

BEREC report on impact of bundled offers in retail and wholesale market definition

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1 Introduction

1. Market definition is an important step in the imposition of *ex ante* obligations under the current regulatory framework. As the Framework Directive¹ establishes, NRAs will intervene to impose obligations on undertakings only where the markets are considered not to be effectively competitive as a result of such undertakings being in a position equivalent to dominance within the meaning of Article 102 of the Treaty on the Functioning of the European Union (TFEU).
2. According to the Commission's Guidelines on market analysis (the Guidelines)², *"[I]n assessing whether an undertaking has SMP, that is whether it 'enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately consumers', the definition of the relevant market is of fundamental importance since effective competition can only be assessed by reference to the market thus defined"*.
3. The Commission's Guidelines do not explicitly deal with bundles³, although the Explanatory Note accompanying the Recommendation on relevant markets acknowledges the importance of bundled products in the field of market definition⁴. Indeed, in section 3.2 of the Explanatory Note to the Recommendation the Commission recognises that when consumers prefer to purchase the services from a single supplier, given high transaction costs, the bundle *"may become the relevant product market"*.
4. However, according to the Explanatory Note, if *"...in the presence of a small but significant non-transitory increase in price there is evidence that a sufficient number of customers would "unpick" the bundle and obtain the service elements of the bundle separately, then it can be concluded that the service elements constitute the relevant markets in their own right and not the bundle."*
5. Beyond these broad statements, there is very little guidance provided at EU level on the potential impact of bundled offers in the market definition exercises that NRAs must undertake according to the EU regulatory framework.
6. It is important to note that the situation has changed since the one described by Commission in the Recommendation which stated that whilst *"... certain bundles are well established (voice and SMS on mobile), others are at an earlier stage of development such as bundles of television and internet."* Consequently, in the discussion of relevant markets, bundling is only referred by the Commission in the context of mobile services⁵.
7. With regard to bundling and market definition, BEREC wishes to point out that bundling beyond the mobile sector has gained importance in a number of

¹ Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ L108/33 of 24 April 2002.

² Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, OJ C165/6, 11 July 2002.

³ However, Point 78 of the Guidelines refers to product diversification (e.g. bundled products) as one of the several criteria which can be used to measure the market power of an undertaking.

⁴ Explanatory Note - Accompanying document to the Commission Recommendation 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 and services, SEC (2007) 1483 final.

⁵ Here a cluster retail market is considered generally to apply which includes access, national, international and roaming calls and SMS (p. 41).

Member States in recent years⁶. While in most cases products continue to be sold on a standalone basis, the share of consumers buying different communications services as a bundle increased significantly in a number of countries. In fact, the evolution described by BEREC/ERG Reports indicates that bundling is becoming an increasingly popular way of buying and selling communication services.

8. The increased take up of bundles raises the question of how bundling at the retail level might affect market definition at both the retail and wholesale levels. This report aims to give guidance to NRAs on how to consider market definition when there is high take up of bundles at the retail level. In particular, the document covers the modifications on technical aspects on market definition required by this fact and potential implications at wholesale level.
9. BEREC considers that the definition of a bundled market at retail level can be appropriate in some circumstances. In such cases the wholesale market definition can be affected. The document explores the potential impact at wholesale level resulting from a retail bundled market definition and the manner NRAs could handle it, including market definition tools and acknowledging that wholesale markets are closely linked to retail ones.
10. This report sets out guidance on how an NRA might define and analyse markets in instances where bundled products are prevalent at a wholesale and/or retail level. In particular, the paper identifies conditions that might suggest to NRAs the presence of 'bundle markets'. In a regulatory context, the defining of bundle markets may be useful where the monitoring of compliance with remedies applied from the current list of 'stand-alone' recommended markets is proving difficult and ineffective; and where anti-competitive effects are evident in a retail market(s) through possible leverage market power (vertical or horizontal), to the detriment of end users.
11. This document is structured in the following way:
 - Section 2. Background.
 - Section 3. Treatment of bundles in the context of Competition Law.
 - Section 4. Impact of bundling in the definition of retail markets.
 - Section 5. Impact of bundling in the definition of wholesale markets.
 - Section 6. Conclusions.

2 Background

12. Bundling has become an increasingly common way of commercialising communications services. Bundling arises when a firm sells two or more services together, as one combined offering, at a joint price⁷.
13. Two types of bundling may be identified:
 - **Pure bundling** occurs when consumers can purchase only the entire bundle and not the single services separately.

⁶ See for example ERG Report on the replicability of bundles from the perspective of the availability of wholesale inputs and access to content, ERG (09) 49rev1.

⁷ Some operators may identify the isolated prices of the services included in the bundle in the invoice. However only one invoice is sent to the end user and it is possible to make the overall payment of the bundled offer via the same commercial transaction.

- **Mixed bundling** occurs when consumers are offered a choice between purchasing the entire bundle (usually at a discounted price) and purchasing the separate components of the bundle.
14. While not technically a form of bundling, the effects of tying can be similar to those of mixed or pure bundling: tying occurs when the purchase of one good is conditional on the purchase of another good.
 15. In the case of mixed bundling, operators often make it attractive for consumers to purchase the bundle rather than the standalone services, usually by applying a discount on the bundle. In addition to receiving a discount for buying the bundle, consumers may benefit from buying the bundle, for example as they receive a single bill, and potentially improved functionality of the services when purchased from a single provider.
 16. In the process of defining a relevant market for electronic communications services (be it at the retail or wholesale level) it is important to take into consideration the fact that there is also likely to be demand for the standalone services, regardless of whether there is a separate market for the bundle.
 17. The bundling of electronic communications services can be built upon a primary service such as fixed access to the telephone network, for example. The purchase of additional services could be either compulsory (as in the case of tying, described above) or as a result of consumers' buying decisions.
 18. Bundling is also well extended in certain demand segments, such as among business customers. These customers often demand a complete solution for their needs which usually includes a number of services such as fixed telephony and data connectivity. BEREC has already launched a public consultation dealing with relevant issues regarding market definition in these cases⁸. Provision of communications services to high end users is therefore outside the scope of this document.
 19. The discussion included in the sections below focuses on the increase in take up of bundles at the retail level (by residential customers) and the implications of this fact in market definition both at the retail and wholesale levels.
 20. Given the difficulties inherent in defining the relevant market in a sector experiencing rapid technological and commercial changes such as the telecommunications sector, and its importance in the regulatory process, the discussion presented below and the guidance included in this report could be particularly relevant for those NRAs which observe high penetration rates of bundled offers.

3 Treatment of bundles in Competition Law

21. According to the regulatory framework, market definition should be in accordance with competition law principles. In principle, the outcome of a market definition exercise in an *ex post* analysis should be the same as a market definition exercise under *ex ante* analysis. On the other hand, relevant markets defined for the purposes of sector-specific regulation will always be assessed on a forward looking basis, as the NRA will include in its assessment an appreciation of the future development of the market⁹. Therefore, when discussing bundling and

⁸ BoR (10) 46 Public Consultation on the draft BEREC report on relevant market definition for business services.

⁹ See Points 27 and 37 of the Guidelines.

market definition, it is appropriate to analyse the treatment given to these practices in the context of competition law.

22. The Commission Notice on the definition of relevant market for the purposes of Community competition law (the Notice¹⁰) provides “*guidance as to how the Commission applies the concept of relevant product and geographic market in its ongoing enforcement of Community competition law*”¹¹. In the event of a suspected infringement of competition law, the first element to be considered is the relevant market.
23. According to the Notice, “*a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use*” (§7). “*A relevant geographic market comprises the area in which the firms concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous*” (§8).
24. The Notice does not make any reference or provide specific guidance for the definition of markets of bundled services or products. Consequently, it can be assumed that, under European competition law the process of defining a bundled market should not be substantially different to the one followed when defining the market for a standalone service.
25. The Notice explains the method used by the EC to define a relevant market. It states that the “*exercise of market definition consists in identifying the effective alternative sources of supply for the customers of the undertakings involved, in terms both of products/services and of geographic location of suppliers*”¹², so it incorporates both the product and the geographical dimensions of the relevant market.
26. As a first step, an analysis of the service or product characteristics and its intended use makes it possible to limit the field of investigation of possible substitutes. “*However, product characteristics and intended use are insufficient to show whether two products are demand substitutes. Conversely, differences in product characteristics are not in themselves sufficient to exclude demand substitutability, since this will depend to a large extent on how customers value different characteristics*”¹³.
27. The substitutability criterion may be applied on both the demand side and supply side. On the demand side, the question that needs to be considered is whether customers of the product in question would switch readily to a substitute product in response to a small but significant non-transitory increase in price (SSNIP) of the product considered. A SSNIP of between 5% and 10% is usually considered when defining the boundaries of the market. On the supply side, the question is whether other suppliers have both the ability and incentives to start producing the relevant products in response to a SSNIP.
28. The Notice also mentions the types of evidence that it may be appropriate to consider when defining the relevant market, such as evidence of substitution as a result of recent events in the markets, the results of econometric studies, the perspective of customers and competitors, consumer preferences, the barriers and costs associated with switching to other products or geographic areas and

¹⁰ OJ C372/5, 9 December 1997.

¹¹ See Notice, § 1.

¹² See Notice, § 13.

¹³ See Notice, § 36.

the possible existence of different categories of customers and price discrimination¹⁴.

29. Before drawing its conclusions, the EC may also consider any other relevant aspects of the products in question or consult the main firms in the sector on the limits of the product market and geographic market.
30. Although the Notice does not deal specifically with the evidence that may be required when defining a bundled market, it is possible to find precedents in case law. In cases of anticompetitive bundling or tying, where firms are accused of leveraging market power from one market into another, dominant companies have often argued that there is a single market for the bundle, as it is necessary to identify separate markets in order to demonstrate that a firm is leveraging market power. We return to the issue of leverage of market power in Section 4.2.
31. In *Tetra Pak II*¹⁵, for example, Tetra Pak claimed that there was a natural link between the products it sold to its customers (machines and cartons). The consequence in Tetra Pak's view was that it could lawfully combine the two products through contract (tying). However, the EC Courts rejected these approaches, pointing in particular to the fact that there existed independent manufacturers who specialised in the manufacture of cartons (the tied product), a fact that indicated there was separate consumer demand and hence a distinct market for the tied product¹⁶.
32. The Commission has also defined separate markets in the Microsoft case¹⁷. There, the Commission concluded that PC operating systems and media players were separate products. This was because: (i) although Microsoft tied its media player with Windows, there remained separate consumer demand for stand-alone media players, distinguishable from demand for PC operating systems; (ii) a number of vendors developed and supplied media players on a standalone basis; and (iii) Microsoft itself developed and distributed versions of its Windows Media Player for other PC operating systems.
33. The elements above suggest that present or past provision of standalone services by alternative operators may be seen as a relevant justification for the definition of a market for standalone services. When applying competition law principles to EU electronic communications regulation, and in particular to the market review process, this situation might happen in a large number of markets subject to NRA assessment.
34. As it has been noted, *ex ante* and *ex post* market definition should normally coincide. However, it is important to bear in mind that an *ex ante* assessment does not take as a starting point a potential anticompetitive practice. Under competition law cases, taking into account the "*preliminary information available or information submitted by the undertakings involved, the Commission will usually be in a position to broadly establish the possible relevant markets within which, for instance, a concentration or a restriction of competition has to be*

¹⁴ See Notice, §§38-50.

¹⁵ Commission Decision of 24 July 1991, Case IV/31.043, *Tetra Pak II*.

¹⁶ Case T-83/91, judgment of 6 October 1994, *Tetra Pak v Commission*; Case C-333/94P, judgment of 14 November 1996, *Tetra Pak v Commission*.

¹⁷ Commission Decision of 24 March 2004, Case COMP/C-3/37.792, *Microsoft*, see also Press Release IP/04/382.

assessed¹⁸. This would be unlikely to be the case in an *ex ante* assessment to such a large extent¹⁹.

35. The potential divergences between the market definition exercise under an *ex ante* and *ex post* analysis is recognized in the Guidelines, when stating at § 27 that *“although NRAs and competition authorities, when examining the same issues in the same circumstances and with the same objectives, should in principle reach the same conclusions, it cannot be excluded that, given the differences outlined above, and in particular the broader focus of the NRAs’ assessment, markets defined for the purposes of competition law and markets defined for the purpose of sector-specific regulation may not always be identical”*.
36. Also, undertakings present in the markets analysed from an *ex ante* perspective are often regulated. This fact may modify the behaviour of operators, in particular operators with SMP, as *ex ante* obligations are designed to avoid anticompetitive conduct. In particular, competitors may have entered the market as a result of regulation, thus modifying the final conclusions of the NRA.
37. Even though the Notice does not mention specifically the definition of bundled markets, the Guidance on the Commission's enforcement priorities in applying Article 82²⁰ of the EC Treaty to abusive and exclusionary conduct by dominant undertakings provides some comments and considerations about bundling that might also be taken in consideration.

4 Impact of bundled offers in retail markets

4.1 Market trends regarding bundled offers

Evidence of bundled offers

38. Offering bundled services has become an increasingly common practice among electronic communications operators in recent years, and bundled offers are constantly evolving. Initially, bundles in fixed telecommunications markets tended to include fixed access and varying pricing plans for fixed voice telephony sold as a bundle. As electronic communications services converge, bundled offers increasingly comprise services which may not have been traditionally identified as occupying the same market, such as fixed telephony, broadband services, mobile services and TV (both access and content).
39. This has coincided with a shift towards an all IP environment: electronic communications operators can provide a variety of retail services over a single platform and thereby provide a ‘one-stop-shop’ for end users. In some Member States, for example, fixed voice telephony is now provided mainly via IP networks. In this regard operators selling fixed voice services may face increasing incentives to bundle this with internet access and potentially other services.
40. This is supported by the findings set out in the report on the replicability of bundles of BEREC (December 2009²¹). It indicates that bundling services in retail

¹⁸ See Notice, § 26.

¹⁹ As noted above, account should be taken of the prospective analysis of market conditions under an *ex ante* assessment, see Points 27 and 37 of the Guidelines.

²⁰ All references to Art 82 EC should be understood as references to the current article 102 of the Treaty on the Functioning of the European Union (as renamed by the Treaty of Lisbon, which entered into force on 1 December 2009).

²¹ Report on the Replicability of bundles from the perspective of the availability of wholesale inputs and access to content of December 2009.

markets has become increasingly popular across EU Member States. In 2005 only 18% of all European households purchased bundled offers, increasing to 29% in 2007, and 38% in 2009²².

41. The recent E-Communications household survey found out that the most popular bundle combines Internet access with fixed telephony.
42. Triple-play offers (including internet access, fixed telephony and TV) are the second most popular bundle, subscriptions having grown from 6% in 2007 up to 8% in 2009. TV services are increasingly included in bundles which an increase from 41% in 2007 up to 47% in 2009.
43. As in the previous years mobile services comes last with 22% of these services provided in bundles (21% in 2007).
44. This survey also shows that consumers often regard bundles as being favourable in terms of price and purchase convenience. For example, consumers increasingly perceive bundles as a means of reducing spending on communications services²³, and may place a value on purchasing services as part of a bundle due to receiving one single bill for various services.
45. Due to this trend, NRAs have become increasingly aware that bundling has the potential to distort competition. Some NRAs therefore require operators with SMP to communicate offers, including bundles, prior to launching²⁴. When bundles are under investigation, the focus tends to be on bundles that include fixed access, fixed voice telephony and fixed broadband, and to a lesser extent TV services and mobile. The latter two tend to be considered only when they are bundled with fixed access, fixed voice and/or fixed broadband.
46. In this regard, wholesale access obligations are largely focussed on fixed access, fixed voice and broadband markets, and to a lesser extent on TV markets. Wholesale mobile access and wholesale mobile broadband access are not mandated by most NRAs although it is still regulated in a few countries.
47. The BEREC report discovered that NRAs consider competition distortions to be most likely to arise in cases where competitors do not have access to TV content and are therefore unable to include it in bundled offers. NRAs are also concerned about whether competitors can replicate TV services and mobile services²⁵. The relationship between retail competition and wholesale regulation, which may not be capable to offer alternative operators an appropriate range of services, is becoming a key element of the discussion in markets where bundle penetration is high.
48. Households' increased internet use may also affect production patterns at the wholesale level. As already mentioned there has been a gradual shift to an all IP environment, enabling electronic communication operators to compete with cable operators when bundling fixed voice and broadband with TV services. Likewise, cable TV operators often use their cable infrastructure for supplying broadband telecommunications services as well as fixed access and voice telephony. Companies that previously operated in different markets are therefore now offering a similar range of products.

²³ However, there are some Member States where bundles are not popular and hence are not regarded as convenient as for instance it is perceived that bundles contain services which are not useful for them. In fact, 17% of Europeans think this way.

²⁴ See e.g. ES/2008/805, IE/2004/116.

²⁵ Note that these are the conclusions of the aforementioned report, and do not necessarily apply on a country-by-country basis.

New potential retail offerings

49. The increased take-up of bundles suggests that it may be appropriate to define separate markets for bundles of services. These may include fixed voice, fixed broadband, TV, and potentially mobile voice and mobile broadband.
50. An increasing number of mobile operators offer broadband and fixed telephony, as they are likely to already have much of the necessary infrastructure, and may therefore be well-placed to offer bundles of services. Although take-up of quadruple play bundles (which tend to include fixed voice, fixed broadband, TV and mobile services) has so far been slow, convergence of fixed and mobile services could potentially result in increased take-up in the future.
51. It is also possible that technological advances could lead to bundling a greater number of services which currently would not fall under the definition of electronic communications, such as smart metering (although there is little, if any, evidence that this will happen in the near future).
52. However, even though bundling strategies have become popular in recent years, it is likely that operators will continue to offer single services in addition to bundles: offering mixed bundles tends to be more profitable than offering pure bundles.
53. The presence of an increased range of bundled products, however, does not necessarily indicate that it would be appropriate to define new separate markets for these bundles. When defining markets, it is necessary to consider how bundles are likely to be bought and sold under competitive conditions. In the next section, we consider the incentives that firms face to offer bundles of services, before turning to the evidence that may be used when defining retail and wholesale markets in the presence of retail bundling.

4.2 Incentives to bundle

54. The economic literature indicates that bundling has the potential to improve economic efficiency, although it also has the potential to be used for anticompetitive purposes. ERG has also acknowledged this fact: *“[I]n analyzing retail bundling practices, there may be a trade-off between static positive and dynamic negative effects. For example, in the short term, retail bundling practices may well be welfare-enhancing as a consequence of both supply-side and demand side efficiencies- such as the existence of production and marketing economies of scope or reductions in consumers’ transaction costs”*²⁶.
55. Firms may face incentives to offer bundles for a number of reasons – some welfare enhancing and some potentially anticompetitive. Bundling can lower production and distribution costs or lead to other synergies for the producer because it could i) create economies of scale and scope; ii) reduce transaction costs; iii) improve existing products; iv) help manufacturers to ensure quality; v) avoid double marginalisation problems; vi) allow firms to engage in price differentiation among different categories of customers²⁷. When considering market definition, the first two categories – economies of scope and transaction cost savings – are likely to be the most important and are discussed below in more detail.

²⁶ ERG Report on the discussion on the application of margin squeeze tests to bundles, cited above.

²⁷ See “The law and the economics of Article 82 EC”. Robert O’Donoghue and A. Jorge Padilla.

Economies of scale and scope

56. Bundling may give rise to both economies of scale and scope in production and distribution. Operators offering bundles of services may experience economies of scope when providing these services to a given customer. For example, marketing and distribution costs could be allocated to several products if they are sold together.
57. It is useful to clarify precisely how bundling can result in these economies of scale and scope, and whether these effects are likely to be specific to bundling. This will help to determine which factors should be taken into account when defining markets in the presence of retail bundling (discussed later).
58. Bundling can act as a form of price discrimination, which may result in increased output. As a result of this increased output, a firm using bundling to price discriminate may be able to exploit economies of scale. However, these economies of scale are not necessarily specific to bundling: the same firm may be able to achieve a similar level of output (and therefore scale economies) using other pricing structures. For example, a firm may be able to engage in other forms of price discrimination that result in increased output without bundling. Since there may be other ways in which the firm can achieve these economies of scale, they do not necessarily create a rationale for offering bundles.
59. Economies of scope in the production of two products could mean that a firm producing one product may face incentives to produce the other as well (and may have to in order to compete). This does not necessarily imply, however, that this firm would face incentives to offer these two products together as a bundle. For example, there are likely to be economies of scope in growing maize and wheat, which might mean that a producer of one faces strong incentives to produce the other. However, this does not necessarily create incentives to supply the two products together as a bundle.
60. There are potential economies of scope, however, that arise only when two products are sold together to the same customer. For example, firms offering more than one telecoms service to a given household may face lower billing as well as platform²⁸ costs than if the services were provided to two separate households. This type of scope economy relies on the same customer purchasing more than one product from the same supplier. These “customer-specific” economies of scope may create stronger incentives to bundle than the economies of scale and scope discussed above.
61. It is useful to make this distinction, as it helps to understand the factors that may be relevant in defining bundled markets. In principle, the presence of customer-specific economies of scope may be more likely to result in bundling under competitive conditions and should therefore potentially be considered in the market definition. However, the same may not be true for the other types of economies of scale and scope identified. We return to a more detailed discussion of this in Section 4.3.
62. It should also be noted that bundling services does not necessarily lead to reduced costs, as this may depend on the impact that bundling has on the market shares of operators. If bundling leads to more competitive retail markets, it is possible that firms may be less able to exploit economies of scale, as their output may decrease. In such cases, there may be diseconomies of scale associated

²⁸ Platform costs should be broadly understood to include cost sharing of access and transport networks.

with bundling. This is unlikely to factor into market definition, however, as it would not affect the ability of a hypothetical monopolist supplier of a bundle profitably to maintain prices above the competitive level.

Consumer preferences for buying bundles

63. Consumers may place a higher value on consuming bundles compared to standalone services if they face lower transaction costs as a result. For example, consumers may prefer to receive a single bill for their communications services, and as a result may have a higher willingness to pay for the bundle compared to the standalone services.
64. Bundling may also reduce the costs of searching for the most appropriate combination of goods in the presence of complex demand.
65. Furthermore, in converging markets, it is possible that the overall quality of a bundle of services is greater than the quality of standalone services from different suppliers. If this is the case, consumers may have a preference for consuming services as bundles. As a result, where operators are able to exploit consumers' preferences, they may face further incentives to offer bundles of services.

Bundling as a form of price discrimination

66. Bundling can also act as a form of price discrimination (especially when consumers' valuation for two services is negatively correlated). For example, consider a situation where there is a monopolist providing two services - A and B: Some consumers place a high valuation on service A, but a low value on service B, while other consumers place a low valuation on service A but a high value on service B. In this case, the profit maximising pricing structure for a monopolist may be to sell a bundle of the services at a single price.
67. In addition, operators also bundle services with the objective of reducing churn. NRAs should bear in mind that customers who acquire a bundle will possibly become less sensitive to a change in a variable pertaining to a specific service included in the bundle, in comparison to their situation if consuming a stand-alone offer.

Bundling for anticompetitive reasons

68. Firms can also use bundling as a way of engaging in anticompetitive behaviour and excluding rivals from the market. A firm with market power in the market for one service may be able to leverage their market power into another, more competitive market through bundling.
69. Consider an example where there is a firm that offers two services, A and B, and has market power in the provision of service A but faces competition in the provision of service B. The firm may be able to use bundling to gain market power in the market for service B, either to protect its position in market A, or to gain market power in the currently competitive market for service B so it can later monopolise that market.
70. When services A and B are often consumed together, the firm may be able to leverage its market power by offering pure bundles of A and B or deeply discounted mixed bundles. If consumers tend to consume the two services together, and the firm offers bundles of A and B at attractive prices, consumers may be less likely to purchase B on a standalone basis. This could result in the

firm excluding potential rivals from the market for service B, potentially even where the foreclosed firms are more efficient at providing that service.

4.3 Relevant market definition at retail level

71. When considering the definition of bundled markets, it is important for NRAs to consider whether bundling would occur under competitive conditions, or whether it is likely to be the result of the behaviour of a firm with market power.
72. The Commission's Explanatory Note accompanying the Recommendation on relevant markets states that the SSNIP test should be used when determining whether it is necessary to define a separate market for bundles of services. It sets out that: *"If, in the presence of a small but significant non-transitory increase in price [SSNIP] there is evidence that a sufficient number of customers would "unpick" the bundle and obtain the service elements of the bundle separately, then it can be concluded that the service elements constitute the relevant markets in their own right and not the bundle"*.
73. The EC Notice on market definition sets out that the relevant product market should be defined as the narrowest set of products over which a hypothetical monopolist could maintain profitably a SSNIP above the competitive price level. Since the SSNIP should be applied to the competitive price, when considering the boundaries of the market, it is necessary to identify the prices that would be expected under competitive conditions.

The SSNIP test and the cellophane fallacy

74. When assessing the boundaries of single product markets, it may be difficult to determine what the competitive price level would be. It can be therefore sometimes useful to use the prevailing price levels as a proxy. Applying the SSNIP test on prevailing market prices, however, can result in defining the boundaries of the market incorrectly. A profit maximising firm with significant market power (SMP), would not find it profitable to increase prices further by implementing a SSNIP (as it is already maximising its profits).
75. In such cases, the logic of the SSNIP test may lead to extend the boundaries of the market incorrectly. In this case, the actions of a firm with market power can result in the (incorrect) finding that the firm does not actually have market power. This is known as the *cellophane fallacy*²⁹. As a result, it is often necessary to test whether the prevailing prices are likely to reflect those that would be expected under competitive conditions. For example, looking at firms' profitability may indicate whether the prevailing prices are likely to reflect those that would be observed under competitive conditions: if firms are making supernormal profits, it is likely that prevailing prices are above the competitive level.
76. A similar issue may arise when using the SSNIP test to define bundled markets. The Commission guidelines set out above suggest that when implementing a SSNIP it may be appropriate to define the market as a bundle if consumers would not "unpick" the bundle as a result of the price increase. However, considering a SSNIP on the prevailing prices could result in an incorrectly defined market.

²⁹ The cellophane fallacy received its name from *United States v E.I. Du Pont De Nemours & Co*, 351 US 377 (1956). DuPont claimed that cellophane was not a separate market, since there was a high cross-price elasticity of demand with other flexible packaging material.

77. As discussed in Section 4.2, a firm with market power in one market may seek to leverage this power into another market by offering deeply discounted bundles. When implementing a SSNIP (at prevailing prices) on a deeply discounted bundle, consumers may be unlikely to unpick the bundle as a result of the price increase (as the price of the bundle following the SSNIP may still be below the price of buying the individual products separately).
78. Using the logic of the SSNIP test, this would indicate that the individual products do not exert a significant constraint on the ability of the hypothetical monopolist seller of the bundle to raise prices, which would likely imply that the bundle constitutes a separate market from the individual products.
79. In this case, however, the finding that the appropriate market is for the bundle is the result of the firm attempting to leverage market power from one market into another. When the market is defined as a bundle, it implies that there is no need to consider leverage (as leverage requires more than one market). However, in this case leverage is clearly a concern.
80. When considering whether it is appropriate to define a market as a bundle, it can be complex to test whether the prevailing prices represent those that would be observed under competitive conditions.
81. In the case of bundling, we would need to test whether the observed prices represent the *structure* of prices that would be observed under competitive conditions (for example, whether the presence of deeply discounted bundles are the result of the underlying economies of scope, or the result of leverage). As mentioned, testing this can be complex and NRAs may need more detailed information about the specific costs related with bundles.

Evidence for the purpose of market definition

82. Despite these issues, the logic of the hypothetical monopolist test and the SSNIP test remains potentially relevant for defining bundled markets. Using *prevailing* prices as a proxy for those that would be observed under competitive conditions may not be appropriate for the reasons explained above. However, it is still useful to consider the hypothetical monopolist test under competitive conditions: whether a hypothetical monopolist supplier of a bundle may be able profitably to maintain the price of the bundle above the competitive level without consumers “unpicking” the bundle. There is a range of evidence that could be considered when assessing whether this would be possible, and therefore whether it would be appropriate to define a market as a bundle³⁰.
83. **Economies of scope:** as set out in Section 4.1, firms may experience economies of scope as a result of selling a bundle of products to a given customer (“customer-specific economies of scope”). If firms selling individual products are unable to experience these economies of scope, it is possible that a hypothetical monopolist of the bundle could maintain profitably the price of the bundle above the competitive level without considerable numbers of consumers unpicking the bundle. In this example, because firms selling the bundle have a cost advantage over firms selling the products individually, they may be able to price the bundle above the competitive level, but still undercut rivals selling only the individual products. In the presence of these customer-specific economies of

³⁰ The following list of evidence that may be appropriate to consider is not exhaustive, and it may not be necessary to consider all of these sources of evidence when defining a market: the evidence required is likely to vary on a case-by-case basis.

scope, therefore, it may be appropriate to define the market as a bundle of products³¹.

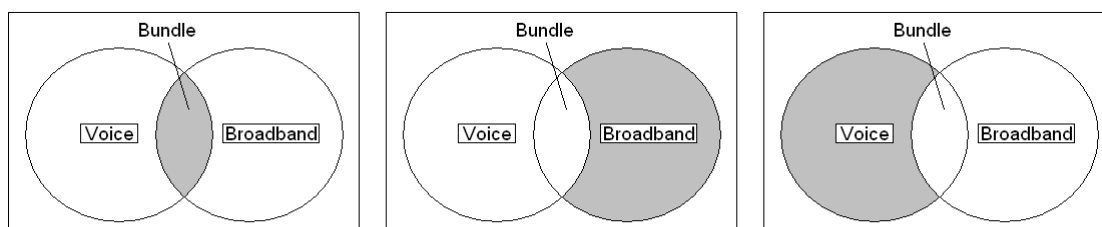
84. **Transaction cost savings:** consumers may place a value on consuming services as part of a bundle due to reduced transaction costs. For example, consumers may place a value on receiving a single bill for their telecoms services, and as a result may place greater value on the bundle than on the individual services. When this is the case, it is possible that a hypothetical monopolist of the bundle would be able profitably to maintain a SSNIP on the price of the bundle above the competitive level (this would likely be the case where the transaction cost saving is greater than the SSNIP imposed). As with customer-specific economies of scope, when this is the case, it may be appropriate to define the market as a bundle. It may be possible to use market research techniques to ascertain whether consumers place a value of consuming the bundle rather than the individual services.
85. Other evidence may also be taken into consideration, such as:
- Whether consumers have switched from bundles to individual products and vice versa as a result of changes in price: for example, if consumers have switched from bundles to individual products as a result of an increase in the price of the bundles, it may indicate that at prevailing prices, consumers consider the individual products to be close substitutes. As discussed above, however, market definition should consider the substitutability at competitive prices.
 - Switching costs: when there are considerable costs associated with switching between the bundle and individual products, it may also be appropriate to define a separate market for the bundle. Using the framework of the SSNIP test, if consumers are unresponsive to prices as a result of switching costs between bundles and individual products, a hypothetical monopolist of the bundle may be able profitably to maintain prices above the competitive level. In such cases, it may be appropriate to define the market as a bundle. It is important to note, however, that switching costs could be constructed artificially by firms with market power in order to reduce churn. As with using switching behaviour as evidence, this evidence may not reflect the situation under competitive conditions, so does not necessarily indicate whether it would be appropriate to define a market as a bundle.
 - The take-up of bundles compared to individual products (and the availability of individual products): if a large proportion of consumers purchase bundles, it may suggest that consumers have a preference for consuming the product as a bundle (either as a result of lower prices or increased value of the bundle compared to individual products). However, as discussed above, the prevailing prices may reflect a firm's strategic behaviour, and as a result, observed penetration levels may reflect prevailing prices rather than the underlying preferences of consumers and cost economics of sellers. A high

³¹ It is possible that firms may also experience economies of scale as a result of increased output through bundling (for example, if they are using bundling as a form of price discrimination and thereby increasing output). These economies of scale are unlikely to factor into the market definition unless they are available only to firms offering bundles. For example, if firms selling the individual services can experience the same economies of scale through other forms of price discrimination, a hypothetical monopolist of the bundle may be unable profitably to maintain prices above the competitive level as a result of these scale economies, and it may therefore not be appropriate to define the market as a bundle. The same is true of economies of scope that can be exploited without bundling: if firms selling the individual products can also experience the same economies of scope by selling the two products (but not as a bundle), it may not be appropriate to define the market as a bundle.

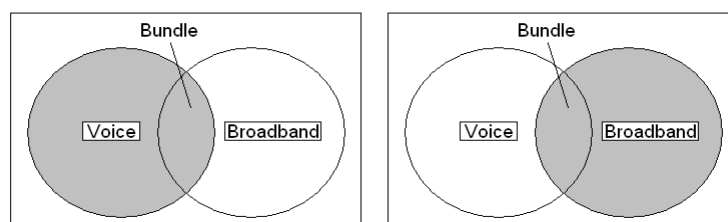
level of bundling penetration may raise the question of whether it would be appropriate to define a market as a bundle, but does not necessarily provide evidence in itself on the suitability of a bundled market definition.

86. Using the logic of the SSNIP test, there are a number of possible outcomes from a market definition exercise involving bundles, depending on the degree of substitutability between the bundle and the individual products, and the focal product of the market definition exercise. Below we discuss the possible outcomes that may arise when considering whether to define a separate market for a double play bundle (containing fixed voice and broadband):

- It is possible that there are markets for each of the individual services and a separate market for the bundle. This would be the case where a hypothetical monopolist seller of the bundle is able to maintain the price of the bundle above the competitive level without consumers unpicking the bundle. This is demonstrated in the following diagrams. Each diagram below shows a separate market, with the grey areas representing the boundaries of each market; there are separate markets for the bundle and each individual product:



- It is possible that there is a separate market for each individual service, and that bundles should be considered part of these individual markets. This may be the case where a hypothetical monopolist of the bundle is unable to maintain price profitably above the competitive level without consumers unpicking the bundle but where the availability of bundles constrains the ability of a hypothetical monopolist of an individual service to maintain prices profitably above the competitive level.

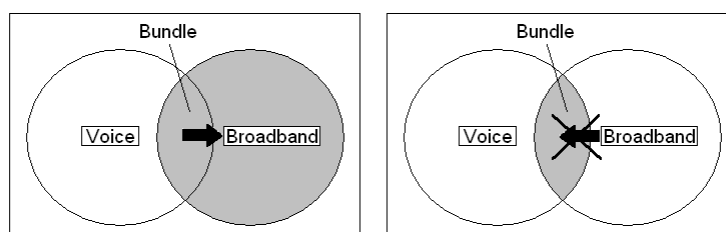


- It is possible that there is a single market for bundles, and no separate market for the individual services. This outcome is unlikely if consumers choose to buy the individual product despite the availability of discounted bundles. Even where consumers do not buy the individual services, it is possible that there are still separate markets for them. A firm with market power could engage in pure bundling for strategic reasons, meaning that consumers are unable to purchase the individual services. A lack of availability of the individual services, therefore, is not evidence of a lack of substitutability between the individual services and the bundle.
- It is also possible that there could be a single market containing the bundle and its constituent parts. This may be the case where each individual service does not exert sufficient constraint on the hypothetical monopolist of the bundle. However, where a hypothetical monopolist of the bundle and all the individual components is able profitably to maintain prices above the

competitive level, it may be appropriate to define the market as containing the bundle and its constituent parts.

- Finally, it is worth noting that there may be asymmetric substitution between bundles and individual products. For example, consumers may consider bundles of voice and broadband to be a substitute for fixed voice services, but potentially not the other way around. This could mean that the availability of bundles constrains the ability of a hypothetical monopolist of an individual service to maintain prices profitably above the competitive level. It is possible, however, that the opposite may not be the case: individual products may not constrain the ability of a hypothetical monopolist of the bundle to maintain prices profitably above the competitive level. In this scenario, the bundle could be in the market as defined with the individual service as the focal product, but the individual service would not be in the market when defined with the bundle as the focal product.

The below diagrams illustrate this: in the diagram on the left, broadband is the focal product and the bundle constrains the pricing of the broadband provider. As a result, the market is defined as containing both broadband and the bundle. In the diagram on the right, however, broadband does not sufficiently constrain the pricing of the bundling operator, and so standalone broadband is not included in the market for the bundle.



- More generally, it is important to consider what the focal product should be in a market definition exercise. For example, if the analysis is trying to determine whether there is a problem with leverage of market power, assessing whether there is a separate market for the bundle of services (i.e. taking the bundle as the focal product of the market definition exercise) may not be the appropriate test.
- As discussed above, it is possible to define a market for the bundle of services, while still defining separate markets for the individual services. The presence of a separate market for the bundle of services, therefore, does not necessarily indicate that there is no problem with leverage. When assessing leverage of market power, therefore, it may make sense to focus on whether there are separate markets for the individual services.

Impact on SMP analysis

- The issues discussed around bundling and market definition are likely to impact on the analysis of SMP if a separate market has been defined for a bundle. However, the impact on market analysis is beyond the scope of this paper.

4.4 Conclusions on retail market definition

- According to competition law principles, market definition where bundles are present should not differ from the traditional market definition process. However, applying the existing framework to bundled markets is likely to be difficult. The section above has analysed the treatment given to bundles by competition

authorities and has outlined some of the key economic principles. Competition case law indicates that the existence of alternative providers of standalone services could be seen as an important indicator of separate demand, while economic theory indicates that it may be appropriate to define a separate market for bundled services if there is limited substitutability between standalone services and bundles of services.

91. Bundles are becoming an increasingly important way of commercialising electronic communications services. Market trends show that take up of bundled services is increasing in all Member States, becoming the main way of consuming electronic communications services in many of them. The presence of economies of scope and transaction cost savings, among other, could make it appropriate to define separate markets for bundled services.
92. This situation could potentially result in defining new bundled markets. Although, as set out above, several outcomes are possible.

5 Impact of retail bundled offers on wholesale markets

93. Section 4 set out a number of reasons why it may be appropriate to define retail markets as a bundle or set of bundles. If a NRA concludes that a retail market should be considered to be a bundled market, it may also be necessary to analyse the impact of this conclusion in upstream markets. In this section, guidance is given to NRAs on how to tackle bundles at wholesale level.
94. Once a NRA has defined the retail market as a bundled market, it may also be necessary to analyse the impact at wholesale level. It may be the case that bundling increases competition at both the retail and wholesale levels, whereas under different circumstances, bundling could restrict competition. Given this, it may be appropriate for NRAs to define a bundled market at the wholesale level, or potentially to explore other mechanisms to impose regulation, if needed, on the individual components of the bundle at the wholesale level.
95. In the paragraphs below we discuss the circumstances under which it may be appropriate to define a wholesale market as a bundle.

5.1 Potential impact of new markets at retail level on wholesale market definition

96. When considering whether a wholesale market should also be defined as a bundle, it is useful to consider whether the same logic that was discussed for retail market definition can be applied to the wholesale level. If the same factors that resulted in the retail market being defined as a bundle are also present at the wholesale level, it is likely that the wholesale market should also be defined as a bundle.

Economies of scope

97. Sections 4.2 and 4.3 discussed how certain types of economy of scope may create incentives for firms to offer bundles, and may result in retail markets being defined as bundles. In some cases, these retail economies of scope may be the result of economies of scope at the wholesale level that are passed downstream. In such cases, it may be appropriate to also define wholesale markets as bundles.
98. The following two examples illustrate under what conditions it may (or may not be) appropriate to define wholesale markets as bundles:

99. Consider a firm that provides two services at the retail level – services A_R and B_R . Supplying A_R requires the wholesale input A_W , and supplying B_R requires the wholesale input B_W . The wholesale provider faces economies of scope in the provision of wholesale inputs A_W and B_W to a given customer, so sells a bundle of A_W and B_W for less than the price of these inputs when bought separately. This transfers the economy of scope from the wholesale level to the retail level.
100. As discussed in section 4.2, the presence of this scope economy may make it appropriate to define the retail market as a bundle of A_R and B_R . Where this economy of scope has been passed down from the wholesale level, a hypothetical monopolist operator of the bundled wholesale product may be able profitably to maintain prices above the competitive level without customers (in this case retail service providers) switching to the bundle's constituent products (i.e. 'breaking up' the bundle). If this is the case, it might be appropriate to also define the wholesale market as a bundle.
101. In contrast, consider a firm offering two different services, where there are economies of scope at the retail level resulting from reduced installation/customer management costs of the bundle compared to providing the two separate products to different households. If these cost economies are sufficiently strong, it may be appropriate to define the retail market as a bundle.
102. In this example, however, the economy of scope that resulted in defining the retail market as a bundle is not present at the wholesale level. It is unlikely that under competitive conditions, the wholesale provider would be able to maintain the price of the bundle above the competitive level without retail operators switching to the individual wholesale products. As such, even if the retail market is defined as a bundle, it is unlikely that the wholesale market will also be.

Transaction cost savings

103. As discussed in sections 4.2 and 4.3, it is possible that consumers would rather consume a bundle of products than its constituent parts on a stand-alone basis (as a result of transaction cost savings from consuming the bundle, for example). If this preference is particularly strong, it may be appropriate to define the retail market as a bundle, as a hypothetical monopolist supplying the bundle may be able profitably to maintain the price above the competitive level without consumers switching to the bundle's constituent products. This would be the case where consumers' transaction cost savings are greater than the SSNIP imposed.
104. As before, when considering the relevant product market at the wholesale level, it is useful to examine what factors result in the retail market being defined as a bundle, and whether the same factors also apply to the wholesale market.
105. In the majority of cases, transaction cost savings at the retail level will not be present at the wholesale level, as they usually reflect a time or convenience factor to the consumer. This is unlikely to affect the constraints firms face at the wholesale level. It is possible, however, that other transaction cost savings will be present at the wholesale level that may lead towards a bundled market definition. It is therefore unclear whether transaction cost savings at the retail level would be likely to result in wholesale markets also being defined as bundles, although other transaction cost savings may be present at the wholesale level which could potentially result in a bundled wholesale market definition.
106. As at the retail level other evidence may also be taken into consideration by NRAs while analysing the adequacy of defining a bundled wholesale market (e.g. switching costs).

107. It is worth noting that there may be circumstances in which wholesale markets should be defined as a bundle, but the corresponding retail markets might not. For example, if there are sufficient economies of scope at the wholesale level it may be necessary to define a wholesale market as a bundle. However, since a given wholesale input is likely to account for only a proportion of a retail operator's cost stack, the presence of economies of scope at the wholesale level may not have a sufficiently strong effect at the retail level to warrant also defining the retail market as a bundle. Although this scenario could be relevant in some cases, this report deals only with the potential impact of retail bundling at the wholesale level. The issue of potential bundled markets at the wholesale level, without bundled retail markets, is thus outside the scope of this report.

Implications if new market definitions are derived

108. In the paragraphs above, the circumstances in which it may be appropriate to define wholesale markets as containing a bundle of products have been discussed. If wholesale markets have been defined previously as containing individual products, but are now defined as bundles, it may be necessary to re-examine which markets require *ex ante* regulation.

109. The EC Recommendation³² (Recital 5) sets out three factors that should be considered when identifying markets that require *ex ante* regulation:

“In order to identify markets that are susceptible to ex ante regulation, it is appropriate to apply the following cumulative criteria. The first criterion is the presence of high and non-transitory barriers to entry [...] The second criterion admits only those markets whose structure does not tend towards effective competition within the relevant time horizon. The application of this criterion involves examining the state of competition behind the barriers to entry. The third criterion is that application of competition law alone would not adequately address the market failure(s) concerned.”

110. In such cases – especially where one or more of the previously defined individual markets required regulation – it may be necessary to re-apply these three criteria to the bundle to determine which markets require *ex ante* regulation.

111. For example, consider two products that were previously defined as being in separate markets, one of which required *ex ante* regulation but the other did not. If the market is now defined as a bundle of wholesale products, it is possible that the entire bundled market should be subject to *ex ante* regulation.

112. In such cases it will be necessary to reapply the three criteria to the bundle – examining the barriers to entry in providing the bundle, the degree to which the newly defined market tends towards a competitive state, and the suitability of competition law for addressing potential market failures.

Conclusion

113. In conclusion, section 4 set out the conditions under which it may be appropriate to define retail markets as bundles. We set out in this Section how the same logic can be applied to wholesale markets. If the retail market is defined as a bundle, it

³² 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 L344/65 of 28 December 2007.

is useful to consider whether the factors that result in a bundled retail market definition are also present at the wholesale level. For example, if economies of scope at the retail level are the result of economies of scope at the wholesale level, it may be appropriate to also define the wholesale market as a bundle.

114. On the other hand, when bundles become the reference to compete in the retail market, NRAs should bear in mind that it can be important that alternative operators have access to all relevant wholesale inputs in order to assure effective entry and competition in the downstream level³³.

5.2 Translation of differences of competition conditions at the retail level to the wholesale level.

115. The effect of bundling on the assessment of differences in competitive conditions is likely to vary depending on the nature of the underlying constraints under consideration.
116. On the one hand, wholesale obligations defined on the basis of standalone services could prevent competition from growing at retail level. Operators could demand a wider range of services, included in the bundle defined at retail level. On the other hand it could dilute, under certain conditions, indirect constraints considered in geographical market definition (see a more detailed discussion in the Annex).
117. To deal with this potential translation of competitive failures from retail to wholesale markets in the case of a bundled retail market, the EU Regulatory Framework provides tools to monitor the sufficiency of *ex ante* obligations that are in place. For example, in its Explanatory Note to the Recommendation on relevant markets, in the field of margin squeeze, the European Commission seems to acknowledge the necessity to extend certain obligations to non-regulated markets.
118. Moreover, in the presence of closely related products belonging to different markets, it is important to recall what is said in article 14.3 of the Framework Directive, whose wording has been slightly modified after its reform in 2009³⁴. According to this article, *“[W]here an undertaking has significant market power on a specific market (the first market), it may also be designated as having significant market power on a closely related market (the second market), where the links between the two markets are such as to allow the market power held in the first market to be leveraged into the second market, thereby strengthening the market power of the undertaking. Consequently, remedies aimed at preventing such leverage may be applied in the second market pursuant to Articles 9, 10, 11 and 13 of Directive 2002/19/EC (Access Directive), and where such remedies prove to be insufficient, remedies pursuant to Article 17 of Directive 2002/22/EC (Universal Service Directive) may be imposed”*.
119. BEREC has no experience yet in the application of this article, although it recognizes that under certain circumstances it may be an appropriate basis to deal with situations where operators are not able to compete at the retail level on

³³ It is however important to note that some of these wholesale inputs may be outside the scope of NRAs' intervention in some instances (e.g. TV content is not regulated by many NRAs).

³⁴ Directive 2009/140/EC of 25 November 2009 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, OJ L337/37 of 18 December 2009.

a bundled basis. However it is important to note that the three criteria test has to be applied also in closely related markets if NRAs decide to analyse them on the basis of the aforementioned provision.

6 Conclusion

120. Bundling of different electronic communications services has progressively gained importance in a number of Member States over recent years, beyond broadly acknowledged bundles such as provision of a set of basic services in mobile telephony. Technical, commercial or other bundled practices by the SMP and alternative operators may have important implications for the market review processes undertaken by NRAs.
121. As noted in the report, the traditional starting point for the assessment of bundles in the context of *ex ante* regulation is set – as with other areas – by competition law principles, although particular attention may need to be paid to specific issues pertaining to the electronic communications markets such as the impact of regulation or the rapidly evolving nature of the markets. From a regulatory standpoint, the finding of a bundled market may also have implications regarding the implementation of the three-criteria test, or for the analysis of market power.
122. The document has analysed the limitations of applying the SSNIP test to market definition in the context of bundles, as observed prices could be the result of the strategic behaviour of an operator with market power.
123. Given this problem, the document considers, in addition to the SSNIP test, other indicators that may be useful to NRAs in the market definition process, such as the presence of customer-specific economies of scope and transaction cost savings when consumers purchase bundles.
124. Where bundling is prevalent at the retail level, NRAs may also have to consider the impact at the wholesale level. It should be stressed that the finding of a bundled market at the retail level does not automatically imply that an equivalent bundle market exists at the wholesale level³⁵, as it is necessary to undertake a fresh assessment of the underlying competitive conditions upstream, in accordance with competition law principles.
125. The factors that may be considered when defining bundled markets at wholesale level are also considered in the document. In addition, the report acknowledges that wholesale obligations defined on the basis of standalone services may not be sufficient to assure an effectively competitive downstream market, where there is a bundled wholesale market.

³⁵ In the same line, the fact that no bundle market is found at the retail level does not necessarily imply that no such bundle market exists at the wholesale level.

ANNEX I: IMPACT ON GEOGRAPHIC MARKET DEFINITION

1. The effect of bundling on the assessment of differences in competitive conditions is likely to vary depending on the nature of the underlying constraints under consideration.
2. Take the example of defining distinct geographic wholesale markets as a result of differences in competitive conditions. The effect of bundling at the retail level on wholesale market definition may depend on whether the wholesale providers face direct or indirect constraints.
3. In the case of indirect constraints³⁶, retail bundling could have the effect of diluting the constraint on the wholesale provider imposed by competition at the retail level. If the wholesale provider raised the price of the wholesale product above the competitive level, substitution at the retail level might be lower if consumers purchase bundles rather than individual products.
4. To illustrate, consider what happens when a firm increases the price of a wholesale product, which is passed through to the retail price. If the retail product is a bundle, this input will constitute a smaller proportion of cost than would be the case for the individual product. For example, a 5 percent increase in the price of the input might translate to a 2 percent increase in the retail price for the individual product, but only a 1 percent increase in the retail price for the bundle. This may lead to lower levels of switching as a result of an increase in wholesale prices when consumers buy bundles.
5. This means that where bundling is prevalent at the retail level, the effect of indirect constraints may be weakened. Where the presence of indirect constraints resulted in a broader market definition in some areas as a result of retail competition, bundling at the retail level may result in a narrower wholesale product market definition.
6. In cases where separate geographic markets have been defined on the basis of indirect constraints in some areas but not others, this might reduce the differences of competitive conditions between these areas. If this is the case, it might no longer be appropriate to define separate geographic wholesale markets.
7. Conversely, this would not be the case when considering direct constraints at the wholesale level. It is not clear that bundling at the retail level would necessarily affect whether or not separate geographic wholesale markets would be defined when wholesale providers face direct constraints.
8. Last, it is worth noting that the diluting of indirect constraints caused by the definition of bundled markets causes a situation in which an NRA may define a wholesale market where only one operator operates (the SMP operator) but where at the retail level (or in some geographic areas) there is effective competition, namely from other platforms (e.g. cable constraining cooper access). This may imply that there is no need to solve any regulatory problem. In principle it should be acknowledged that no intervention may be required when there are no problems identified in the retail markets. Thus

³⁶ It should be noted that in the framework of the Article 7 review process, the Commission has systematically sustained that indirect pricing constraints, where they are found to exist, should be taken into account in the context of the SMP assessment. In this regard the Commission has stated that if weak constraints are automatically taken into account at the market definition stage, there is a risk of prejudging the SMP assessment and understating the real extent of market power at the wholesale level by including self-supplied market shares for all vertically integrated competitors irrespective of whether the latter are actually constraining the market behaviour of the incumbent (e.g. case UK/2007/0733 and UK/2010/1065, PT/2008/0851, NL/2008/0827, EE/2009/0943).

NRAs may want to also consider and analyze this question when they are considering the suitability of defining relevant bundled markets.

Annex II: Article 7 case law on bundled offers

Under the Article 7 procedure the Commission has dealt with the following cases, which are relevant for this report on bundled offers, both from a market definition and remedies perspective. The following list is not exhaustive but represents the most important recent cases.

Issues related to market definition

Cases NL/2008/0821-822

The Dutch NRA OPTA defined the relevant market for retail fixed access as including both fixed telephony access and voice calls services³⁷. The Commission expressed the view that the arguments and evidence put forward did not demonstrate this conclusively, but concluded that the exact scope of the market definition did not affect the regulatory outcome.

Based on its retail market definition, OPTA defined a relevant market for wholesale fixed telephony, which includes both wholesale access and call origination services³⁸. OPTA justified the inclusion of wholesale access in the product market by noting that whilst wholesale access and call origination are complementary services, they are offered as pure bundles in wholesale services such as Unbundled Local Loops (ULL), Wholesale Broadband Access (WBA) and Internet Leased Lines (ILL). According to OPTA, in the presence of wholesale regulation, alternative network operators (ANO) would not buy separately wholesale access and call origination in case of a price increase of ULL, WBA and ILL. Thus, wholesale access and call origination would belong to the same relevant product market.

DE/2009/0897

The Commission did not contest the German NRA's inclusion of complete connections³⁹ in the retail access market definition, based on the evidence provided on the increased substitutability between traditional narrowband connections and complete connections, especially as regards their functionality⁴⁰ and pricing structure.

³⁷ OPTA argued that in the Netherlands end-users would opt increasingly, and more often than in the rest of Europe, for purchasing so-called bundles of fixed telephony access and voice calls. Around a third of Dutch customers still choose unbundled services (i.e. access and calls provided separately).

³⁸ In the Recommendation on relevant markets the market for fixed call origination is defined as a separate market not including wholesale access. In contrast to the market for mobile telephony, wholesale access and call origination for fixed telephony might be purchased from different network operators. Moreover, call origination can also be purchased from alternative operators bundled with transit, while wholesale line rental (WLR) would be offered by the main access network provider.

³⁹ I.e., DSL or broadband cable connections that are bundled with telephony services and are not simultaneously coupled with a narrowband connection.

⁴⁰ I.e., complete connections should offer the functionalities, which the end user of traditional connections is used to, for example both types of connections are offered with local exchange telephone numbers.

Thus the Commission – based on a properly conducted substitutability test – accepted the inclusion of individual products (fixed telephony access) and bundles (complete connections) in the same market.

RO/2009/1002

In its analysis of the wholesale call origination market the Romanian NRA proposed a market definition which may lead to the inclusion of call transit services between a local and a transit switch and between two transit switches into the relevant originating segment, depending on the hand-over point with the interconnecting wholesale customer⁴¹. The Commission did not challenge this definition of the originating network segment, which follows the same approach taken for the wholesale fixed call termination network segment⁴². The Commission recalled, however, that competitive conditions may evolve at a different pace at the various network levels comprising this originating segment. The Commission therefore invited ANCOM to adjust the definition of the originating network segment, should competition in the transit/conveyance of calls develop more swiftly at higher network levels than at lower network levels.

Issues related to remedies

Case SI/2005/0231

In its analysis of the retail fixed access market, the Slovenian regulator proposed to prohibit the tying of the broadband access connection to ISDN telephony services, i.e. to prevent the incumbent to make the purchase of the broadband connection conditional on the purchase of the SMP product 'retail narrowband access'. The Commission invited APEK to impose a general obligation on the local incumbent not to oblige consumers of fixed access products to subscribe to any particular type of access product unless it is technically necessary for the provision of a given service. In other words, APEK should prevent the incumbent to leverage its SMP position in one market into markets which are potentially competitive.

Case DK/2010/1099

In the context of the market for wholesale broadband access, the Danish NRA proposed to impose on the SMP operator an extended access obligation, i.e. to give access to additional functionalities such as multicasting, which allows IPTV. This obligation was intended to enable alternative operators to replicate the bundled retail services of the incumbent. The Commission stated that it is possible that the market for wholesale broadband access develops in such a way that a TV offering becomes indispensable to effectively compete at retail level, in which case such a remedy may be justified. In other words, alternative operators should only be aided by regulation to replicate bundled offers, if their ability to compete at retail level critically depends on it.

⁴¹ According to the Explanatory Memorandum to the Recommendation on relevant markets, national regulatory authorities enjoy a measure of discretion as to the delineation between call origination, termination, and transit services depending on network topologies (p. 27).

⁴² See case RO/2008/0774.