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COMMISSION RECOMMENDATION

of 18.12.2020

on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code

(Text with EEA relevance)

{SWD(2020) 337 final}

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof,

Having regard to Directive (EU) 2018/1972¹ of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (the Code), and in particular Article 64(1) thereof,

Whereas:

- (1) Directive (EU) 2018/1972 seeks, in addition to the three primary objectives of promoting competition, the internal market and end-user interests, to promote connectivity and access to, and take-up of, very high capacity networks, including fixed, mobile and wireless networks, for the benefit of all citizens and businesses of the Union.
- (2) The appropriate incentives for investment in new, very high capacity networks, which support innovation in content-rich internet services, will strengthen the international competitiveness of the Union while delivering benefits to its consumers and businesses. It is therefore crucial to promote sustainable investment in the development of very high capacity networks by means of an appropriately adapted and predictable regulatory framework.
- (3) One of the aims of the new regulatory framework is to progressively reduce *ex ante* sector-specific rules as competition in the markets develops and, ultimately, to ensure that electronic communications markets are governed only by competition law. In line with this objective, the purpose of this Recommendation is to identify those product and service markets in which *ex ante* regulation may be justified.
- (4) The definition of relevant markets may change over time as the characteristics of products and services available on such markets evolve and the possibilities for demand and supply substitution change due to technological, market and regulatory

¹ OJ L 321, 17.12.2018, p. 36.

developments. For this reason, this Recommendation should therefore replace the 2014 Recommendation².

- (5) Article 64(1) of the Code requires the Commission to identify markets within the electronic communications sector, the characteristics of which may be such as to justify the imposition of regulatory obligations in accordance with the principles of competition law. Competition law principles are therefore used in this Recommendation to define relevant product markets in the electronic communications sector.
- (6) The ultimate objective of regulatory intervention is to produce benefits for end-users in terms of price, quality and choice by achieving sustainable competition at retail level. The starting point for the identification of relevant markets in this Recommendation should be the definition of retail markets in a forward-looking perspective over a given time horizon, guided by competition law. Indeed, where retail markets are effectively competitive in the absence of wholesale regulation, national regulatory authorities should conclude that regulation is no longer needed on related wholesale markets.
- (7) In accordance with Article 67(1) of the Code, imposition of ex ante regulatory obligations may be justified only in markets where the three criteria referred to in Article 67 (1) (a), (b), (c) are cumulatively met. This Recommendation includes product and service markets, which the Commission, after observing the overall trends in the Union, found to meet the three criteria. Hence these markets are considered by the Commission to have characteristics which may justify the imposition of regulatory obligations at least in some geographic areas and over a foreseeable period. It should be for the national regulatory authorities to consider in their analyses of these markets whether the further requirements set in Article 67 (2) are met.
- (8) The first criterion relates to the presence of high and non-transitory barriers to entry. It seeks to establish whether, when, and to what extent market entry is likely to occur, and to identify the relevant factors for a successful entry into an electronic communications market. From a static point of view, two types of barriers to entry are particularly relevant for the purpose of this Recommendation: structural barriers and legal or regulatory barriers.
- (9) Structural barriers to entry derive from different cost or demand conditions that determine asymmetric conditions between incumbents and new entrants, impeding or preventing market entry of the latter. High structural barriers may also be found, for instance, when the market is characterised by absolute cost advantages or substantial economies of scale and/or network effects, capacity constraints and/or high sunk costs. Structural barriers can also exist where the provision of service requires a network component that cannot be technically duplicated or its duplication is not economically feasible.
- (10) Legal or regulatory barriers may have a direct effect on the conditions of entry and/or the positioning of operators on the relevant market. In regulated sectors, authorisation procedures, territorial restrictions, safety and security standards, and other legal requirements may deter or delay entry. However, the relevance of legal and regulatory

² Commission Recommendation 2014/710/EU of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (OJ L 295, 11.10.2014, p. 79)

barriers in electronic communications markets is decreasing. Legal or regulatory barriers that are likely to be removed within the relevant time horizon of 5 years should not normally constitute a barrier to entry such as to fulfil the first criterion.

- (11) In innovation-driven markets characterised by ongoing technological progress, such as the electronic communications markets, barriers to entry may progressively become less relevant. In such markets, competitive constraints often come from threats exerted by potential innovative competitors that are not currently in the market. Therefore, the possibilities to overcome barriers to entry within the relevant time horizon should also be taken into consideration when identifying the relevant markets for possible ex ante regulation. This Recommendation identifies markets where barriers to entry are expected to persist for the period of the next 5-10 years.
- (12) Different barriers to entry should not be considered in isolation but cumulatively. While an entry barrier when regarded individually may not be considered as high, together with other barriers might create effects which cumulatively would prevent or impede entry into the market.
- (13) The second criterion addresses whether a market structure tends towards effective competition within the relevant time horizon, having regard to the state and prospect of infrastructure-based competition and other sources of competition behind the barriers to entry. An analysis of effective competition implies that the market will become effectively competitive absent ex ante regulation within the period of review, or will do so after that period, provided that clear evidence of positive dynamics in the market is observable already within the period of review. For instance convergence of products, delivered via different network technologies, may give rise to competitive constraints being exercised by operators active in distinct product markets and may lead to the convergence of markets.
- (14) Even when a market is characterised by high barriers to entry, other structural factors in that market may indicate that the market still tends towards effective competition within the relevant time horizon. In markets where an increased number of networks can be expected on a forward-looking basis, the application of this criterion entails primarily examining the state and likely future development of infrastructure-based competition.
- (15) In assessing the adequacy of competition and the need for regulatory intervention, national regulatory authorities should also take into account whether wholesale access is available to any interested undertaking on reasonable commercial terms permitting sustainable competitive outcomes for end-users on the retail market. Commercial agreements, including agreements on wholesale access, co-investment agreements and reciprocal access agreements between operators, which have been entered on a lasting basis and are sustainable, have the potential to improve competitive dynamics and may ultimately resolve competition concerns at the related retail market and therefore lead to deregulation of the wholesale markets. Thus, provided that they comply with principles of competition law, they should be taken into consideration when assessing whether a market is expected to become competitive on a forward-looking basis.
- (16) Technological developments, or the convergence of products and markets, may give rise to competitive constraints being exercised between operators active in distinct product markets. In this respect, over-the-top (OTT) services, which today are generally not considered as direct substitutes to traditional services provided by electronic communication service providers, and which in any case do not provide physical and data connectivity, might nevertheless play a more important role in

certain retail markets in the coming years due to further technological developments and their continuous expansion and subsequently exercise indirect constraint on wholesale markets.

- (17) The decision to define a market as susceptible to ex ante regulation should also depend on an assessment of the sufficiency of competition law to address adequately the market failures identified. This third criterion aims to assess the adequacy of competition law to tackle identified persistent market failure(s), in particular given that ex ante regulatory obligations may effectively prevent competition law infringements. Competition law based interventions are likely to be insufficient where frequent and/or timely intervention is indispensable to redress persistent market failure(s). In such circumstances, ex ante regulation should be considered an appropriate complement to competition law. In general, the application of general competition rules in markets characterised by sustainable and effective infrastructure-based competition should be sufficient.
- (18) The application of these three cumulative criteria should limit the number of regulated markets within the electronic communications sector and thereby contribute to reducing ex ante sector-specific regulation progressively as competition in those markets develops. Failure to meet any of the three criteria would indicate that a market is not susceptible to ex ante regulation. It is essential that ex ante regulatory obligations are imposed on a wholesale market in order to ensure sustainable competition only where there are one or more undertakings with significant market power and where competition law remedies are not sufficient to address the problem.
- (19) Newly emerging markets are considered to comprise products or services where, due to their novelty, it is difficult to predict demand conditions or market entry and supply conditions, and consequently difficult to apply the three-criteria test. Such markets should not be subject to inappropriate ex ante regulatory obligations in order to promote innovation, while preventing, at the same time, foreclosure by the leading undertaking.³ Incremental upgrades to existing network infrastructure rarely lead to the creation of new or emerging market. The lack of substitutability of a product has to be established from both demand and supply side perspectives before it can be concluded that it is not part of an already existing market. The emergence of new retail services may give rise to a new derived wholesale market to the extent that such retail services cannot be provided using existing wholesale products.
- (20) Given the evolution of competition, including infrastructure-based competition, this Recommendation identifies only relevant markets at the wholesale level, as was the case in the 2014 Recommendation. *Ex ante* regulation imposed at the wholesale level should be considered sufficient to tackle potential competition problems on the related downstream retail market(s).
- (21) In line with Recital 165 of the Code, national regulatory authorities should at least analyse the markets that are listed in the Recommendation, including those markets that are listed but no longer regulated in the specific national or local context. With respect to the markets listed in the Annex to this Recommendation, national regulatory authorities may still consider it appropriate, based on specific national circumstances, to conduct the three-criteria test. National regulatory authorities may conclude that the

³ See Recital 23 of the Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, OJ C 159/1 of 7.5.2018 and Recital 163 of the EECC.

three-criteria test is not met in the specific national circumstances. If the three-criteria test is not met for a specific market listed in the Recommendation, national regulatory authorities should not impose regulatory obligations on that market.

- (22) National regulatory authorities should also analyse markets that are not contained in this Recommendation, but that are regulated within the territory of their jurisdiction on the basis of previous market analyses, or other markets, if they have sufficient grounds to consider that the three criteria test is met. Hence, the national regulatory authorities can also define other relevant product and service markets, not listed in this Recommendation, if they can prove that in their national context, the markets meet the three criteria test.
- (23) When carrying out a market analysis under Article 67 of the Code, both the national regulatory authorities and the Commission should start the analysis from the retail markets. The assessment of a market should be done with a forward-looking perspective in the absence of regulation based on a finding of significant market power and starting from existing market conditions. The analysis should assess whether the market is prospectively competitive and whether any lack of competition is durable, by taking into account expected or foreseeable market developments. The analysis should take into account the effects of other types of regulation applicable to the relevant retail and related wholesale market(s) throughout the relevant regulatory period.
- (24) If the retail market concerned is not effectively competitive from a forward-looking perspective in the absence of ex ante regulation, the corresponding wholesale market(s) susceptible to ex ante regulation in line with Article 67 of the Code should be defined and analysed. In addition, when analysing the boundaries and market power within (a) corresponding relevant wholesale market(s) to determine whether it is/they are effectively competitive, direct and indirect competitive constraints should be taken into account, irrespective of whether these constraints result from electronic communications networks, electronic communications services or other types of services or applications that are equivalent from the end-users' perspective.
- (25) When defining the relevant wholesale markets which may be susceptible to ex ante regulation, national regulatory authorities should start by analysing the market which is most upstream of the retail market in which competitive problems have been identified. National regulatory authorities should conduct an analysis of the markets that are situated downstream from a regulated upstream input, to determine whether they would be effectively competitive in the presence of regulation upstream, until it reaches the retail market.
- (26) The most upstream market may, depending on national circumstances, consist of or include more generic cross-market wholesale products such as physical infrastructure access (e.g. duct access) or passive access products. In particular, where civil engineering infrastructure exists and is reusable, effective access to such infrastructure may significantly facilitate the roll-out of very high capacity networks and encourage development of infrastructure-based competition to the benefit of end-users.
- (27) For these reasons, the Commission has considered the appropriateness of including a separate market for access to physical infrastructure in this Recommendation. However, as there are significant differences in network topologies, availability of ubiquitous ducts and level of demand for access to ducts and poles across the Union, the Commission concluded that a separate market for access to physical infrastructure

cannot, at present, be identified at Union level and should therefore not be included in the list of markets susceptible to ex ante regulation.

- (28) Furthermore, Article 72 of the Code allows national regulatory authorities to impose access to civil engineering as a stand-alone remedy on any relevant wholesale market. Such obligation to provide access to civil engineering may be justified irrespective of whether the physical infrastructure to which access is granted is part of the regulated relevant market and should be considered by national regulatory authorities before other access obligations are imposed downstream, if proportionate and sufficient to promote competition in the benefit of the end-users.
- (29) As regards wholesale broadband markets, virtual access products may be designed in a way that they display similar or equal product features, regardless of the location of the handover point for access. Therefore, it could be technically possible to provide wholesale broadband access at central or local level with comparable quality of service from both the access seeker and the end users' perspectives. In this context both the product features and the willingness of access seekers to migrate between access points or to make use of various handover points within the network architecture need to be analysed as part of the substitutability analysis.
- (30) Many alternative operators climbed the ladder of investments and developed their own networks to the local access point. Those operators would likely not consider central access products as a substitute for local access as it would leave the investments into their own network infrastructure stranded. At the same time, it has to be acknowledged that the access network is the most difficult part of the network to replicate due to the high sunk deployment costs in relation to the number of customers that can benefit from the deployment.
- (31) Despite the observed increase of infrastructure-based competition, local access is still characterised by high entry barriers and regulated in the majority of Member States. The wholesale local access market still meets the three-criteria test, given that the access network is the part of the network most difficult to replicate. However, on a forward-looking basis, the barriers to entry into the central access market can no longer be regarded as high and non-transitory at Union level as the market tends towards effective competition due to the presence of alternative platforms, the widespread commercial availability of trunk capacity and the possibility of locally interconnected operators to provide central access. Where access products, provided at various handover points, are identified as being substitutes under specific national circumstances, the market should be found to encompass all such products. Whether such a broad market meets the three criteria test needs to be established on a case by case basis.
- (32) The increased capabilities of electronic communications networks providing mass-market products may satisfy the connectivity needs even of certain business customers. However, an important segment of the business market, as well as the new demand emerging from digitization of industry and from socio-economic drivers such as public services e.g. hospitals and schools, will require also dedicated connections. Therefore, certain businesses still require products with characteristics that are distinct from those of mass-market products.
- (33) With a view to delineating the boundaries of the market for dedicated capacity and other business access products national regulatory authorities should, while ensuring that the relevant wholesale products correspond to the retail market problem identified, take into account several factors such as different product functionalities and intended

use, price evolution over time and cross-price elasticity. The distinguishing product characteristics of dedicated capacity are their ability to provide dedicated and uncontended connections and symmetrical speeds and should be assessed, as for products in other markets, by means of a substitutability analysis.

- (34) The deployment of alternative infrastructures providing a dedicated fibre connectivity for business has increased significantly in particular in more densely populated areas, commercial centres and business districts. However, there may be areas in which, even though the deployment of an alternative infrastructure for mass-market connectivity may be economically viable, it may be less economically viable to duplicate networks providing isolated dedicated connections due to the size of the addressable market. In those less densely populated areas, due to lack of infrastructure-based competition, there is a risk that the demand for dedicated capacity would not be served by competitive offers in the absence of regulation.
- (35) In both the above wholesale access markets, competitive problems are unlikely to persist uniformly across a given Member State and such markets should be subject to a thorough geographical analysis. Therefore, when defining relevant markets in accordance with Article 64(3) of the Code, national regulatory authorities should identify geographic areas where the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different, having particular regard to the question whether the potential operator having significant market power acts uniformly across its network area or whether it faces appreciably different conditions of competition to a degree that its activities are constrained in some areas but not in others.
- (36) To date, national regulatory authorities have found most markets to be national because the incumbent's copper network had a national coverage. However, as the deployment of alternative networks progresses, competitive conditions can vary significantly and sustainably between different areas of the same Member State (for instance between urban and rural areas), thus making necessary the definition of separate geographic markets.
- (37) For the purpose of the geographic market definition, national regulatory authorities should define a basic geographic unit as a starting point for assessing competitive conditions. Such unit might follow the network topology or administrative boundaries, depending on national circumstances. In all cases, following the Commission's practice⁴, the geographic unit should be (a) of an appropriate size, i.e. small enough to avoid significant variations of competitive conditions within each unit but big enough to avoid a resource-intensive and burdensome micro-analysis that could lead to market fragmentation, (b) able to reflect the network structure of all relevant operators, and (c) have clear and stable boundaries over time. As regards condition (b), national regulatory authorities should rely, where relevant, on the geographical survey of networks conducted in accordance with Article 22 of the Code.
- (38) Following the principles of competition law, and based on the analysis of the geographic units previously described, national regulatory authorities should then

⁴ In particular, Communication from the Commission C/2018/2374— Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services, , OJ C 159, 7.5.2018, p. 1–15.

establish a first definition of the scope of the geographic markets by aggregating together units that exhibit similar competitive conditions. National regulatory authorities should assess competitive conditions in a forward-looking manner, by looking at structural and behavioural indicators, taking into account in particular, in line with Article 64(3) of the Code, the importance of infrastructure-based competition. Such indicators can be *inter alia* the networks footprint, the number of competing networks, their respective market shares, trends in market shares, localized or uniform pricing behaviour, characteristics of demands and customer switching and churn. The resulting definition of geographic markets should be checked against an analysis of demand and supply side substitutability. Non-adjacent geographic markets that present similar competitive conditions may be analysed together at this stage.

- (39) Significant variations of competitive conditions should be taken into account on a forward-looking basis at the stage of market definition. Segmentation of remedies may be used to address less significant or less stable variations in competitive conditions, including by adjusting remedies periodically or punctually, without thereby undermining regulatory predictability.
- (40) Article 75 of the Code empowers the Commission to adopt a delegated act setting a single maximum Union-wide mobile voice termination rate and a single maximum Union-wide fixed voice termination rate (together referred to as ‘the Union-wide voice termination rates’). The Union-wide voice termination rates will directly apply to any provider of fixed and mobile termination services in the Union. The Union-wide single voice termination rates are based on the efficient costs of providing termination services. The application of the Union-wide voice termination rates will limit the ability of mobile and fixed operators to set excessive termination rates. Thus, the risk of excessive termination rates, which has been the most serious threat to competition on these markets, would disappear. Due to the strict cost orientation applied in setting the Union-wide voice termination rates, as required by the Code, the termination rates should be similar to those expected in case of competitive markets. Therefore, the termination markets would no longer meet the three-criteria test at Union level.
- (41) Nevertheless, specific circumstances may justify regulation of selected aspects of the termination markets in some Member States. Specific national circumstances may indicate that these markets do not tend towards competition on a forward-looking basis or that competitive problems continue to exist. This may be the case where operators were denied interconnection or have experienced problems with terminating calls from their network in other operators’ networks. National regulatory authorities should address such problems, either by imposing SMP based obligations other than price control, if the three-criteria test is fulfilled, or by using other appropriate regulatory tools, i.e. Article 61(2) of the Code, if the conditions specified there are met.
- (42) The markets listed in the Annex to this Recommendation no longer include three markets that were listed in 2014 Recommendation as they do not fulfil the three-criteria test, i.e. the markets for wholesale call termination on individual public telephone networks provided at a fixed location (market 1), wholesale voice call termination on individual mobile networks (market 2), and wholesale central access provided at a fixed location for mass-market products (market 3b).
- (43) The remaining markets of the 2014 Recommendation, namely markets 3a (local wholesale access provided at fixed location) and 4 (wholesale high quality access provided at fixed location), the latter partially redefined, still warrant *ex ante* regulation as they meet the three-criteria test at Union level. National regulatory

authorities should take into account their national circumstances when delineating these markets, in particular as regards their geographic dimension.

- (44) With a view to ensuring adequate consideration of the impact of regulation imposed on related markets when determining whether a given market warrants ex ante regulation, national regulatory authorities should ensure that related markets are analysed in a consistent manner and, where possible, at the same time or as close as possible to each other in time.
- (45) When considering whether to amend or maintain existing regulatory obligations, national regulatory authorities should also apply the three-criteria test to those markets listed in the Annexes to Commission Recommendation 2003/311/EC⁵, Recommendation 2007/879/EC and Recommendation 2014/710/EU⁶ but are no longer listed in the Annex to this Recommendation.
- (46) The Body of European Regulators for Electronic Communications was consulted in accordance with Article 64(1) of Directive (EU) 2018/1972 and delivered an opinion on 16 October 2020.

HAS ADOPTED THIS RECOMMENDATION:

1. In defining relevant markets appropriate to national circumstances in accordance with Article 64(3) of Directive (EU) 2018/1972, national regulatory authorities should analyse the product and service markets identified in the Annex.
2. When considering that any of the markets listed in the Annex is not susceptible to ex ante regulation in the specific national circumstances, national regulatory authorities should perform the three criteria test and demonstrate, and the Commission will verify, that at least one of the three criteria referred to in Article 67 (1) of Directive (EU) 2018/1972 is not met.
3. When identifying relevant geographic markets within their territory in accordance with Article 64(3) of the Code, national regulatory authorities should carry out a granular analysis of demand and supply-side substitutability, starting from an appropriate geographic unit, and aggregating such units that exhibit similar competitive conditions. The assessment of competitive conditions should be forward-looking and should be based, inter alia, on the number and characteristics of competing networks, distribution of and trends in market shares, prices and behavioural patterns.
4. This Recommendation is without prejudice to market definitions, results of market analyses and regulatory obligations adopted by national regulatory authorities in accordance with the regulatory framework in force prior to the date of adoption of this Recommendation.

⁵ Commission Recommendation 2003/311/EC of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, OJ L 114, 8.5.2003, p. 45. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003H0311>.

⁶ Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 344, 28.12.2007, p. 65–69. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32007H0879>.

5. This Recommendation is addressed to Member States.

Done at Brussels, 18.12.2020

For the Commission
Thierry Breton
Member of the Commission

