Experience and Results of EU Market Analysis System

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Outline

- Background on Market Analysis procedure
- Current status
- Experience to date in different markets
- Appeals
- Looking Forward
  - Second round of Market Analysis
  - Revised Recommendation on Relevant Markets

Market Analysis

1. Definition of relevant product/service market & geographic scope
2. Competition assessment & identification of SMP operators
3. Imposition of remedies on SMP operators

Recommendation on Relevant Markets

Retail markets

1. Access to public telephone network at a fixed location for residential customers
2. Access to public telephone network at a fixed location for non-residential customers
3. Publicly available local and/or national telephone services provided at a fixed location for residential customers
4. Publicly available international telephone services provided at a fixed location for residential customers
5. Publicly available local and/or national telephone services provided at a fixed location for non-residential customers
6. Publicly available international telephone services provided at a fixed location for non-residential customers
7. The minimum set of leased lines (up to and including 2 Mbps)

Recommendation on Relevant Markets

Wholesale markets

8. Call origination on the public telephone network provided at a fixed location
9. Call termination on individual public telephone networks provided at a fixed location
10. Transit services in the fixed public telephone network
11. Wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purposes of providing broadband and voice services
12. Wholesale broadband access
13. Wholesale terminating segments of leased lines
14. Wholesale trunk segments of leased lines
15. Access and call origination on public mobile networks
16. Voice call termination on individual mobile networks
17. The wholesale market for international roaming on public mobile networks
18. Broadcasting transmission services to deliver broadcast content to end users

Markets outside Recommendation

- NRA can define additional markets
- But proposed market must pass three criteria test:
  - High and non-transitory entry barriers
  - Market does not tend towards effective competition over time
  - Competition law not sufficient to regulate market

Significant Market Power

- Based on competition law concept of dominance
  - *An undertaking that either individually, or jointly with others, enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers*
- Single firm dominance
  - Market share (usually above 40%)
  - Other criteria
- Collective dominance difficult to prove

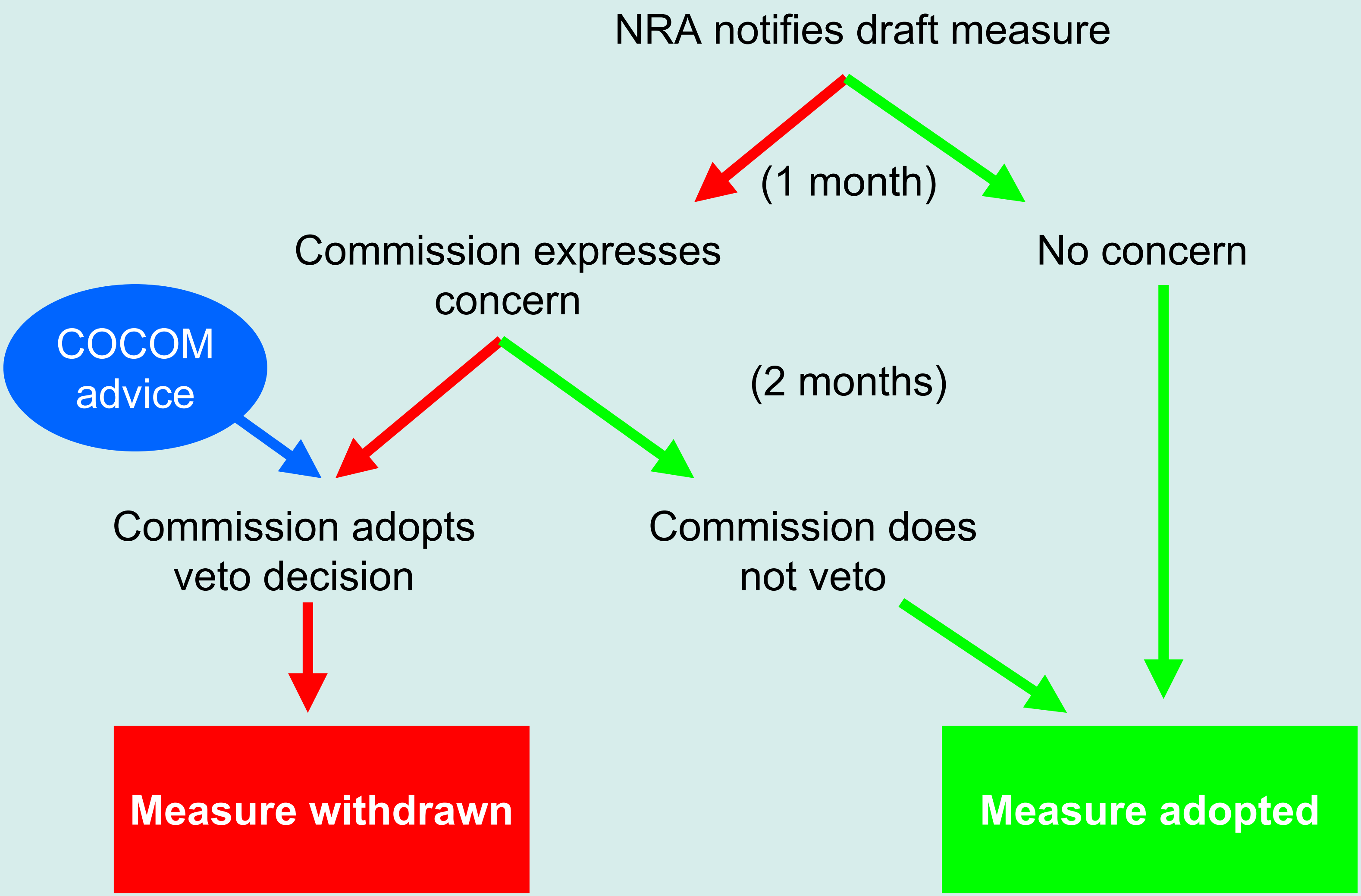
Remedies in Retail Markets

- Universal Service Directive
  - Regulation of retail services (including price controls) only where wholesale regulation and Carrier Selection / Pre-Selection not sufficient (Article 17)
  - Minimum set of leased lines (Article 18)
  - Carrier Selection / Pre-Selection (Article 19)

Remedies in Wholesale Markets

- Access Directive
  - Transparency (Article 9)
  - Non-discrimination (Article 10)
  - Accounting separation (Article 11)
  - Access to, and use of, specific network facilities (Article 12)
  - Price control and cost accounting obligations (Article 13)

Article 7 Notification Procedure



European Commission Veto

- European Commission veto over:
  - Market definitions deviating from Recommendation
  - Designation (or not) of SMP operators
  - NO veto over remedies

- Possible extension of veto in revised framework from 2010

Infringement Proceedings

- October 2005: Failure to start notifications
  - Belgium, Cyprus, Czech Rep., Estonia, Latvia, Luxembourg, Poland
- October 2006: Failure to notify all 18 markets
  - Denmark, Germany, Malta, Portugal

European Commission's view February 2006

- Presents first two years experience with market analysis notifications
- Consistency mainly achieved *where* to regulate rather than *which* regulation is appropriate
- Detail and implementation of remedies varies considerably between NRAs
  - *Such differences are manifest, for example, in pricing (e.g. methodologies for cost orientation), which has significant implications for the internal market. The question thus arises as to whether, and if so how, greater consistency in the application of remedies can be achieved. The question will be addessed in the upcoming review of the regulatory framework.*
- Recognises need to streamline procedures and reduce administrative burden on companies and NRAs

Current Status

- First round
  - Most NRAs finished or near to finishing
  - But some NRAs still need to adopt final decisions
  - Lower completion rate for Markets 17 & 18
  - Estonia lagging far behind
  - No SMP in Markets 3-6, 10, 14 & 15 in some countries, but no universal trend
  - Divergence in detail of key remedies
- Second round
  - Number of NRAs have started
  - Austria already finished!

Fixed Retail Access and Calls (Markets 1-6)

- Market definition:
  - Inclusion of broadband access (Poland – veto)
  - Inclusion of Voice over Broadband calls
  - European Commission proposes to remove Calls Markets 3-6 from revised Recommendation due to sufficiency of wholesale regulation plus CS/CPS

- SMP:
  - Access Markets 1-2: All fixed incumbents SMP
  - Calls Markets 3-6: Some NRAs have found no SMP in local/national and international calls for business customers (Markets 5 & 6) or international calls for residential and business customers (Markets 4 & 6)

Fixed Retail Access and Calls (Markets 1-6)

- Remedies:
  - Few NRAs have concluded wholesale regulation and CS/CPS sufficient
  - Most NRAs apply full set of remedies provided by Universal Service Directive (Article 17), but significant variation in terms of:
  - Price control / cost orientation
  - Advance notification of retail tariffs and NRA assessment method
  - Price caps (trend towards ‘safety caps’ where still exist)
  - Wholesale Line Rental (retail minus margin)

- Purpose of retail regulation to protect competitors rather than end users?

Fixed Call Origination, Transit and Call Termination (Markets 8-10)

- Market definitions:
  - No major deviations from Recommendation in Markets 8-10
  - Inclusion of self-provision in Transit Market (Austria - veto)
- SMP:
  - All fixed incumbents, except no SMP in Transit (Market 10) in some countries
  - Alternative Network Operators SMP in Fixed Call Termination (Market 9)
- Remedies:
  - All NRAs imposed full set of remedies on fixed incumbents, but variation in implementation of cost orientation obligation
  - No consistency to approach to regulating ANOs' termination rates:
  - Strict reciprocity, Delayed Reciprocity, No price control at all

Local Loop Unbundling (Market 11)

- Market definition:
  - Copper loops only, fibre loops excluded
- SMP:
  - All fixed incumbents
- Remedies:
  - All NRAs imposed full set of remedies, but variation in implementation of cost orientation obligation
  - ‘Naked’ shared access
  - Migration procedures from bitsream access to LLU
  - Little attention to SLU so far, but will become increasingly important with deployment of FTTC / VDSL

Wholesale Broadband Access (Market 12)

- Market definition:
  - ‘Orthodox approach’ – DSL only
  - But many NRAs included alternative broadband infrastructure (cable, FTTH, BFWA) based on substitutability at retail level and indirect pricing constraint exercised at wholesale level
  - Malta – Cable included based on substitutability at wholesale level
  - Germany - VDSL
  - UK - Geographic sub-markets depending on competition from LLU

- SMP: All fixed incuments, except:
  - Netherlands – No SMP in low quality broadband access market
  - UK – No SMP in geographic areas where LLU competition
  - Malta - Joint SMP with cable operator

Wholesale Broadband Access (Market 12)

- Remedies: A number variations:
  - Range of bitstream access options imposed
  - Price control obligation – retail minus vs. cost orientation approaches
  - No price control at all in few countries (reliance on non-discrimination obligation) – Czech Rep., Finland, Netherlands, UK
  - Investment ladder – Not create disincentives for LLU entry
  - ‘Naked’ bitstream access

Retail Leased Lines (Market 7)

- Market definition:
  - Minimum set of leased lines with harmonised technical characteristics up to and including 2 Mbps
  - Some NRAs also defined markets above 2 Mbps, but all concluded not meet 3 criteria test (except France)
- SMP:
  - All fixed incumbents
- Remedies:
  - Automatic set of obligations listed in Universal Service Directive (Article 18 and Annex VII):
  - Non-discrimination, cost orientation *“where appropriate”* and transparency
  - Only Hungary not imposed cost orientation

Wholesale Terminating and Trunk Leased Lines (Markets 13 & 14)

- Market definition: No consistency in terms of:
  - Upper boundary of capacities included, or in definition of sub-markets based on capacity
  - Inclusion of non-traditional interfaces (Ethernet)
- SMP:
  - All fixed incumbents SMP in terminating segments, but countries split on whether SMP in trunk segments market
  - Germany proposed that both terminating and trunk segments above 2 Mbps not meet 3 criteria but European Commission objected
- Remedies:
  - NRAs apply full set of remedies, but variation in implementation of cost orientation obligation
  - Some NRAs apply lighter regulation to higher capacity leased lines

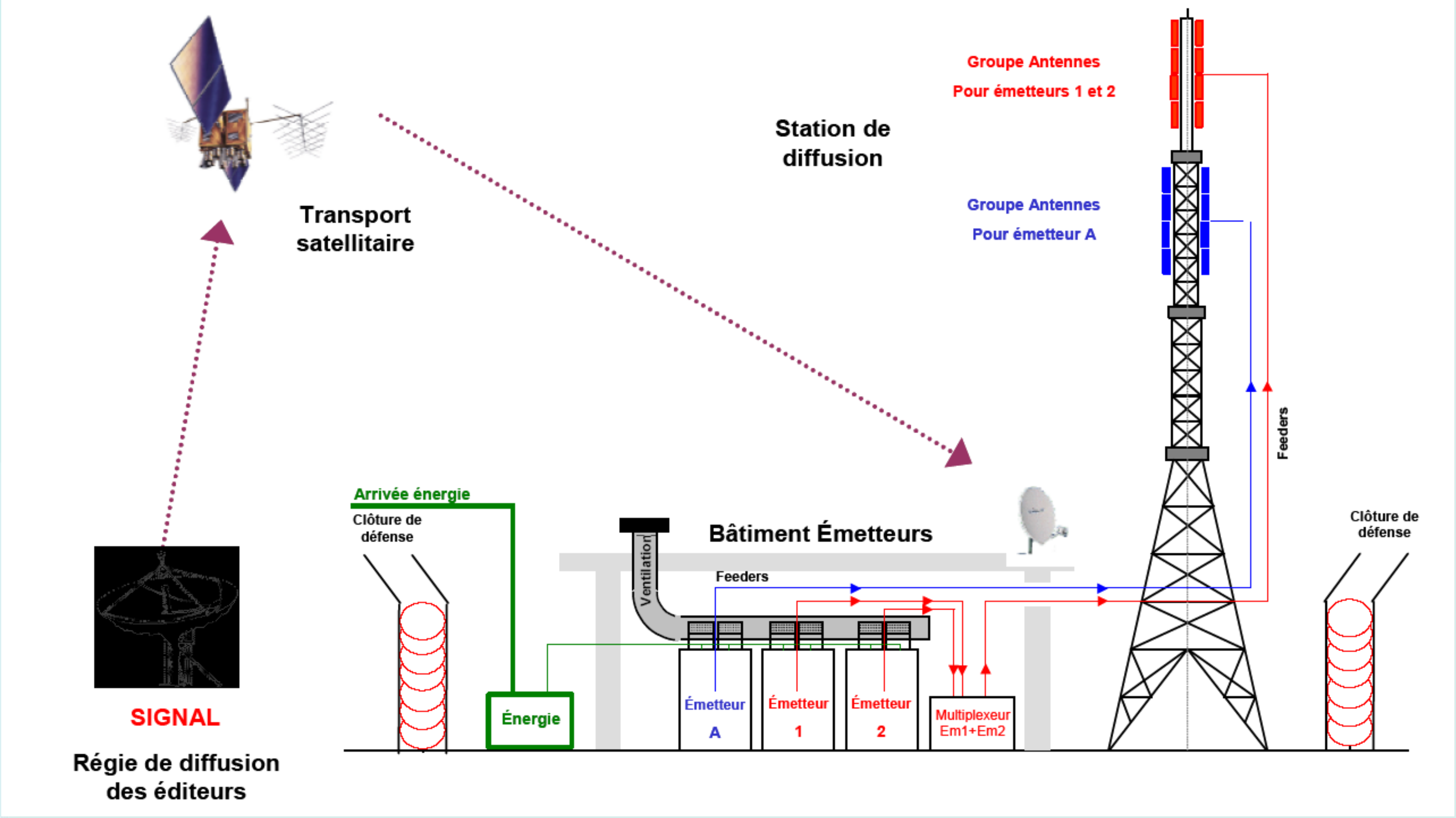
European Commission Recommendation on Leased Lines Part Circuits Prices (2005)

Capacity	Sum of the monthly price and 1/24 of the one-off connection price				One-off connection price
	Circuit length of up to 2 km	Circuit length of up to 5 km	Circuit length of up to 15 km	Circuit length of up to 50 km	
64 kbps	€ 61	€ 78	€ 82	€ 99	€ 542
2 Mbps	€ 186	€ 248	€ 333	€ 539	€ 1,112
34 Mbps	€ 892	€ 963	€ 1,597	€ 2,539	€ 2,831
155 Mbps	€ 1,206	€ 1,332	€ 1,991	€ 4,144	€ 3,144

Broadcasting Transmission (Market 18)

- This market has proven particularly problematic
- Terrestrial platform
  - More countries found SMP in anlogue transmission than digital
  - In countries where SMP in digital terrestrial transmission, often DTT networks launched before analysis of Market 18. Broadcasters already locked into long-term countracts
  - Not clear what is an access obligation in Market 18?
  - Who is customer? Broadcaster purchasing a managed transmission service or alternative operator buying access to unbundled network elements?
- Cable platform
  - Cable operators SMP in Germany, Malta and Netherlands
- Not clear whether this market will be included in revised Recommendation

Terrestrial Broadcasting Transmission



Wholesale Mobile Access and Call Origination (Market 15)

- Market definition:
  - In many countries no transactions in wholesale market (since only vertically integrated Mobile Network Operators)
- SMP:
  - No SMP in most countries
  - Single firm SMP in some smaller countries – Cyprus, Norway, Slovenia
  - Joint SMP – France (withdrawn), Ireland (overturned on appeal), Spain (Vodafone appeal to Court of First Instance)
- Remedies:
  - Meet reasonable requests for MVNO access
  - National roaming on cost oriented terms

Market 15 bis - Italy

- Market definition:
  - Wholesale mobile call origination on individual mobile networks for calls to non-geographic Directory Enquiry & Value Added Service numbers
  - Demand conditions different than in Market 15
- SMP:
  - Single firm SMP all four Mobile Network Operators
- Remedies:
  - Call origination charges capped at 2 x MTR until cost data available
- Commission Phase 2 investigation under way

Wholesale Mobile Voice Call Termination (Market 16)

- Market definition:
  - 2G/3G voice call termination on individual mobile networks
  - ‘Home Zone’ services with fixed access numbers
  - SMS excluded, but expected to be included in revised Recommendation
- SMP:
  - All Mobile Network Operators
  - Appeals based on countervailing buyer power argument in few countries

Wholesale Mobile Voice Call Termination (Market 16)

- Remedies: A number of variations in regulation of MTRs:
  - MTRs set on basis of cost model vs. benchmarking
  - Glide paths for reductions in MTRs not leading to converged end prices
  - Asymmetry of MTRs for later 2G operators and 3G new entrants, but no consistency in approach between countries
  - Inclusion of 3G spectrum in cost model for setting MTRs - UK
- European Commission says:
  - MTRs should normally be symmetric
  - Any asymmetry needs to be justified by higher costs (1800 MHz operator) or later market entry and should be phased out over glide path period

Market 16 bis - France

- Market definition:
  - SMS termination on individual mobile networks
- SMP:
  - Single firm SMP all three Mobile Network Operators
- Remedies: SMS termination rates capped at:
  - 3 eurocents/SMS for Orange & SFR
  - 3.5 eurocents/SMS for Bouygues
  - Non-discrimination – Same termination rates irrespective of where SMS originates
- European Commission asked ARCEP to specify path to reach symmetrical price cap for all operators

International Roaming (Market 17)

- Most NRAs abstained from analysing this market due to Roaming Regulation under adoption
- NRAs which analysed market all found no SMP

Appeals – Current EU Framework

Little guidance on appeals procedures (Article 4 Framework Directive)

- Member States must provide an effective and independent appeal mechanism
- Right of appeal for any user or operator affected by NRA decision
- Appeal body must have appropriate expertise available to it
- Merits of the case must be taken into account
- NRA decision stands pending outcome of appeal unless the appeal body decides otherwise
- If the appeal body is not a court, it must give written reasons for its decision, and its decision must be subject to review before a court

Appeals - Future EU Framework (2010)

- The problem: Appeals systems in some Member States:
  - Take years to reach final outcome
  - Systematically suspend NRA decisions during the appeal process
  - Create incentive to use appeal process as a delaying tactic
- European Commission proposal:
  - NRA decisions should only be suspended where irreparable harm to the appellant can be shown
  - But does NOT address length of appeal proceedings

Situation in 9 EU Member States

- Number of levels of appeal:
  - 2 stages: Belgium, Italy
  - 3 stages: Denmark, Spain, Sweden (proposal to reduce to 2)
  - Mixed depending on type of NRA decision: France, Germany, Netherlands, UK
- First level of appeal usually heard by a court, but not always:
  - Administrative appeals board: Denmark, Ireland
  - Specialised judicial body dealing with economic issues: UK
  - NRA: Spain (at choice of plaintiff)
- Further levels of appeal always heard by a court

Timeframe for Appeal Body to Decide

- Few countries specify binding timeframes:
  - Denmark: 3 months (not mandatory)
  - Ireland: 4 months (not mandatory)
  - Spain: 1 month (when CMT is first level appeal body)
  - Sweden: 6 months (proposal)
  - UK: 4 months (CAT referral to Competition Commission concerning price controls)

Interim suspension

- At discretion of appeal body whether to suspend NRA decision, national laws mention following situations:
  - Imposition of fines: Belgium, Denmark
  - Prevent serious and irreparable harm: France, Italy, Spain, UK
  - Urgency: France, UK
- But, very different application in practice

Appeals against NRA Market Analysis Decisions

- Status November 2006
- Very few appeals: France, Spain, UK
- Efficient procedure: Denmark
  - Markets 8, 11, 12, 13, 16, limited use of suspensions, cases closed after 6 months at first level, no appeals to second level
- Lengthy procedure, but no suspensions: Germany
  - Markets 1-6, 8-10, 11, 12, 16, no cases closed so far, longest open 17 months
- Lengthy procedure, many suspensions: Sweden
  - Markets 8-10, 12, 16, 18, closed cases took 19 months, longest open 27 months

Some open questions

- Status of European Commission comments
  - Spain – Market 8 (Wholesale Line Rental)
  - Spain – Market 15 (Vodafone Appeal to Court of First Instance)
- Cross-border impact of appeals
  - Denmark – Market 16 (MTR benchmarking)
- Definition of “irreparable harm”
  - Would apply to MTR glide path?
- Will Commission veto over remedies reduce number of appeals?

Revised Recommendation on Relevant Markets

- Expected July 2007
- Shorter list of Markets. Possible removal of:
  - Retail fixed calls and leased lines (Markets 3-6, 7)
  - Wholesale mobile access and call origination (Market 15)
  - International roaming (Market 17)
  - Broadcasting transmission (Market 18)
- Mobile call termination (Market 16) modified to include voice and SMS
- Simplified notification procedure by NRAs in some cases

- But NO bigger changes to market analysis system before 2010 (e.g. veto over remedies)

Second Round of Market Analysis
What will we see?

- Deregulation of fixed retail calls markets?
- Access obligations on cable networks?
- Regulation of fibre / VDSL?
- Definition of geographic sub-markets?
- Geographic asymmetry of remedies?
- Definition of markets outside Recommendation?
- Any solution to problem of systematic appeals in some countries?