

VATM • Square Ambiorix 13 • B-1000 Brüssel

Regulatory Coordination and Markets Unit
DG CNECT
European Commission
B-1049 Brussels
By e-mail to:
[CNECT-RELEVANT-
MARKETS@ec.europa.eu](mailto:CNECT-RELEVANT-MARKETS@ec.europa.eu).

Durchwahl
+32-2-235 09 80

Datum
26.02.2014

Comments on the Draft revised Recommendation on relevant markets

VATM thanks the European Commission to be able to provide input on the second Commission's draft recommendation and the explanatory note on the Review of the Recommendation on relevant markets susceptible to ex-ante regulation. VATM, the Association of Telecommunications and Value-Added Providers presenting the interests of about 120 pro-competitive companies active in the German market, has already commented on the questionnaire on the recommendation¹ and would like to point out once more important aspects to maintain competition and investment.

VATM acknowledges that the second draft has been improved in some aspects compared to the first proposal. We therefore welcome that DG picked up criticism and opened a second opportunity to pick up stakeholder views. At the same time we regret that DG CNECT failed introducing essential changes within the new draft. The impression remains that DG CNECT is still pushing further its paradigm shift away from infrastructure-based services competition. In this context we see, that statements made within the explanatory note have not been transferred to the new draft of the recommendation and therefore do not reach the objective to ensure competition as a driver of innovation.

VATM calls to maintain the not substitutable and therefore necessary regulatory access opportunities for infrastructure-based competition within the fixed market (Wholesale market voice):

- The obligation to provide access to the wholesale market voice – as currently practiced in market protection. Nationwide alternative offers for the business customer segment would not be available without Preselection and business communication services. The

¹ http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=1551

same is true for alternative offers of 0800- customer hotlines. If just one origination is missing due to a lack of regulation or just one subsidiary of a medium-sized or large company cannot be connected, the offer won't be competitive with the incumbent. A competitive offer assumes a least to connect all locations and all services can be reached.

- In addition we would like to underline, that without imposing CS/CPS increased prices for end customers would be the result. If the market opportunities are reduced and restricted at the same time, no correction provided by competition is available to avoid the negative effects on end customers. This would damage the favored harmonisation in the EU as European calls would suffer a significant price increase.
- In our view it is essential to keep the wholesale market voice (CS/CPS/ business communication services and origination to value-added services), not least because they will substantially help to broadband rollout through as these infrastructure based services pay a price per unit for the network usage, different from pure Internet based services.

As substantial investment commitments can only be expected within a regulatory environment which guarantees a high degree of planning safety. DG CNECT has to take this into account. In respect of physical unbundling this means 10 – 20 years of reliability due to investment decisions taken and to be expected in the future, regarding wholesale origination we expect a period of up to 7 years due to research & development and hardware investment for new infrastructure-based services.

VATM therefore calls again on the European Commission to adjust the number and content of markets only in relation of existing competition and not on the basis of political decisions or non-provable forecasts. Overall this draft and the explanatory note lack an adequate and fact-based rationale for the publicly proposed paradigm shift away from infrastructure-based services competition towards oligopoly-based competition.

In this context VATM would like to comment on the new draft as follows:

1. Concerning the proposal to remove market 1 (access to the public telephone network at a fixed location for residential and non-residential customers) and market 2 (call origination on the public telephone network provided at a fixed location):

We regret that the position of DG CNECT remains unchanged and Market 1 and Market 2 are still removed from the list of markets. As already raised, we do not share the Commissions view of upcoming effective competition in Market 1 and Market 2 which have been subject to ex-ante regulation so far². NRAs still see the three criteria test being fulfilled for these markets and therefore confirmed a lack of effective competition in these markets. This is underlined by an

² https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/Market_overview_25_february_2013.pdf

outstanding strong market share of 73 %³ for incumbents in fixed access services across the EU. VATM therefore calls into question the proposed deregulation of these markets as we do not see comprehensive reasons given by the Commission. We are notably concerned that the premature removal of an ex-ante regulation for political reasons will have negative consequences for competition and consumer and business services welfare.

- Due to a lack of competition, Market 1 and Market 2 have been subject to ex-ante regulation so far (see FN 3). Nevertheless DG CNECT foresees a deregulation of the current markets 1 and 2. This view is based on the evaluation, that (...) *the entry in the market for access to the fixed telephone network is no longer characterized by high and non-transitory barriers to entry. The market for wholesale call origination therefore tends towards effective competition from a forward-looking perspective.* At the same time, the Commission states that (...) *given the high number of national markets where the market for wholesale call origination has currently not been found effectively competitive, it is possible that some NRAs will not yet identify a sufficiently clear tendency towards effective competition in their national markets.*⁴
- In view of this we do not see that DG CNECT is drawing any conclusions for the second draft of the market recommendation. Rather, we understand that there is a gap between the finding that „*high number of national markets where the market for wholesale call origination has currently not been found effectively competitive*” and the conclusion that nevertheless those markets are not suitable for a future ex-ante regulation as they trend towards effective competition from a “forward-looking perspective”. This gap cannot be justified by simply stating that from now on competition law is sufficient (third criterion)
- Missing distinction between residential and non-residential markets. Current market 1 is defined with both customer groups in view. Commission analysis in the Explanatory Note is solely concerned with the residential part of this market, whereas the non-residential part with its mostly very different characteristics and different demand and supply substitutability is no longer included in the analysis. As a result, DG CNECT fails to acknowledge the fact that whereas the residential retail market may see some development of intra- and inter-platform competition, especially from the cable networks, this is not the case for non-residential services. In addition, whereas VoIP or OTTs may be seen in some minor way as competitive checks to SMP in residential voice – we show below that this is even there not the case – but for business services unmanaged VoIP or OTTs are no competitive checks.

³ Webb Henderson, SPC Network: Future of Regulation. An analysis of developments in EU Telecoms Markets and the implications for the European Commission's Review of Relevant Markets, p. 55: <http://www.ectaportal.com/en/upload/Reports/FUTURE%20OF%20REGULATION%20SPC%20Network%20Report%20for%20ECTA%20FINAL.pdf>

⁴ http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=4190 , page 27 f.

- If current Market 1 is to be deleted due to less necessity to regulate retail products, this deletion has to be limited to the residential market. The fixed access market for non-residential customers has to be kept in place as with the higher market share of incumbents and their geographical and product scope the danger of anti-competitive price squeezes is too great. DG CNECT has shown no analysis concerning the non-residential part of the market. In addition, especially for business service the wholesale remedy of WLR (including rebates) has to be kept to allow business services providers – in combination with carrier selection – the provision of nation-wide services to businesses.

- Contradictory assumptions: On the one hand the Commission affirms today's need of a regulation but on the other hand the Commission is assuming a trend towards effective competition, although the following facts run counter to this assumption:
 - Incumbent market shares in retail telephone lines remain very high across Europe 65-85% with even higher market shares in the business user segment
 - In case of migration from PSTN to VoB competitive conditions do not intrinsically change.
 - Unmanaged and managed VoB services provide limited substitution and are not substitutes for traditional circuit switched voice services for:
 - 'captive users' who cannot switch to VoB – 39% of European households do not have fixed broadband access,
 - users who perceive fixed telephony and VoB services as complements or have preference for PSTN because of reliability (also for non-telecoms services such as alarms) and quality,
 - business users who rely heavily on and continue to demand traditional voice services due to quality & reliability considerations

In view of the market figures and observed market developments the result is abstruse: Although the European Commission has confirmed the market evaluation of the national regulatory authorities on market 1 and market 2 (see footnote 3) and sees a continued preference of these NRAs to evaluate these markets (as no effective competition is found), DG CNECT justifies the proposed deletion by inviting member states to take a forward looking perspective based on hoped-for developments, but not on proven substitutability and proven direct or indirect pricing and behavior constraints.

In other words: We are surprised, that after continuing to observe a lack of competition but by taking into account a forward looking approach DG CNECT concludes that a regulation should no longer be necessary.

Impact on the market:

1.1 Call-by-Call / Preselection / Wholesale Line Rental (CS/CPS/WLR):

We neither share the view of DG CNECT that regarding CS / CPS / WLR a clear downward trend can be observed nor that those services are mainly restricted only to some member states of the EU.

- DG CNECT has shown no evidence that CS/CPS has lost its ability to provide indirect pricing constraints on the retail tariffs of the still dominant incumbent operator. To the contrary, as CS/CPS still effectively constrains the retail prices of the incumbent operators (especially for calls to mobile and international destinations), its importance cannot be judged by the actual minutes generated but must include the price differential generated for incumbent retail minutes.
- DG CNECT has shown no evidence that VoIP or OTTs have been able to effectively constrain retail pricing for calls. An effective constraint might be observed if retail prices for calls to mobile or international destinations would differ in the offers of certain operators depending on the technical solution provided (“Broadband with NGN” or PSTN). Only if retail prices differ in these two scenarios, “Broadband with NGN” has proven its ability for an increased constraint. From our observations in the German market, there are no differences in the retail calls prices for those different technological solutions⁵. We therefore conclude that DG CNECT hopes for effective competitive constraints from a migration to NGN are just hopes and are not based upon observable and proven facts. In essence, without the hopes on the NGN migration the whole case for the removal of markets 1 and 2 despite continuing high market shares for the incumbent operator collapses.
- Market figures prove the constant high use of CS, CPS and WLR services across the EU⁶:
 - Germany: about 6 to 7 Million users of CS and CPS,
 - France: WLR is used by 1,595,000 and CS/CPS by 1,282,00 customers
 - Ireland 375,351 WLR customers and 27,114 CS and CPS customers.
 -
 - Netherlands 288,000 WLR lines and 315,000 CS and CPS customers.
 - UK 5,860,000 lines are served by WLR and 2,310,000 customers use CS and CPS

⁵ See current DT retail tariffs under <http://www.telekom.de/privatkunden/internet/komplettpakete/-/call-und-surf-basic-mit-internet-flatrate> and <http://www.telekom.de/privatkunden/telefonie/tarife-und-anschluesse/-/call-start>

⁶ Compare: Wik, Die Bedeutung der Betreiber(vor)auswahl für den Wettbewerb in den Telefoniemärkten, 2013, p. 61: and Webb Henderson, SPC Network: p. 51.

- Austria: Market share of A1 Telekom Austria in residential fixed access lines is 85% and in non-residential 92%. Approximately 24% of total originated minutes are generated by carrier selection providers (2010). 13,9% of total 2,67 Million fixed access lines are served by CPS and 3,6% by CS (Q1/2013), in total 467,000 customers.

A deregulation of Market 1 and Market 2 would run counter to the interests of those end users and would negatively affect sustainable competition in the telephone services markets in the foreseeable future. Specifically, in Germany the market share of the Incumbent Telekom Deutschland (TD) will certainly increase (again) in these markets and TD can be expected to gain (again) considerable market power on the market for international calls. Not only will TD be able to capture almost all calls currently being made via CS/CPS, it will also be able to raise retail prices to mobile and international destinations currently being constrained by the easy access to CS-based calls. Therefore the negative effects on price competition especially for captive and elderly users without technical knowledge in Germany are evident.

- We cannot see any macroeconomic disadvantages resulting from imposing CS/CPS/WLR. To pave the way for and sustain services competition, the entry obligations on market 1 and for call origination on market 2 must continue to be an integral part of German regulatory policy in the future. In this context, it is ultimately irrelevant whether carrier (pre)selection is imposed as an obligation on market 1 or (as is the case in most other European countries) on market 2. A cost-benefit analysis shows substantial benefits in terms of direct and indirect pricing constraints on the still dominant incumbent, especially for the benefit of elderly, less well-off members of the population or for captive customers. The regulatory costs for keeping the obligations are insignificant, as - compared to LLU or bitstream access – the access rules are not very complex and not subject to change.
- While the Commission recognized that CS/CPS/WLR is still demanded by alternative operators in Europe in order to provide retail services (mainly to non-residential customers), she does not transfer these findings into the new draft: One problem consists by focusing on retail markets instead of concentrating on wholesale bottlenecks. This is shown by the fact that the Commission is relating on an increasing transition towards all-IP networks and penetration of VoIP/VoB technology.
- Unfortunately the Explanatory Note conforms to the Draft Single Market Proposal in its proposed replacement of access-based competition by retail regulation. Whereas the SMP refers to retail price equality between national and European calls – to lessen the blow from removing CS/CPS – the Explanatory Note even goes further to advocate retail price controls, for instance via Home Zones, instead of continuing access to CS/CPS. We clearly would like to point out that wholesale regulation is beneficial to the market and therefore no retail regulation should be proposed as effective wholesale regulation is

always superior to retail regulation in a scenario with constrained competition. Furthermore DG CNECT concludes concerning the question if introducing a mobile phone as the "home phone might be a substitute to fixed narrowband access that (...) there are still important differences (...) and therefore a (...) substitution is not foreseen to be sufficient to warrant identification of a combined market for access services". In our view this gives an important lesson concerning CS/CPS, as their role in a competitive retail market for individual calls cannot be substituted equally by retail products like VoIP and / or introducing home zones.

- It is also worth mentioning that for SMEs VoIP or OTTs are not an equivalent substitute to CPS due to often a poor quality and a lack of functionalities. Moreover access solutions lower or remove economic barriers to market access in the form of economies of scale and scope as well as sunk costs. If regulated appropriately, they will lead to efficient infrastructure investments on the part of the incumbent and its competitors. Infrastructure-based services competition can be or become intensive. Infrastructure-based services competition is not self-sufficient to the extent it depends on the availability of regulated wholesale services. Access-based competition can be viable in terms of static allocative efficiency and also in terms of productive efficiency. Only innovation in services will generate the demand for improved NGA networks, therefore reducing infrastructure-based service competition is detrimental to the development of NGA.
- It should also be noted, that more than 30% of all companies in Germany (still) do not have a broadband line and the current and future technical characteristics and quality of bitstream access is often not sufficient to satisfy (all) demands (Upstream bandwidth; symmetry; contention ratio etc.) of business subscribers.

1.2 VAS - Value-added services (e.g. 0800 and 116- European phone numbers)
VATM and other stakeholders have extensively discussed with the European Commission the continued need for wholesale obligations on market 2 concerning the call origination from fixed networks to value-added services as a (regulated) call origination service is an integral part of competition on the business service market for VAS.

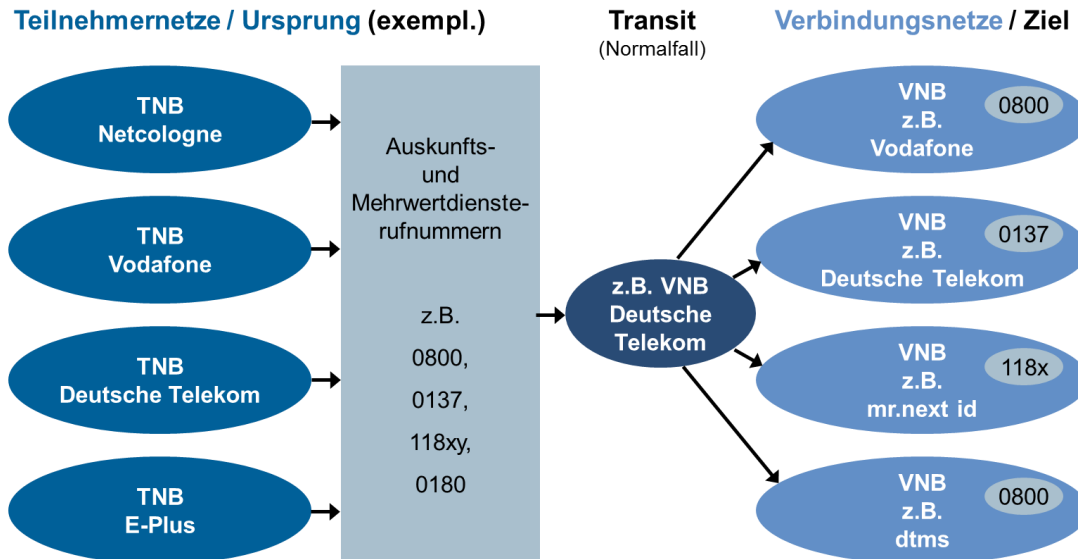
- In the Explanatory Note VAS numbers have been dealt with in the market for termination services, as the corresponding retail market has been identified as "calls to VAS numbers". DG CNECT analysis as well as the Ecorys study have taken the wrong direction when describing the correct markets. VAS numbers are procured by businesses to offer certain services to the public. In the case of 0800 it might be free access to a particular hotline (fault repair etc.), in the case of 116 these are services with emergency character. Therefore the correct retail market is the business services market for VAS. The correct corresponding wholesale market is the origination market from fixed sources. Up to know, only origination services from fixed connections have been deemed in need of ex-

ante regulation. In addition, as will be pointed out later, transit services in case of VAS also fulfill the three criteria test.

- As also pointed out by Wik⁷, VAS have certain characteristics which differentiate them from other electronic communication services. First, we have to differentiate between services via service call numbers and services specific to mobile communications. Services using service call numbers include basically 0800 free phone services, 0180 service numbers, 0900 premium rate services, 0137-MABEZ services, 116 services and 118xy directory assistance services. Services specific to mobile communications basically comprise internal mobile premium voice services (22xyz speed dial numbers), internal mobile premium data services via speed dial numbers (subscription use, ad hoc/one-time use) as well as internal mobile payment services via speed dial numbers.
- As pointed out several times, we would like to stress again the origination problem, which was clearly illustrated within several meetings and was also worked out in the Wik study mentioned above. It was shown that the VAS market actually requires the interaction of many market participants. To ensure that all subscribers of all network operators can access all VAS, the provision of specific wholesale services is essential. As the market participants in the business services market for VAS numbers (retail) sometimes differ from the (local) fixed and mobile access operators, a deletion of market 2 would lead in an originating-monopoly of the incumbent and therefore a “dehydration” of the market of value-added telephony services (e.g. by increasing costs for companies offering services like 0800). In addition SMP in the retail access market will –in the absence of ex-ante origination services regulation - be translated into SMP in the business services market for VAS. This is due to the fact that origination costs are the main cost component of providing VAS services (like 116 or 0800). Therefore either by raising competitors costs (by increasing origination costs or declining to offer transit services) or by using the extra margins from providing origination services above costs and then undercutting non-SMP operators in the business services market for VAS, the market power from the retail access markets can be brought to bear in the business services retail market for VAS. This interaction is clearly illustrated in the following diagram.

⁷ Die Regulierung der Märkte 1 und 2 als Voraussetzung eines nachhaltigen und infrastruktur-basierten Dienstewettbewerbs - Studie von WIK-Consult (Neumann/Stumpf/Plückebaum im Auftrag des VATM): http://www.vatm.de/uploads/media/Die_Regulierung_der_Maerkte-WIK-Consult.pdf

Origination and transit to value-added telephony services:



- This graph shows that competition in transit will not occur in the foreseeable future (estimated for a least the next three to seven years) and that a service provider will usually only be able to have a market presence if all end users are able to access its service and the calls of these end customers will be directed to its network. "Denying access to the origination wholesale products would put the competition out of business."⁸. Without origination services, service providers would have to become LLOs just for single calls of those retail customers to VAS numbers. This option would be economically prohibitive and technically impossible to boot. Since TD is itself an active provider in the business services market for VAS, it has no interest in providing origination voluntarily or at cost, i.e. without a corresponding obligation to provide access.
- A removal of markets 1 and 2 would ultimately render competition in the business services markets no longer sustainable. Apart from negatively impacting businesses themselves, this will then affect customers of those businesses through a variety of feedback effects (less 0800 or 116 services due to increased costs for these services; higher cost for goods, as businesses are forced to use the incumbent operator for their total communication needs – in the absence of CPS and WLR). If it is the goal of the Commission to increase the competitiveness of European businesses, this cannot be achieved by depriving them of competitive supply. To the contrary, businesses must be empowered to access a variety of com-

⁸ Bundesnetzagentur: Draft consultation of the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway, Call origination on the public telephone fixed network and voice call termination on individual public telephone fixed networks, markets 2 and 3 of Recommendation 2007/879/EC, February 28, 2012.

peting providers with different solutions and services to find the optimum and cost-effective solution. But this goal would be frustrated if Market 2 would be removed, as service competition in the business services market for VAS could no longer be safeguarded. This would affect inter alia directory assistance services and service hotlines (including 0800 and 116 European phone numbers).

- On the one hand, competition is the central precondition for the development of different services. On the other hand many existing services are not accessible within a monopoly market situation (see chart). In this context it remains unclear why the Commission is referring a lack of innovation compared to the US and other regions when simultaneously worsening the market conditions for competition and innovation in Europe.
- Hence it could be derived, that the prerequisites for a need for regulation also in terms of the three criteria test continue to exist for the transit market to VAS. Providers of value-added services including directory assistance will now and in the future depend on regulated transit services which originate transport calls from the telephone networks of third parties thereby ensuring the accessibility of services. A direct interconnection between all (specialized) VAS providers and all local loop operators (LLOs) would not be economically feasible and efficient both from the perspective of the LLOs and from the perspective of VAS providers. Moreover, TD has in effect a non-substitutable market position for a significant part of the traffic when it comes to transit traffic from alternative IXC/VAS networks to alternative destination networks of VAS providers due to its still dominant position in the retail consumer and business markets. In addition to this position, which will not be eradicated in the migration to NGN, TD fortifies this position by declining to use transit services of third parties. Therefore each LLO and each service provider needs to have a direct interconnection with TD, which then renders the use of other transit operator effectively uneconomical. Therefore the necessity to further regulate transit services to VAS numbers is grounded in the continuing dominant position of TD in all retail access markets.

1.3. Business Communication Services

- According to estimates⁹ the value of the communication services requested by MSCs/MNCs (multi-site corporations" and "multi-national corporations) throughout Europe is more than 90 billion euros; this is more than 53% of all communication services requested by companies or more than 27% of all requested communication services. At the same time, for a significant number of companies e.g. in Germany, the option of being able to obtain access via preselection (i.e. a fixed preset code to a long distance carrier) or to use tel-

⁹ Godlovitch, I., Monti, A., Schäfer, R.G. and U. Stumpf (2012): Business communications, economic growth and the competitive challenge; WIK-Consult study for the European Competitive Telecommunications Association (ECTA) and International Telecommunications User Group (INTUG), November, page 2:
<http://www.ectaportal.com/en/REPORTS/Other-Reports-Studies/WIK-Report-Business-Communications-Jan-2013/>

ephone lines through access resale, is still an important component of their communication profile.

- Regarding the communications needs of business users it has been proved by a study¹⁰ that 69% of them prefer to have their communications needs met by a single TC provider. However, only 53% of these users who prefer to work with one TC provider report that this is in fact a feasible solution for them. More than 50% of respondents report problems with obtaining fixed and mobile network services from a single carrier. In 46% of cases it was not possible to obtain a suitable offering from more than one or two providers. Many large customers had to resort to several providers to meet their communications needs even though they preferred a single provider solution. There is no TC operator covering all of Europe who could meet the communications needs of multinational companies with its own access solutions. TC providers who want to satisfy the demand of multinational companies usually have only a small infrastructure of their own to build on.
- The ability to make universal offers requires the availability of relative simple wholesale services such as the option to WLR and CPS.¹¹ Especially business customers often require PSTN lines or voice services based on CPS, also because of the poor quality of bitstream services. This is the only way for providers of business services to be able to provide a comprehensive service offering covering an extensive area and for harmonised services across the EU member states. Therefore, the regulatory requirements necessary for services competition should apply equally to the business and residential markets. In the absence of regulation alternative operators are not able to offer these services any more. Customers have to purchase from the incumbent.¹² This could lead to a knock-out effect for alternative business communication suppliers, if the customer demands from his potential supplier to meet all requirements.¹³ An abolishment of these simple wholesale services will negatively affect the business customer market.¹⁴

1.4 Conclusion

- Above, we have shown that the European Commission has still not presented an adequate rationale for the proposed deregulation of Market 1 and Market 2. There are therefore no convincing reasons for giving up proven regulatory practices. We think it is not a satisfactory solution to force NRAs which have to continue to regulate those markets due to

¹⁰ ebda

¹¹ Wik consult: Regulation of markets 1 and 2 as a precondition for sustainable and infrastructure-based services competition, p. 30: http://www.vatm.de/uploads/media/Die_Regulierung_der_Maerkte-WIK-Consult.pdf

¹² Webb Henderson, SPC Network, p. 63.

¹³ ebda, p. 63.

¹⁴ Wik consult: Regulation of markets 1 and 2 as a precondition for sustainable and infrastructure-based services competition, p. 30.

the current and foreseeable market realities to go through the “full” 3 criteria test with the full regulatory uncertainty exclusively resting on competitive providers. As it has been proved in the past, NRAs need strong arguments to deviate from an EC Recommendation. As there are obviously proven reasons to keep those markets within the new list of relevant markets (or least create a new voice wholesale market which allows to continue CS/CPS/WLR and origination to VAS (business services) from all locations), we therefore call on the Commission to amend this second draft proposal by including a market ensuring to mandate the provision of wholesale infrastructure services that are necessary to continue competition.

- Dropping the obligation for CS/CPS/WLR would run contrary to the interests of end users and negatively affect sustainable competition in the telephone services markets. We cannot see any macroeconomic disadvantages resulting from CS/CPS/WLR which could be raised as arguments against the macroeconomic advantages outlined above.
- Origination services for connections from the telephone network – this includes transit services – are an indispensable prerequisite for a competitive business services market for value-added telephony services including directory assistance. All in all, there is a high risk that at first some of the VAS telephone numbers can no longer be accessed by end users if the call origination obligation (plus transit) is lifted. Then these VAS numbers will be concentrated at the incumbent operator, which can guarantee the biggest share of accessibility, wiping out competition in the retail business services market.

2. Concerning the proposal on Market 4 (new 3a) Wholesale local access provided at a fixed location and new 3b) Wholesale central access provided at a fixed location for massmarket Products) and on Market 5 (new 4) Wholesale high-quality access provided at a fixed location)

VATM namely believes that one of the key challenges of the future regulatory regime is to ensure and enlarge competition in the fixed market. The outcome of the future regulation of markets 3 and 4 (new) will therefore be a strategic step towards the question whether Europe will further deliver growth and innovation. VATM believes that the Commission needs to come back to a technologically and competitively neutral pro-investment policy, discarding the advice of asset investors who are only interested in asset prices of European incumbent stocks.

- Concerning the discussion of imposing virtual wholesale products VATM would like to stress out: VULA is NOT functionally equivalent to and cannot replace LLU. VATM has already raised its concerns about the discussed deviation from infrastructure-based competition. Although DG CNECT always rejected the concerns of competitors, VATM would like to

stress again that even the discussion about the imposition of virtual access on a technology-neutral basis as an access remedy leads to uncertainty within the market and by investors and thereby to a standstill in broadband expansion. However, a harmonization of wholesale products (VULA) may be helpful for business customers if it enables customers to offer their products across Europe. Harmonization in the private customer sector is also helpful for some market participants if it helps to improve the wholesale conditions in terms of best-practice approaches. Quality is a key factor when it comes to harmonization. It has to be designed so that each member state will actually be able to provide competitive offerings and quality is not limited by incumbent's offering. This is imperative if European companies are to benefit from an improved single market in telecommunications. In private customer sector competitors can profit from quality increase by identifying and implementing best practice so far this does not lead to discrimination to incumbent. Therefore VULA on different stages is necessary and not only in cases, unbundling is economically and/or technically not feasible. ULL and VULA must therefore coexist at the same time

- VATM is not completely in line with the dividing line drawn up by the Commission to separate markets 3 and 4 (new). Whereas small business users may show demand characteristics similar to those of retail customers, it is different for medium-sized enterprises and larger enterprises. In its Explanatory Note the Commission does include these medium-sized enterprises into the residential market by applying the term "SME". The experiences of our members show that there is a marked difference in nature and structure of the products demanded between small and medium enterprises. This makes it all the more important to take more into account the interest and needs of medium-sized enterprises within market 4 (new). We therefore urge the Commission to reconsider its delineation between markets 3 and 4.
- Consideration could also be given to differentiate wholesale submarkets. Such a differentiation could significant help to precise regulation.
- It has not been controversial within the regulatory practice to offer access to incumbent networks as a regulatory principle. The legal framework but also the NGA Recommendation clearly states that NRAs should mandate unbundled access:
 - Physical remedies have been the key wholesale remedies used by alternative operators to compete and innovate. Looking at the German market it can be referred that nearly 10 million unbundled local loops, more than 25 percent of all fixed network connections are by now managed by competitors. Access to a local loop is an essential prerequisite for competitors so that they can offer customers a connection with up to 50 Mbit/s using mostly their own VDSL infrastructure or, going forward, up to 100 Mbit/s using their own VDSL vectoring infrastructure. Harmonization of wholesale products may be helpful for business customers if it enables customers to offer their products across Europe.

Harmonization in the private customer sector is also helpful for some market participants if it helps to improve the wholesale conditions in terms of best-practice approaches.

- Physical products are not comparable in terms of the level of differentiation allowed in the provision of retail services. A virtual product does not give alternative operators the same scope for innovation and differentiation *vis-à-vis* the incumbents' retail offers (e.g. by offering higher speeds and higher quality of service).
- Favoring virtual products over physical ones runs counter the principle of *promoting, where appropriate, infrastructure based competition* - a principle which is highlighted in the regulatory framework (Article 8 (5) (c) of the Framework Directive). Physical unbundling remedies require more investments by alternative operators than virtual ones but also allow further differentiation at the retail level.
- Preference of virtual access over physical access is not a feature of the regulatory framework and should not be advocated in the Recommendation of Relevant Markets.

2.1 Market 3 (current Market 4 [new 3a] and current Market 5 [new 3b])

- In our view, it still does not make sense to merge the markets for LLU and bitstream into one market. The new rationale now with a possible supplement product in the absence of the possibility to unbundle does not hold water. The Draft Single Market Regulation clearly aims at restricting the physical access or even being able to remove it. Given the overall activities of TD and other incumbents to achieve this, absolute caution against any restriction of the LLU access is thus necessary.
- In addition, the arguments raised by the Commission¹⁵ (product supplement and technical factors such as vectoring) do not justify a cancellation of physical access.- The purported issue that the LLU access is (no longer) warranted for technical reasons, such as vectoring, and instead only bitstream access should be provided, does not change the fact that there are two different markets. One must distinguish clearly between the cause and effect. The issue that a generally existing right to physical unbundling may be restricted if there is good cause and as an exception from the rule, is completely different than the issue whether this unbundling claim may be restricted within a market from the outset or not be granted at all (in potentially pre-defined cases).
- Furthermore, the definition of VULA is still very vague. The idea of the EC is apparently that a VULA will connect at the street cabinet or the MDF; in this respect, it may correspond to the street cabinet AP- product that DTAG must offer due to the new LLU reference offer (because of vectoring). For alternative end customer network operators (aTNB) this would

¹⁵ EXPLANATORY NOTE, page 39, paragraph 2 and page 40, paragraph 2 and 3

mean that they must lay fiber to the street cabinets just to be able to offer an inferior competitive product – compared to the LLU product. This is not only economically unfeasible; it also runs contrary to the very politically desired concept of competition via networks (by relying only on the incumbent's network). It would mean a step backwards for the deployment of broadband networks. A VULA must also be offered at a regional MDF level and a national level. However, VULA products on different stages of the network have always to be offered in parallel with unbundled access, because a economic business with SDF unbundling is restricted to only few carriers due to high fibre rollout costs. Competition needs both: Unrestricted access to unbundled LLU and VULA and not only VULA in that case, that unbundling is economically and/or technically not feasible.

- It is therefore crucial that LLU access continues to be maintained unrestricted and as a separate market. By merging it with the Bitstream Access (BSA) Market, vectoring would be taken as a pretext to undermine this principle. From this point, it would only be a small step to the substitution of the LLU access by BSA. A substitution of LLU by BSA is neither necessary nor reasonable. VULA is an advancement of BSA and not part of ULL. This has to be considered in the Market Recommendation and must not lead to the result that VULA and ULL are consolidated in one market. This goal and the re-monopolization effect that comes with it clearly reflect TD's strategy. The EC must not participate collusively in it though the Market Recommendation.
- VATM would also like to point out that geographic segmentation is not relevant for this market. Removing regulation where there is competition only from the customer's point of view is misleading, as competition is based on regulatory conditions. Instead of considering the as-is-condition, market conditions have to be considered in the case of suspending regulation. As for example in Germany 95% of the competitors are acting dependent of regulated wholesale products, withdrawing the right to access would provide no alternative access form especially to the incumbent's last mile. Investments already carried out would be devaluated and new investors will look into other sectors of the economy.

2.2 Market 4 (Wholesale high-quality market provided at fixed level)

- VATM agrees with the need of identifying a separate market for business services to provide services typically be offered with high-quality service level guarantees, guaranteed availability and often symmetric up and download speeds.
- The Commission considers it appropriate, on a forward looking basis, to define a market for "Wholesale high-quality access provided at a fixed location", including a range of access products necessary to fulfil the needs of business service providers/large retail business customers. In particular, the market would include business-grade bitstream and also ter-

minating segments of leased lines – on the basis of a ‘chain of substitution’ analysis. The Commission is at pains to confirm that such a finding would not prejudice NRA’s scope to decide the most appropriate remedy (or remedies) to be imposed on SMP operators. We don’t consider business grade bitstream and terminating segments of leased lines to be substitutes, because, for example, a leased line offers a guaranteed bandwidth which bitstream is not doing. We would be concerned if this approach led to deregulation of these business access products. Therefore defined business submarkets have to be explicitly integrated in the new market 4, including leastwise: Enterprise LLU, Enterprise Bitstream, Leased Lines, Mobile Backhaul.

- Overall, harmonization of wholesale products may be helpful for business customers if it enables customers to offer their products across Europe. Quality is a key factor when it comes to harmonization. It has to be designed so that each member state will actually be able to provide competitive offerings and quality is not limited by incumbent’s offering. This is imperative if European companies are to benefit from an improved single market in telecommunications. WIK, for instance, calculated in a recently published study that the creation of a pan-European market for business customer services would yield an economic benefit amounting to a total of 90 billion euros annually due to harmonized, adequate wholesale products in all member states.
- VATM approves of the stronger segmentation now being made between (terminating segments of) leased lines and virtual access products (based on – symmetrical – DSL). These may be seen in a continuous line of substitution, but sometimes this substitution, especially from the point of supply substitutability, is rather thin. Therefore it is necessary to help NRAs by declaring a rather weak substitution. Otherwise some NRAs may find themselves forced to withdraw access to leased lines if some form of bitstream access is available. This would be a disaster for the business services market, which more and more relies on harmonized (best practice) access to a range of wholesale products (leased lines, BSA, CPS, WLR and origination services) throughout the European Union.

2.3 Conclusion

- It is essential to clarify not to require imposing EU virtual products instead of any other existing wholesale access products. In this context it is of the utmost importance to leave room for interpretation. Activities of the European Commission for European standardization of wholesale products to replace an unbundled local loop are the wrong way within the context of suspending national unbundling obligations.
- Playing with fire: LLU has significant, long term benefits over active wholesale access products both from a consumer, economic and investment perspective. Competition based on LLU promotes and enables innovation and higher broadband speeds and maximises effi-

cient investments as altnets have to roll out their own core networks as well as invest in equipment and product innovation in order to compete with the SMP operator. It is therefore the leading form of wholesale access. But also additionally VULA on different stages is necessary and not only in cases, unbundling is economically and/or technically not feasible.

3. Additional comments

VATM would like to address the need of postponing the revision until the market has a clear view on the outcome of the Telecom-Single Market Package. The current proposal is premature and ignores the results still to be delivered. As the Telecom-Single-Market Package also contains proposals on wholesale products and discussions on this matter are still in progress both initiatives should be linked and handled jointly.

More than 120 of the telecommunications and service companies which operate in the German market are active in the VATM. All of them are in direct competition with the ex-monopoly Deutsche Telekom AG and are working for more competition in the telecommunications market – for the benefit of innovations, investments and employment. Since liberalization in 1998 the competitors have made investments totalling around € 58,1 billion in the fixed network and cellular telephone areas. The new fixed network and cellular phone companies safeguard over 53.300 jobs in Germany, as well as about 50 % of the employment in the supplier firms as well.