

RECOMMENDATIONS

COMMISSION

COMMISSION RECOMMENDATION

of 15 October 2008

on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services

(notified under document number C(2008) 5925)

(Text with EEA relevance)

(2008/850/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ⁽¹⁾, and in particular Article 19(1) thereof,

Whereas:

- (1) Under the regulatory framework for electronic communications networks and services, national regulatory authorities are obliged to contribute to the development of the internal market by cooperating with each other and with the Commission in a transparent manner in order to ensure the development of consistent regulatory practice and the consistent application of the directives making up the regulatory framework.
- (2) To ensure that decisions taken at national level do not have an adverse effect on the single market or on the objectives pursued by the regulatory framework, national regulatory authorities must notify the Commission and other national regulatory authorities of those draft measures stipulated in Article 7(3) of Directive 2002/21/EC.
- (3) As an additional requirement, national regulatory authorities must obtain Commission authorisation for

obligations covered by the second subparagraph of Article 8(3) of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities ⁽²⁾, which is a separate process.

- (4) The Commission will give national regulatory authorities, if they so request, the opportunity to discuss any draft measures, before formal notification of such measures under Article 7 of Directive 2002/21/EC and Article 8(3) of Directive 2002/19/EC. Where, pursuant to Article 7(4) of Directive 2002/21/EC, the Commission has indicated to the national regulatory authority that it considers that the draft measure would create a barrier to the single market or where it has serious doubts as to its compatibility with Community law, the national regulatory authority concerned should be given an early opportunity to express its views regarding the issues raised by the Commission.
- (5) Directive 2002/21/EC lays down certain binding time limits for the consideration of notifications under Article 7.
- (6) To ensure the effectiveness of cooperation and the consultation mechanism set out in Article 7 of Directive 2002/21/EC and to guarantee legal certainty, clear rules dealing with the main procedural aspects of the notifications made under Article 7 were put in place by Commission Recommendation 2003/561/EC of 23 July 2003 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC

⁽¹⁾ OJ L 108, 24.4.2002, p. 33.

⁽²⁾ OJ L 108, 24.4.2002, p. 7.

of the European parliament and of the Council on a common regulatory framework for electronic communications networks and services⁽¹⁾. Recommendation 2003/561/EC should be replaced by this Recommendation with a view to further simplifying and improving the notification process.

- (7) To give further guidance to national regulatory authorities on the content of draft measures and to increase legal certainty on the completeness of a notification, certain minimum information should be provided on what a draft measure should contain in order to be properly assessed.
- (8) Account has to be taken of the need to ensure effective assessment, on the one hand, and to simplify administration as far as possible, on the other hand. In this respect, the notification mechanism should not involve any unnecessary administrative burden on the national regulatory authorities. It would also be beneficial to clarify procedural arrangements in the context of the second subparagraph of Article 8(3) of Directive 2002/19/EC.
- (9) To help simplify the examination of a notified draft measure and to make the process quicker, national regulatory authorities should use standard formats for notifications.
- (10) In order to improve the efficiency of the notification mechanism, to increase legal certainty for national regulatory authorities and market players and to ensure timely implementation of regulatory measures, it is desirable that a notification by a national regulatory authority covering a market analysis also includes the remedies proposed by the national regulatory authority to address the market failures identified. Where the draft measure relates to a market which is found to be competitive and remedies already exist in relation to that market, the notification should also include the proposals for withdrawing those obligations.
- (11) In general, a short notification form should be used for certain categories of draft measures in order to reduce the administrative burden on national regulatory authorities and the Commission. However, notification of these categories by way of the standard notification procedure remains possible.
- (12) Where a national regulatory authority intends to withdraw regulatory obligations in relation to markets not included in Commission Recommendation 2007/879/EC 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⁽²⁾, notification of such a draft measure under Article 7 of Directive 2002/21/EC should be made by means of the short notification form.
- (13) Where a national regulatory authority carries out a review of a market that has been found to be effectively competitive in a previous review and finds once more that this market is effectively competitive, the notification should be made by means of the short notification form.
- (14) National regulatory authorities frequently amend technical details of the remedies imposed to take account of changes in economic indicators (such as equipment, labour, inflation, cost of capital, property rental rates, etc.), or to update forecasts or assumptions. Changes or updates of details which do not change the nature or the general scope of remedies (e.g. extension of reporting obligations, details of required insurance coverage, amounts of penalties, or delivery times) should be notified by means of the short notification form. Only material changes to the nature or scope of the remedies that have an appreciable impact on the market (such as price levels, amendments to the methodologies used to calculate costs or prices, determination of glide paths) should be notified by the standard notification procedure.
- (15) With regard to certain markets (in particular, voice call termination markets), national regulatory authorities may come to the same conclusion as in a previous review and wish to impose remedies on further operators (e.g. new entrants) with a similar customer base or total turnover to operators covered by a previous review which do not materially differ from draft measures already notified. The short notification form should be used for these draft measures.
- (16) A draft measure notified by means of a short notification form will in principle not give rise to comments by the Commission to the national regulatory authority in accordance with Article 7(3) of Directive 2002/21/EC.
- (17) In order to increase transparency on a notified draft measure and to facilitate the exchange of information about such measures between national regulatory authorities both the standard and the short notification forms should contain a summarised description of the main elements of the notified draft measure.

⁽¹⁾ OJ L 190, 30.7.2003, p. 13.

⁽²⁾ OJ L 344, 28.12.2007, p. 65.

(18) The European Regulators Group for Electronic Communications Networks and Services established by Commission Decision 2002/627/EC⁽¹⁾ has recognised the need for these arrangements.

(19) To meet the objectives laid down in Article 8 of Directive 2002/21/EC, in particular the need to ensure consistent regulatory practices and consistent application of that Directive, full compliance with the notification mechanism laid down in Article 7 is essential.

(20) The Communications Committee has delivered its opinion in accordance with Article 22(2) of Directive 2002/21/EC,

HEREBY RECOMMENDS:

1. Terms defined in Directive 2002/21/EC and the specific directives have the same meaning when used in this Recommendation. In addition:

(a) 'recommendation on relevant markets' means Recommendation 2007/879/EC and any subsequent Recommendation on relevant markets;

(b) 'notification' means the notification to the Commission by a national regulatory authority of a draft measure pursuant to Article 7(3) of Directive 2002/21/EC or a request pursuant to the second subparagraph of Article 8(3) of Directive 2002/19/EC, accompanied by the standard notification form or short notification form as provided in this Recommendation (Annex I and Annex II).

2. Notifications should be made by electronic mail with a request for acknowledgement of receipt.

Documents sent by electronic mail will be presumed to have been received by the addressee on the day on which they were sent.

Notifications will be registered in the order in which they are received.

3. Notifications will become effective on the date on which the Commission registers them (date of registration). The date of registration will be the date on which a complete notification is received by the Commission.

Notice will be given on the Commission's website and by electronic means to all national regulatory authorities of the

date of registration of the notification, the subject matter of the notification and any supporting documentation received.

4. Notifications should be in any of the official languages of the Community. The standard notification form (Annex I) or the short notification form (Annex II) may be in an official language other than that of the draft measure in order to facilitate consultation by all other national regulatory authorities.

Any comments made or decisions adopted by the Commission pursuant to Article 7 of Directive 2002/21/EC will be in the language of the notified draft measure, translated where possible into the language used on the standard notification form.

5. Draft measures notified by a national regulatory authority should be accompanied by the documentation needed for the Commission to carry out its tasks. For those draft measures that fall under point 6 below and are notified by means of the short notification form, the Commission does not need in principle any additional documentation to carry out its tasks.

Draft measures should be duly substantiated.

6. The following draft measures should be made available to the Commission by means of the short notification form contained in Annex II:

(a) draft measures concerning markets which have been removed from or have not been previously listed in the Recommendation on relevant markets, either where the market is found to be competitive by the national regulatory authority, or where the national regulatory authority considers that the three cumulative criteria referred to in point 2 of the Recommendation on relevant markets for identifying markets that are susceptible to *ex ante* regulation are no longer met;

(b) draft measures concerning markets which, while included in the Recommendation on relevant markets in force, had been found to be competitive in a previous market review, and remain competitive;

(c) draft measures that change the technical details of previously imposed regulatory remedies and do not have an appreciable impact on the market (e.g. annual updates of costs and estimates of accounting models, reporting times, delivery times); and

⁽¹⁾ OJ L 200, 30.7.2002, p. 38.

- (d) draft measures concerning a relevant market that has already been analysed and notified in relation to other undertakings, where the national regulatory authorities imposes similar remedies on other undertakings, without materially changing the principles applied in the previous notification.
7. The Commission, in close cooperation with the national regulatory authorities, will monitor the practical consequences of the short notification procedure with a view to make any further adjustments as may be necessary or add other categories of draft measures that should be notified using the short notification form.
8. Draft measures not falling under point 6 should be made available to the Commission by means of the standard notification form set out in Annex I. The draft measures notified should include each of the following where applicable:
- (a) the relevant product or service market, in particular, a description of the products and services to be included in and excluded from the relevant market on the basis of demand-side and supply-side substitutability;
- (b) the relevant geographic market, including a reasoned analysis of the competitive conditions on the basis of demand-side and supply-side substitutability;
- (c) the main undertakings active on the relevant market;
- (d) the results of the analysis of the relevant market, in particular the findings as to the presence or absence of effective competition, together with the reasons therefore. For these purposes, the draft measure should contain an analysis of the market shares of the different undertakings and a reference to other relevant criteria, as appropriate, such as barriers to entry, economies of scale and scope, vertical integration, control of infrastructure not easily duplicated, technological advantages or superiority, absence of or low countervailing buying power, easy or privileged access to capital markets/financial resources, overall size of the undertaking, product/services diversification, highly developed distribution and sales network, absence of potential competition and barriers to expansion;
- (e) where appropriate, the undertakings to be designated as having, individually or jointly, significant market power within the meaning of Article 14 of Directive 2002/21/EC and the reasoning, evidence and any other relevant factual information in support of such designation;
- (f) the results of the prior public consultation carried out by the national regulatory authority;
- (g) the opinion issued by the national competition authority, where provided;
- (h) evidence that, at the time of notification to the Commission, appropriate steps had been taken to notify the draft measures to the national regulatory authorities in all other Member States;
- (i) in the case of notification of draft measures which fall within the scope of Articles 5 or 8 of Directive 2002/19/EC or Article 16 of Directive 2002/22/EC of the European Parliament and of the Council⁽¹⁾, the specific regulatory obligations proposed to address the lack of effective competition in the relevant market concerned or, in cases where a relevant market is found to be effectively competitive and such obligations have already been imposed in respect of that market, the draft measures proposed to withdraw those obligations.
9. Where, for the purposes of the market analysis, a draft measure defines a relevant market which differs from those in the Recommendation on relevant markets, national regulatory authorities should provide sufficient reasoning of the criteria used for such a market definition.
10. Notifications made in accordance with the second subparagraph of Article 8(3) of Directive 2002/19/EC should also contain adequate reasoning as to why obligations other than those listed in Articles 9 to 13 of the Directive should be imposed on operators with significant market power.
11. Notifications falling within the scope of Article 8(5) of Directive 2002/19/EC should also contain adequate reasoning as to why the intended draft measures are required to comply with international commitments.
12. Notifications made by means of the standard notification procedure that include the applicable information within the meaning of point 8 will be presumed to be complete. Where the information, including documents, contained in the notification is incomplete in any material respect, the Commission will inform the national regulatory authority concerned within five working days and specify to what extent it considers the notification to be incomplete. The notification will not be registered until the national regulatory authority concerned has provided the requisite information. In such cases, for the purposes of Article 7 of Directive 2002/21/EC, the notification will become effective on the date on which the Commission receives the complete information.

⁽¹⁾ OJ L 108, 24.4.2002, p. 51.

13. Without prejudice to point 8 above, following registration of a notification, the Commission, acting in accordance with Article 5(2) of Directive 2002/21/EC, may seek further information or clarification from the national regulatory authority concerned. National regulatory authorities should endeavour to provide the information requested within three working days, where this is readily available.
 14. The Commission will verify whether or not the draft measure made available by means of a short notification form falls within the categories listed under point 6. Where the Commission considers this not to be the case, it will inform the national regulatory authority concerned within five working days and ask the notifying regulatory authority to submit the draft measure by means of the standard notification procedure.
 15. Where the Commission makes comments in accordance with Article 7(3) of Directive 2002/21/EC, it will notify the national regulatory authority concerned by electronic means and publish such comments on its website.
 16. Where a national regulatory authority makes comments in accordance with Article 7(3) of Directive 2002/21/EC, it shall communicate those comments to the Commission and the other national regulatory authorities by electronic means.
 17. Where, in application of Article 7(4) of Directive 2002/21/EC, the Commission considers that a draft measure would create a barrier to the single market or it has serious doubts as to its compatibility with Community law and in particular the objectives referred to in Article 8 of Directive 2002/21/EC; or it subsequently withdraws its objections, or takes a decision requiring a national regulatory authority to withdraw a draft measure, it will notify the national regulatory authority concerned by electronic means and post a notice on its website.
 18. With regard to notifications made pursuant to the second subparagraph of Article 8(3) of Directive 2002/19/EC, the Commission, acting in accordance with Article 14(2) of that directive, will normally take a decision authorising or preventing the national regulatory authority from adopting the proposed draft measure within a period not exceeding three months. The Commission may decide to extend this period for a further two months in view of the difficulties raised.
 19. A national regulatory authority may decide at any time to withdraw the notified draft measure, in which case the notified measure will be removed from the register. The Commission will publish a notice to that effect on its website.
 20. Where a national regulatory authority adopts the draft measure after receiving comments from the Commission or another national regulatory authority made in accordance with Article 7(3) of Directive 2002/21/EC, it shall communicate to the Commission and other national regulatory authorities of the manner in which it took the utmost account of the comments made.
 21. When requested by a national regulatory authority, the Commission will informally discuss a draft measure prior to notification.
 22. In accordance with Regulation (EEC, Euratom) No 1182/71 of the Council⁽¹⁾, any period of time referred to in Directive 2002/21/EC or in this Recommendation will be calculated as follows:
 - (a) where a period expressed in days, weeks or months is to be calculated from the moment at which an event occurs, the day during which that event occurs shall not be counted as falling within the period in question;
 - (b) a period expressed in weeks or in months shall end with the expiry of whichever day in the last week or month is the same day of the week or falls on the same date as the day during which the event from which the period is to be calculated occurred. Where, in a period expressed in months the day on which it should expire does not occur in the last month, the period shall end with the expiry of the last day of that month;
 - (c) time periods shall include official holidays, Saturdays and Sundays.
 - (d) working days mean all days other than official and/or public holidays, Saturdays and Sundays.
- Should a time period end on a Saturday, Sunday or an official holiday, it shall be extended until the end of the first following working day. The list of official holidays as determined by the Commission is published in the *Official Journal of the European Union* before the beginning of each year.

⁽¹⁾ OJ L 124, 8.6.1971, p. 1.

23. The Commission, together with the national regulatory authorities, will evaluate the necessity of reviewing this Recommendation as appropriate after the date established in the review of the regulatory framework for the transposition by the Member States into national law.
24. This Recommendation is addressed to the Member States.

Done at Brussels, 15 October 2008.

For the Commission
Viviane REDING
Member of the Commission

ANNEX I

Standard form relating to notifications of draft measures pursuant to Article 7 of Directive 2002/21/EC*(Standard notification form)*

INTRODUCTION

The standard notification form specifies the summary information to be provided by national regulatory authorities to the Commission when notifying draft measures under the standard notification procedure in accordance with Article 7 of Directive 2002/21/EC.

The Commission intends to discuss issues relating to the implementation of Article 7 with national regulatory authorities, especially during pre-notification meetings. Accordingly, national regulatory authorities are encouraged to consult the Commission on any aspect of the standard notification form and in particular on the kind of information they are requested to supply or, conversely, the possibility of dispensing with the obligation to provide certain information in relation to the market analysis carried out pursuant to Articles 15 and 16 of Directive 2002/21/EC.

CORRECT AND COMPLETE INFORMATION

All information submitted by national regulatory authorities should be correct and complete and summarised on the standard notification form set out below. The standard notification form is not meant to replace the notified draft measure, but it should enable the Commission and the national regulatory authorities of other Member States to verify that the notified draft measure does indeed contain, by reference to the information contained in the standard notification form, all the information needed for the Commission to carry out its tasks under Article 7 of Directive 2002/21/EC within the time frame set therein.

The information required should be set out in the sections and paragraphs of the standard notification form, with cross-references to the body of the draft measure where this information is to be found.

LANGUAGE

The standard notification form should be completed in one of the official languages of the European Community and may be different from the language used in the notified draft measure. Any opinion issued or decision taken by the Commission in accordance with Article 7 of Directive 2002/21/EC will be in the language of the notified draft measure, translated where possible into the language used in the standard notification form.

Section 1*Market definition*

Please state where applicable:

- 1.1. The relevant product/service market. Is this market mentioned in the Recommendation on relevant markets?
- 1.2. The relevant geographic market.
- 1.3. A brief summary of the opinion of the national competition authority, where provided.
- 1.4. A brief overview of the results of the public consultation to date on the proposed market definition (e.g. how many comments were received, which respondents agreed with the proposed market definition, which respondents disagreed with it).
- 1.5. Where the relevant market is different from those listed in the Recommendation on relevant markets, a summary of the main reasons justifying the proposed market definition by reference to Section 2 of the Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services⁽¹⁾, and the three main criteria mentioned in recitals 5 to 13 of the Recommendation on relevant markets and Section 2.2 of the accompanying Explanatory Note⁽²⁾.

⁽¹⁾ OJ C 165, 11.7.2002, p. 6.

⁽²⁾ Explanatory Note accompanying the Commission Recommendation 2007/789/EC on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, C(2007) 5406 published at http://ec.europa.eu/information_society/policy/ecomm/doc/implementation_enforcement/article_7/sec_2007_1483_2.pdf

Section 2*Designation of undertakings with significant market power*

Please state where applicable:

- 2.1. The name of the undertakings designated as having, individually or jointly, significant market power.
Where applicable, the name of the undertakings considered no longer to have significant market power.
- 2.2. The criteria used to designate an undertaking as having significant market power, individually or jointly, or not.
- 2.3. The name of the main undertakings (competitors) active in the relevant market.
- 2.4. The market shares of the undertakings mentioned above and the basis for calculation of market share (e.g. turnover, number of subscribers).

Please provide a brief summary of:

- 2.5. The opinion of the national competition authority where provided.
- 2.6. The results of the public consultation to date on the proposed designation(s) as undertakings having significant market power (e.g. total number of comments received, numbers agreeing/disagreeing).

Section 3*Regulatory obligations*

Please state where applicable:

- 3.1. The legal basis for the obligations to be imposed, maintained, amended or withdrawn (Articles 9 to 13 of Directive 2002/19/EC).
- 3.2. The reasons for which the imposition, maintenance or amendment of obligations on undertakings is considered proportional and justified in the light of the objectives laid down in Article 8 of Directive 2002/21/EC. Alternatively, indicate the paragraphs, sections or pages of the draft measure where such information is to be found.
- 3.3. Where the remedies proposed are other than those set out in Articles 9 to 13 of Directive 2002/19/EC, please indicate what 'exceptional circumstances' within the meaning of Article 8(3) of that Directive justify the imposition of such remedies. Alternatively, indicate the paragraphs, sections or pages of the draft measure where such information is to be found.

Section 4*Compliance with international obligations*

In relation to the third intend of the first subparagraph of Article 8(3) of Directive 2002/19/EC, please state where applicable:

- 4.1. Whether the proposed draft measure intends to impose, amend or withdraw obligations on market players as provided for in Article 8(5) of Directive 2002/19/EC.
- 4.2. The name of the undertakings concerned.
- 4.3. What international commitments entered into by the Community and the Member States are to be met.

ANNEX II

Short form relating to notifications of draft measures pursuant to Article 7 of Directive 2002/21/EC*(Short notification form)*

INTRODUCTION

The short notification form specifies the summary information to be provided by national regulatory authorities to the Commission when notifying draft measures under the short notification procedure in accordance with Article 7 of Directive 2002/21/EC.

It is not necessary to provide a copy of the draft regulatory measure or to attach any other document to the short notification form. However, it is necessary to indicate the Internet reference through which the draft measure can be accessible in the short notification form.

1. One or several markets which has/have been removed from or have not been previously listed in the Recommendation on relevant markets is/are found to be competitive or not to meet the three criteria	
Please briefly describe the content of the notified draft measure. In particular, please refer to the relevant market concerned and the reasons why you consider that the market is effectively competitive or the three criteria are not met:	
Please indicate the Article 7 notification reference of the previously notified draft measures:	
Does the NCA agree with the proposed draft measure as regards the analysis of the relevant market?	Yes No <input type="checkbox"/> <input type="checkbox"/> If no, please outline reasons:
Internet reference to the draft measure:	
Comments:	
2. One or several markets which was/were found to be competitive in a previous market review is/are still competitive:	
Please briefly describe the content of the draft measure, indicating the relevant market concerned:	
Please indicate the Article 7 notification reference of the previously notified draft measures:	
Are there changes: to the market definition, as compared with previously notified draft measures?	Yes No <input type="checkbox"/> <input type="checkbox"/> If yes, please describe briefly
Does the NCA agree with the proposed draft measure as regards the analysis of the relevant market?	Yes No <input type="checkbox"/> <input type="checkbox"/> If no, please outline reasons:
Internet reference to the draft measure:	
Comments:	
3. Changes to technical details of a previously imposed regulatory remedy.	
Please summarise the notified changes to the remedies indicating the relevant market concerned:	
Please justify your conclusion that the measure consists of a change on a technical detail of a remedy and does not change the nature or the general scope of a remedy:	
Please indicate the Article 7 notification reference of the previously notified draft measures:	
Internet reference to the draft measure:	
Comments:	

4. Imposition on further operators of remedies already analysed and notified in relation to other undertakings that are similar as regards their customer base or total turnover in telecoms markets, without changing the principles applied by the NRA in the previous notification.	
Please briefly summarise the content of the draft measure, indicating the relevant market concerned:	
Please indicate the Article 7 notification reference of the previously notified draft measures:	
Please list the operators on whom this draft measure imposes obligations:	
Does the NCA agree with the proposed draft measure as regards the analysis of the relevant market?	Yes No <input type="checkbox"/> <input type="checkbox"/> If no, please outline reasons
Internet reference to the draft measure:	
Comments:	