

Presentation for the NCA Symposium

Impact of OTT services on regulatory market definitions in Europe

19 July 2016 • Omar Bouhali

Contents

A few definitions

OTT services and voice services

OTT services and non-voice services

A few definitions

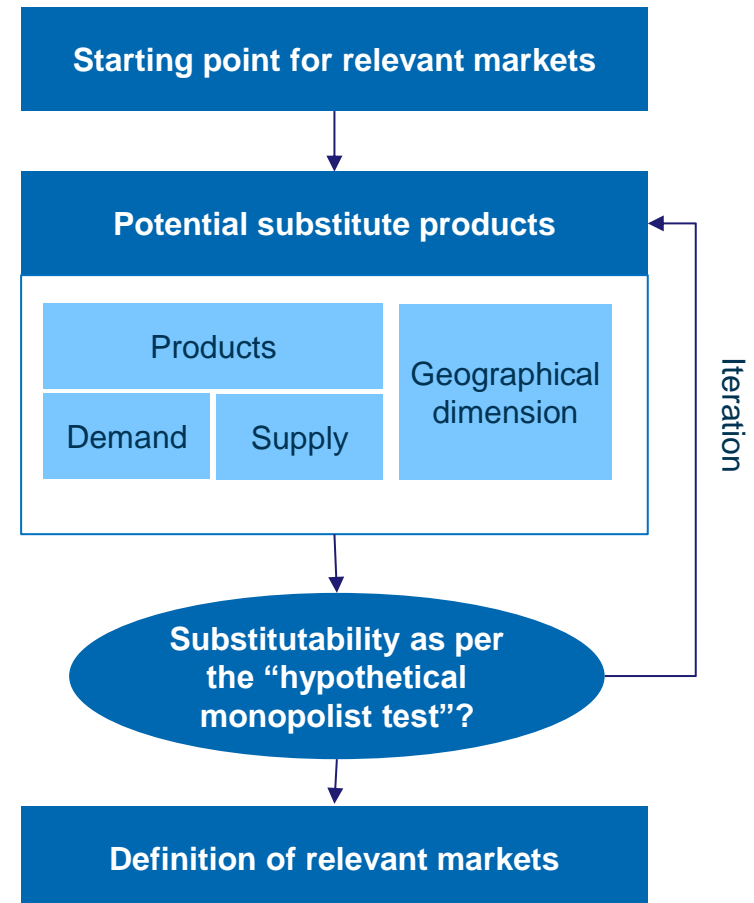
OTT services and voice services

OTT services and non-voice services

Market definition is a key step for ex-ante and ex-post regulation

- Narrow/wide market definitions may lead to different results in terms of dominance in antitrust procedures
- Since 2002, the EU has applied an ex-ante regulatory framework that aligns ex-ante regulation methodologies with competition law principles
 - narrow/wide market definitions may lead to different results in terms of significant market power

Iterative market definition process



The scope of the EU ex-ante regulatory framework is limited to ECS

- An electronic communication service (ECS) is defined as *“[a] service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services”**

- The three main criteria for a service to qualify as an ECS are:
 - the service is normally provided for remuneration
 - it consists wholly or mainly in the conveyance of signals
 - it does not provide, or exercise editorial control over, content

Over the top (OTT) services were initially defined in opposition to operator services

- BEREC then defined OTT as *“content, a service or an application that is provided to the end-user over the public Internet”*^{**}
- This definition implies that:

The OTT provider is generally different than the Internet access provider (IAP), but an IAP can also provide its own OTT services or partner with an OTT provider

OTT refers to a way to deliver a service, not to the nature of the service

An OTT service may or may not qualify as an ECS

An OTT service that does not qualify as an ECS may still compete with ECS

Some OTT services that do not qualify as ECS may still be able to compete with ECS

Examples of OTT services that may qualify as ECS	Examples of OTT services that may not qualify as ECS, but that may compete with ECS	Examples of OTT services that may not compete with ECS
OTT voice service with possibility to place calls to PSTN or receive calls from PSTN (e.g. Skype-In and Skype-Out)	OTT voice services in closed user groups (e.g. Skype) Instant messaging (e.g. WhatsApp)	Video streaming (e.g. Netflix) E-commerce (e.g. Amazon)

A few definitions

OTT services and voice services

OTT services and non-voice services

Most European regulators concluded that OTT is not a substitute for traditional voice services

- OTT services (even those that qualify as ECS) are generally excluded from the definition of the relevant markets, based on:
 - end-user perception that OTT services have lower quality and security
 - lack of interoperability among OTT voice services
- Norway has concluded that some OTT voice services are a substitute for traditional voices services
- Spain and Portugal have considered this substitutability

In Norway, OTT VoB adapted for end-to-end connectivity is included in the access market

- In 2010, NPT (now NKOM) concluded that OTT voice over broadband (VoB) adapted for end-to-end connectivity should be included in the access market
- A national provider of OTT voice services with the potential to place and receive calls to/from PSTN:
 - had a major market share in the telephony market supporting number portability with PSTN
 - provided adapters for PSTN telephony equipment
 - complied with any obligations on telephony service providers

*Source: EFTA surveillance authority, Case n° 68466;
BEREC report on OTT services, January 2016*

In Spain, nomadic voice services were considered but excluded from the PATS markets

- In Spain, a Ministry Order of 2005*:
 - qualified nomadic voice services as ECS, but not as publicly available telephone services (PATS)
 - allocated geographic E.164 numbering resources
 - imposed obligations

- In the 2008 market review, CMT (now CNMC) lifted regulation on PATS**

- In its decision**, CMT considered whether to include nomadic voice services with traditional PATS
 - it concluded that, unlike VoIP-PATS, nomadic voice services were not substitutable because of the absence of service-level agreements (SLA)

* *Order of the Spanish State Secretary for telecommunications and information society, 30 June 2005*

** *CTM Decision MTZ 2008/1079, 12 December 2008*

In Portugal, nomadic voice services were included in the PATS markets

- In Portugal, in 2006, ANACOM:^{*}
 - allocated non-geographic E.164 numbering resources for nomadic services
 - imposed obligations
- In the 2014 market review, ANACOM lifted regulation on access and PATS^{**}
- In its decision^{**}, ANACOM considered whether to include nomadic voice services with traditional PATS
 - it concluded that traditional PATS, VoIP-PATS and nomadic voice services were substitutable enough to be included in same relevant markets
- This decision had no effect on nomadic voice services, as it lifted regulation

^{*} ICP-ANACOM Decision of 23 February 2006

^{**} ANACOM Decision, 14 August 2014

OTT is considered as a substitute for traditional voice services only in very specific cases

- Only two European regulators (NKOM and ANACOM) have concluded that some OTT voice services are substitutes for traditional voices services
- This was in a context where these OTT services:
 - support full interconnection with traditional voices services and are allocated E.164 numbering resources
 - have gained some importance either in terms of market share or in terms of regulatory status
- Outside of these rare situations, OTT voice services are not considered as a substitute for traditional voices services in Europe and therefore have no impact on SMP assessment

A few definitions

OTT services and voice services

OTT services and non-voice services

Substitution between OTT services and SMS has been assessed in France, Denmark and Germany

- Potential substitution between OTT services and non-voice services has only been addressed by regulators who have regulated or considered regulating SMS termination (ARCEP, DBA and AGCOM)
 - unlike in Ghana, under the current European framework interconnection can only be regulated on the basis of a market review
 - the EC's 2003, 2007 and 2014 lists of relevant markets all include call termination on each fixed and each mobile network
 - SMS termination is not included in these lists and, if a regulator wants to regulate SMS termination, it must therefore first demonstrate that SMS termination is relevant for ex-ante regulation (3-criteria test)

In France, ARCEP found that there was no substitute for SMS in 2006...

- ARCEP reviewed SMS termination on each mobile network*
- As part of the market definition, ARCEP concluded that there was no substitution between SMS and each of these services: MMS, voice call, voicemail, instant messaging, mobile email
- Differences in prices and non-ubiquity of smartphones and mobile data packages played a key role in ARCEP's decision
- ARCEP concluded that
 - markets of SMS termination on each mobile network were relevant for ex-ante regulation
 - each mobile operator had a monopoly on SMS termination to its network
- ARCEP regulated SMS termination on that basis

...it came to the same conclusion in 2010, but ARCEP had to withdraw its draft decision in 2014

- The EC issued serious doubts in 2014 based on the following:*
 - between 2009 and 2014, smartphone penetration in France increased from 16% to 53%
 - this penetration is expected to continue increasing over the duration of the market review (3 to 5 years)
 - substitutability of SMS with emails and instant messaging is expected to increase
 - as a result, the competitive constraints at retail level could lead to effective competition and the 3-criteria test is therefore no longer met
- ARCEP decided to withdraw its draft decision (therefore lifting regulation on SMS termination) and to monitor the evolution of the market

In Denmark, DBA found that there was no ubiquitous substitute for SMS in 2011...

- In 2011, DBA reviewed SMS termination markets on each mobile network*
- DBA concluded that there was no substitution between SMS and each of the following services: MMS, instant messaging, push email and email through Internet
- The non-ubiquity of smartphones and mobile data packages played a key role in DBA's decision
- DBA concluded that
 - markets of SMS termination on each mobile network were relevant for ex-ante regulation
 - each mobile operator had a monopoly on SMS termination to its network
- DBA regulated SMS termination on that basis

...but found that SMS could be substituted by instant messaging and emails in 2015

- In 2015, DBA reviewed SMS termination markets on each mobile network*
 - as part of the assessment of barriers to entry for the 3-criteria test, DBA concluded that SMS could be substituted by instant messaging and emails
- The ubiquity of smartphones and mobile data packages played a key role in DBA's decision
- DBA concluded that markets of SMS termination on each mobile network were not relevant for ex-ante regulation
- DBA lifted regulation on SMS termination on that basis

OTT is considered as a substitute to SMS in cases of high smartphone and data penetration

- SMS are found substitutable with emails and instant messaging in markets where penetration of smartphones and mobile data is expected to be close to ubiquity with a forward-looking view over the duration of the market review (typically 3 to 5 years)
- This substitutability with OTT services implies that the SMS termination markets cannot be regulated

Contact details

Omar Bouhali

Principal

omar.bouhali@analysismason.com

25 rue d'Artois

75008 Paris

France