notably by Liberty Global. The implementation of EuroDOCSIS 3.0 across the vast majority of our footprint means Liberty Global cable systems comfortably exceed the 100 Mbps called for by the Digital agenda for Europe strategy.**

**This investment is driving infrastructure competition as the link between EuroDOCSIS 3.0 coverage and FTTN/VDSL rollout (typically by the incumbent) is well recognised, and produces clear consumer surplus. This process of investment in our networks will continue as we seek to meet increasing demand for bandwidth from consumers, and increased investment and therefore competition from incumbent operators.**

**Investment by incumbent's is also likely to strengthen given the Vice President Kroes' recent draft recommendation on wholesale costs which stabilise copper prices and allow more flexibility on fibre access prices if equivalence of access (EOA) for 3rd party's versus their own retail arm is offered, and there is significant competition from copper and cable networks.**

**Nonetheless, we welcome the Commission's insistence in its July 2012 announcement that increased wholesale price flexibility for incumbents - who have invested in NGA - is only possible under strict conditions. Indeed, and in spite of the enhanced competitive pressure exerted by cable operators, effective competition in many markets will require the continuation of regulation of incumbent operators who have an SMP position.**

**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?

**With respect to convergence, we see two trends.**

**First of all, broadband is increasingly becoming mobile. The popularity of smartphones and apps has led to increased data consumption on mobile devices. Whilst this data explosion might not lead to the financial returns sought by network owners, we do see mobile devices being more flexible and getting more usage.**

**As part of this trend LGI has – subsequent to time consuming and intense negotiations - reached commercial agreements with various mobile network operators to get access to their networks, and a result LGI operating companies offer MVNO services in six Member States.**

**However market entry remains a complex process and we therefore urge the Commission to continue to monitor the mobile markets carefully to ensure that new mobile operators are able to operate efficiently and sustainably.**

**We are also developing in-home WIFI based retail offerings allowing our customers to switch seamlessly from mobile, to in home usage, based either on the fixed cable or in-home WIFI network.**

**Moreover, we are investing in our digital TV platform to make our content offerings more integrated with the web and to make broadcasters content more compelling and interactive. New TV platforms such as UPC's Horizon[1] are driving more intensive use of content and connectivity offering interactive television services based on personal discovery and content mobility within the home.**

**For instance, various Liberty Global operating countries offer the possibility for the linear television signal to be received on various 'second screens' in the home such as tablet computers and smartphones.**

**Secondly, we see the lines between linear television and internet blurring. The emergence of Over-The-Top (OTT) content in combinations with television sets that can receive data signals means that the television screen can offer much more content from many more providers.**

**Over the past period, YouTube has become the largest data inflow into LGI's network.**

**Our investment in Horizon is aimed at capturing this convergence and offering clients a central hub to access this wealth of content. Looking at the developments of Google with live broadcasts via YouTube and the decision of Microsoft to offer linear television via the X-box in the Netherlands, we see an imperative to continue to innovate in order to remain the service provider of choice.**

**With regard to bundles, we observe that our customers are increasingly appreciative of the value they offer and our portfolio of bundled offers take a variety of forms. Between 2008 and Q3 2012, the number of services purchased by the average Liberty Global subscriber grew to approximately 1.75 services per customer, with some countries seeing an average of over two services per subscriber.**

**We believe bundles enable operators to pass on the efficiencies of providing services to one and the same customer. In addition, we observe new alliances being formed to address the increased consumer interest in bundled products. One such example is the alliance between France Telecom and Deutsche Telekom with SES Astra that formed the basis for a TV-broadband bundled offering. BT has also recently introduced a new offering integrating the UK's DVB-T offering 'Freeview" with broadband based services.**

**We believe that bundles provide consumers with more choice and better products.**

**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?

[1] http://www.upc.nl/horizon/

**In general we do not observe bottlenecks in the market. The intensification of platform competition and the evolution of convergence mean that we do not envisage access or distribution bottlenecks emerging.**

**By way of example in the broadcast transmission sector, the supply of TV distribution services has grown substantially due to the development of digital technologies such as IPTV, Mobile TV and OTT (over-the-top). This has resulted in new players entering the sector including former telecoms monopolists, mobile platforms and local loop unbundlers. OTT platform operators are also entering the market, and digital terrestrial (DTT) and satellite operators enjoy significant presence in many European markets. Taken together, these trends point to a sharp decline of market share by any single platform.**

**There is a growing supply of consumer electronics products that support TV and video distributed via the Internet, such as smart phones, tablets, connected TVs and game consoles which have accelerated the process of convergence and broadened consumer choice. Increasingly, this process means platform substitution is gaining strength over time.**

**The broadcasting sector is not an isolated example and a similar set of competitive developments can be observed across the major of electronic communications sectors.**

**We would also discourage the Commission from using the concept of 'market bottlenecks' when considering the effect of competition and technological innovation on the electronic communications sector.**

**In our view the question on market bottlenecks is ambiguous. For the avoidance of doubt, we have interpreted the question to relate to any possible limitation in the development of the European communications market as opposed to a more legalistic interpretation akin to an essential facility.**

**As set out above, we do not see observe bottlenecks emerging.**

**The closest thing that we see akin to an emerging market bottleneck over the medium term is the willingness of consumers to pay for high-speed broadband. In our network, we see increased usage of bandwidth for video streams, but have not seen new applications being developed that require high bandwidth to be effective – the killer-app to promote ultra-fast broadband networks.**

**Within this context, we consider that the promotion of economic growth and development of the sector needs to be underpinned by a commercial demand for services provided over these networks.**

**Whilst recognising the wisdom of the economist Keynes "supply creates its own demand", we would observe that a sustained imbalance in policy measures supporting supply over demand side stimulation would ultimately foster inefficient entry and a long-term loss of competition.**

**Seen in this context, and as set out in our response to section III.2 below, it is essential there is no departure from the rigorous, and economic based, principles that underpin the Regulatory Framework for electronic communications are maintained. These have served both competition and the market parties well under the first and second iteration of the Commission's list of relevant markets.**
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**Finally, and with respect to geographic markets, in our view, retail markets will continue to be national in character, as very few examples exist of geographically differentiated pricing.**

**With the further development of platform competition, we believe that there is a basis for relaxing wholesale regulation in areas where there is platform competition. Within this context, we see a specific role in using geographic market segmentation for distinguishing different regimes for wholesale services.**

**We consider that the option of geographically segmenting wholesale markets is more transparent than geographically segmenting remedies, as was imposed in Austria and Ireland.**

**We remain cautious with this approach, however, as the choice and modification of remedies is exempt from the Commission's single market enforcement powers it has for market definition and SMP finding by NRAs.**

### III.2. Three criteria test

**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?

**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?

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

**The Regulatory Framework aims at ensuring harmonisation across the single market and guaranteeing legal certainty. The Recommendation plays an important role in achieving both of these objectives, as it seeks to ensure that the same product and services markets will be subject to a market analysis in all Member States and that market players will be aware in advance of the markets to be analysed.**

**Whether an electronic communications market is susceptible to ante regulation depends on (criterion 1) the persistence of high entry barriers, (criterion 2) the dynamic state of competitiveness and (criterion 3) on the sufficiency of competition law by itself (absent ex ante regulation) to address persistent market failures. This three criteria test is a well-balanced, economically sound, and well understood framework for analysis.**

**The three criteria test has during its 9 years of use proven to be an appropriate instrument in defining relevant markets susceptible to ex ante regulation. NRAs across the European Union have undertaken several hundred market analysis decisions based on its principles, and NRAs already completing a third round of market analysis, relying on the Recommendation or by applying the three criteria themselves in respect of non-listed markets.**

**Liberty Global therefore welcomed the decision of the Commission to explicitly add the 3 criteria test to article 2 of the revised recommendation in 2007.**

**It should be recalled that the three criteria test is (partially) based on Recital 27 of the Framework Directive stipulating that ex ante regulatory obligations should only be imposed where there is not effective competition, i.e. in markets where there are one or more undertakings with significant market power, and where national and EU competition law remedies are not sufficient to address the problem.**

**The combination of the three criteria fully covers this in an appropriate way and there is no need to remove any criteria or to add additional ones. Amending the three criteria, by adding or removing criteria, would also incur legal uncertainty as it would create a firm deviation from current standing practice that has proved its relevance over a sustainable period of time. This would have tremendous impact on market players business as stable business planning based on a pertinent list of markets is essential for sound business planning.**

### III.3. Scope of the markets listed in the Recommendation

**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.

**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.

**Liberty Global does not believe that the scope for any currently existing relevant market should be changed as there is no sound economic reasoning for such change.**

**The three criteria test provides an NRA with the appropriate instrument to demonstrate if national circumstances would justify a change in scope.**

### III.4. Relevant markets listed in the Recommendation

**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.

**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.

**In general, we do not see any justification for the removal of any of the markets listed in the recommendation.**

### III.5. Further markets regulated at national level

**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.

**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.

**On the basis of the 3 criteria test we do not observe that any markets regulated by an NRA based on national circumstances warrant the inclusion of an additional new market.**

**For example, with respect to the broadcasting transmission services market and cable, the competitive constraints which justified its deletion from the 2007 list have intensified. We observe strong infrastructure competition and increasing platform substitutability for the provision of downstream retail broadcast services in the intervening period.**

**Indeed, the entry of IPTV operators into this market and the rapidly growing market share the incumbent operators are enjoying make it clear that is little evidence of criterion 1 of the 3 criteria test (the persistence of high entry barriers) is being satisfied. Entry into the downstream market toward consumers by OTT is also a growing and significant factor.**

**With respect to the dynamic state of competitiveness (criterion 2) as the Commission observed in 2007, it is clear that market is very clearly tending toward effective competition.**

**In addition to the entry of IPTV and OTT platforms in the downstream market, there are an array of competitive forces which mitigate any competition concerns in the upstream wholesale market. In particular we would underline growing broadcaster bargaining power given the range of platforms now available to them, the continuing trend of digitalisation increasing channel capacity, and the fact that individual households are now reachable by a range of differing technology platforms.**

### III.6. Markets to be added to the revised Recommendation

**Question 13:** On the basis of the three criteria test carried out at EU level, can any other markets be indentified that should be added to the list in the revised Recommendation, from an *ex ante* perspective? If yes, please provide comprehensive reasoning thereof.

**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.

**No.**

### III.7. Transnational markets

**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.

**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.

**Under the Commission's guidelines on market analysis, geographic markets can be considered as covering two or more countries, for instance pan-European markets. So theoretically on the basis of the three criteria test carried out at EU level transnational markets can be identified from an ex ante perspective.**

**The market for international roaming on public mobile networks could have been an example of a transnational market; however on 27 June 2007 the European Parliament and the Council adopted Regulation on roaming on public mobile telephone networks within the Community.**

**The identification of a transnational market would raise major jurisdictional questions as to the responsible NRA for undertaking market analysis and taking a final regulatory decision. Under the EU framework, an NRA is defined as the body charged by a Member State with any of the regulatory tasks assigned in this Directive and the Specific Directives. Applying this definition would mean that a national NRA would exercise power outside its national territory. This would trigger additional questions on sovereignty which Liberty Global feels go beyond the scope of this questionnaire.**

**III.8.** Any other issues

**As set out in our response to III.2, the 3 criteria test is the appropriate instrument for defining relevant markets susceptible to ex ante regulation. We therefore have some concern with the passive infrastructure remedies[2] which sit outside the framework of economic regulation under the electronic communications framework.**

**The application of symmetrical remedies across all electronic communications infrastructures present in market - and without the definition of a relevant market and subsequent competition analysis by an NRA - are likely to create harmful and unintended consequences.**

**In our view, these physical access layer, passive remedies, should not be applied in a one-size fits way to all infrastructures, in particular where fixed high speed broadband infrastructures are operating in black and grey competitive areas, and where the process of infrastructure competition is delivering strong investment in NGA infrastructure by several players.**

**We believe priority should be given to voluntary infrastructure sharing, as opposed to the application of symmetrical passive access obligations, as this would undermine planned and existing investments by operators such as cable, the broader effect of which has been to stimulate NGA broadband investments by others.**

[2] Article *12 'Co-location and sharing of network elements and associated facilities for providers of electronic communications networks'*, Directive 2009/140/EC amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services