

1	<p>Consultation by CSA, Medienrat and VRM on wholesale broadband/network access and broadcasting services</p>
2	<p><i>Introduction</i></p> <p>The Communities in Belgium are responsible for “radio-broadcasting and television” which includes content as well as transmission aspects. The regulatory authorities of the Communities must therefore define the relevant product and service markets within the electronic communications markets, analyse these markets and possibly impose obligations on operators.</p> <p>In its Recommendation of 17 December 2007 the European Commission has identified 7 relevant product and service markets susceptible to ex ante regulation. The CSA, Medienrat and VRM (BIPT) have decided to organise a joint consultation on (a) markets 4 and 5 of the new relevant markets Recommendation, i.e. the market for wholesale (physical) network access at a fixed location and wholesale broadband access and on (b) market 18: “broadcasting transmission services, to deliver broadcast content to end users” of the preceding Commission Recommendation.</p> <p>The objective of this consultation is to determine whether and how the relevant markets 4 and 5 have to be regulated and if it is possible to define a market 18 which has to be regulated ex-ante.</p>
3	<p><i>Regulatory context</i></p> <p>Responsibility for the electronic communications sector in Belgium is shared between different authorities, due to the constitutional division of competences. The Communities have an assigned competence for “radio-broadcasting and television”, while the federal authority has this responsibility in the bilingual Brussels-Capital Region in addition to the residual competence for all the other aspects of electronic communications networks and services.</p> <p>The Constitutional Court has decided that cooperation is necessary in order for the different levels of power to regulate the common electronic communications infrastructure. A cooperation agreement was entered into on 17 November 2006 between the Federal State, the Flemish Community, the French-speaking Community and the German-speaking Community.</p> <p>Decisions of regulatory authorities on electronic communications networks fall within the cooperation agreement, including in particular decisions on the analysis of the relevant markets in the electronic communications sector susceptible to ex ante regulation.</p> <p>On markets 4 and 5 (formerly 11 and 12), the federal regulatory authority BIPT adopted a decision on 10 January 2008, and a draft was previously communicated to the community regulatory authorities who were asked to make comments. This decision stipulates that a new market analysis should be finalized before May 2009.</p> <p>In order to start the new round of analyses, and given the interwoven powers, the VRM, CSA and Medienrat have decided to launch a first market consultation together.</p>

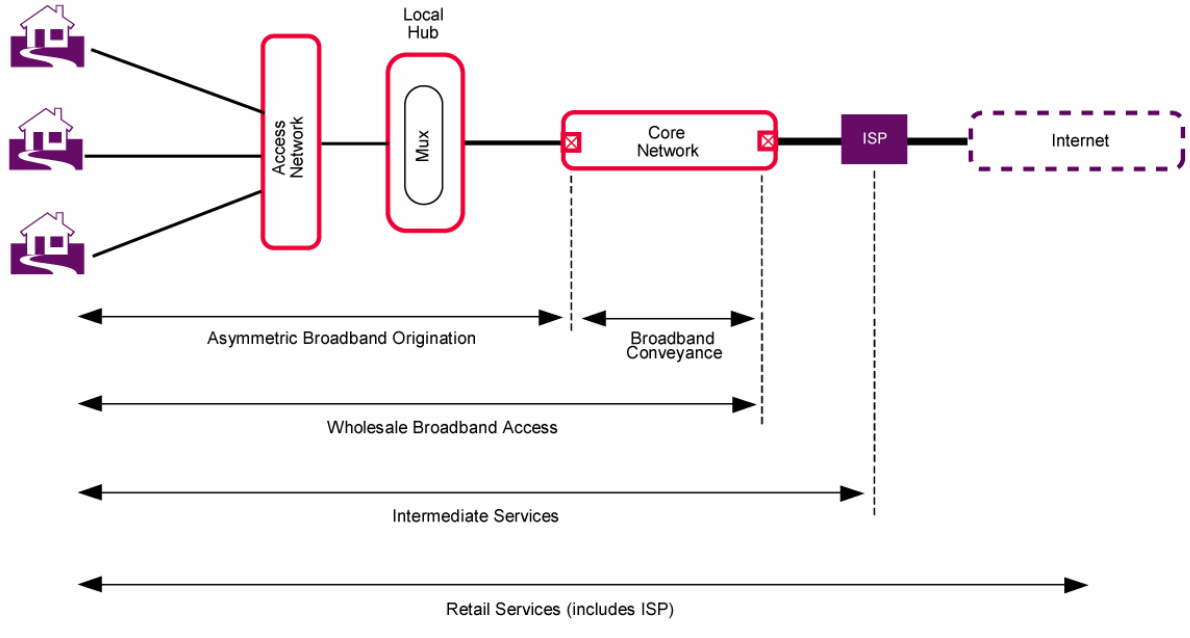
4	<p>Practical details</p> <p>Since this questionnaire is a joint initiative of Dutch-, French- and German-speaking authorities, this document has been written in English.</p> <p>Network operators, aggregators¹ (or service providers), broadcasters (or packagers²), final users and the general public are invited to respond to the consultation in the language of their choice (English, Dutch, French or German) by October 30, 2008.</p> <p>Responses can be sent by:</p> <p>-email: info@csa.be, vrn@vlaanderen.be or info@medienrat.be</p> <p>-post:</p> <table border="0" style="width: 100%;"> <tr> <td style="width: 33%;">M. Marc Janssen, President</td> <td style="width: 33%;">or M. Eric Brewaeys, voorzitter</td> <td style="width: 33%;">or M. Yves Derwahl</td> </tr> <tr> <td>Rue Jean Chapelié 35</td> <td>Koning albert II laan 20 bus 21</td> <td>Gospertstraße 1</td> </tr> <tr> <td>1050 Bruxelles</td> <td>1000 Brussel</td> <td>4700 Eupen</td> </tr> <tr> <td>Belgium</td> <td>Belgium</td> <td>Belgium</td> </tr> </table> <p>In the interests of transparency, we will publish all responses in full on our website, www.vlaamseregulatormedia.be , www.csa.be and www.medienrat.be If you consider that any parts of your response should be kept confidential, please put it in a separate annex to your response.</p> <p>If you have any questions on this consultation paper, you can contact by email: julien.gilson@csa.be (fr) ingrid.kools@vrn.vlaanderen.be (nl) or info@medienrat.be (de).</p>	M. Marc Janssen, President	or M. Eric Brewaeys, voorzitter	or M. Yves Derwahl	Rue Jean Chapelié 35	Koning albert II laan 20 bus 21	Gospertstraße 1	1050 Bruxelles	1000 Brussel	4700 Eupen	Belgium	Belgium	Belgium
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5	<p>This questionnaire is divided into two parts. The first part deals with broadband access, while the second part focuses on broadcasting (transmission) services.</p> <p>Questions relating to broadband</p> <p>The new Commission Recommendation defines markets 4 and 5 as:</p> <p>4. Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location and,</p> <p>5. Wholesale broadband access: this market comprises non-physical or virtual network access including ‘bit-stream’ access at a fixed location. This market is situated downstream from the physical access covered by market 4 listed above, in that wholesale broadband</p>												

¹ Based on the study: Arthur Andersen: Outlook of the development of technologies and markets for the European Audio-visual sector up to 2010 (2002): Aggregators are responsible for the aggregation of individual channels that will be sold to customers (often in a subscription mode).

² Based on the study: Arthur Andersen: Outlook of the development of technologies and markets for the European Audio-visual sector up to 2010 (2002): Programme packagers are responsible for the selection of individual programmes, for the creation of a schedule through packaging of programmes into channels and for selling advertising airtime to fund this schedule. Some channels will outsource content production while others will produce internally. Typical programme packagers are public service broadcasters, free commercial broadcasters and pay TV operators. Although they are also active in other parts of the value chain, their core business relate to programme packaging.

access can be constructed using this input combined with other elements. The broadband part of the questionnaire is aimed at existing and potential players on both demand- and supply-side on (segments of) these markets.

Figure 1 : wholesale services used to provide broadband internet access services to service providers (referred to as intermediate services) and ultimately to consumers



Source: OFCOM, Review of the Wholesale Broadband Access Markets Identification and analysis of markets Determination of market power and setting of SMP conditions Final Explanatory Statement and Notification

6 *Implementation of the current regulation*

According to the European regulatory framework for electronic communications networks and services, the national regulatory authorities (NRAs) must pursue three objectives (Article 8 Framework Directive):

1. Promoting competition in the provision of electronic communications networks, electronic communications services and associated facilities and services;
2. Contributing to the development of the internal market;
3. Promoting the interests of the citizens of the European Union

One of the regulatory tasks of the NRAs is the definition of the relevant markets, which implies the analysis by the NRAs of the markets identified by the Commission in its Recommendation.

On 10 January 2008, the BIPT published its final decision relating to the definition of the markets, the analysis of the conditions of competition, the identification of the dominant operators and the determination of the suitable obligations for the wholesale markets of the group “access”, selected in the Recommendation of the European Commission of 11 February 2003: Wholesale network infrastructure access (including shared or fully unbundled access) at a fixed location (market 11) and wholesale broadband access (market 12).

	<ul style="list-style-type: none"> • What are your impressions concerning the implementation and effectiveness of the current regulation on the broadband market?
7	<p><i>Policy approach to triple play</i></p> <p>The Commission Recommendation on the relevant markets and its accompanying explanatory note define a list of 7 markets susceptible to be regulated ex-ante in accordance with Article 15(1) of the Framework Directive.</p> <p>The starting point for the identification of markets in this Recommendation is the definition of retail markets from a forward-looking perspective, taking into account the demand-side and supply-side and substitutability. Having defined retail markets, it is then appropriate to identify relevant wholesale markets. In order to identify markets that are susceptible to ex ante regulation, it is appropriate to apply the following cumulative criteria:</p> <ul style="list-style-type: none"> • The presence of high and non-transitory barriers to entry; • The market does not tend towards effective competition; • Application of competition law alone would not adequately address the market failure(s) concerned. <p>In its explanatory note, the Commission considers that in most cases the individual services in a bundle are not good demand-side substitutes for each other but nevertheless it also says that they may be considered to be parts of the same retail market if there is no longer an independent demand for individual parts of the bundle.</p> <p>On the supply side, bundling two or more components into one product is driven by savings in production, distribution and transaction costs, and the ability to improve the quality of the product. Bundling may also be related to the technology used where a given network can be configured to provide a large range of services.</p> <p>On the demand side, consumers may prefer bundled services if there are significant transactional costs involved in subscribing to individual services separately. In this case, consumers may prefer to purchase the services as a bundle and from a single supplier. Hence the bundle may become the relevant product market. While certain bundles are well established (voice and SMS on mobile), others are at an earlier stage of development such as bundled television and internet services. 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.</p> <ul style="list-style-type: none"> • Is there a relevant triple-play market (provision of internet access, television and fixed telephone services as a bundle) in Belgium? • If it does, should it be regulated?
8	<p><i>Importance of cable platform in the broadband market</i></p> <p>According to the new Commission Recommendation, the unbundling of cable networks at this stage does not appear technologically possible, or economically viable, so that an equivalent service to local loop unbundling cannot be provided over cable networks.</p> <p>However, in the initial Recommendation, the wholesale broadband access market covered</p>

	<p>‘bitstream’ access that permits the transmission of broadband data in both directions and other wholesale access provided over other infrastructures, if and when they offer facilities equivalent to ‘bitstream’ access. In this context, the question has arisen as to whether wholesale access to cable networks that provide a return path is part of the relevant market.</p> <p>The presence of cable in Belgium may exercise an indirect constraint on the provider of DSL-based wholesale broadband access, through the substitutability between both products at retail level. Broadband subscribers may have a choice between the services provided by the integrated incumbent, by other vertically integrated companies (such as a cable operator), or by operators using inputs supplied by the incumbent. If alternative integrated undertakings have high market shares compared to operators exploiting inputs (and the former choose not to offer wholesale inputs) it is likely that indirect constraints will be more important than direct ones. Such indirect pricing constraint, where it is found to exist, should be taken into account when assessing if the incumbent DSL operator has SMP on the relevant market.</p> <div style="border: 1px solid black; padding: 5px;"> <ul style="list-style-type: none"> • Should the cable platform be taken into consideration when defining and analysing markets 4 and/or 5 from a broadband point of view? Please motivate your answer. • Is the unbundling of the cable networks technically possible and economically viable? Please motivate your answer. • How significant are the switching costs between the DSL network and the coaxial cable, for an alternative operator? </div>
<p>9</p>	<p><i>Next generation access and next generation networks</i></p> <p>'Next generation networks' (NGN) covers the modernisation of the 'core' part of the network (i.e. moving to an all-IP architecture), while Next Generation Access (NGA) covers the 'access' part of the network (i.e. rolling out optical fibre all or part of the way to the customers' premises).</p> <p>Because of the large investments in NGN and NGA, some incumbents are asking for a firm date to be set for the withdrawal of sector-specific ex ante regulation, while others would like to benefit from 'regulatory holidays' for major new investments. Incumbents are particularly critical of mandated access to their infrastructure and of the price at which this is imposed (which they usually consider to be too low). On the other hand, new entrants fear that incumbents would be able to limit the availability of access, undermining existing investment. They therefore see that ex ante regulation and open access provisions on incumbents' networks correlate strongly with increased investment and innovation.</p> <div style="border: 1px solid black; padding: 5px;"> <ul style="list-style-type: none"> • How do you view the development of the market for broadband services during the next years? What do you expect from future regulation? • What will be the technical differences between the implementation of a broadcast service on xDSL (ADSL 2+) and on a “NGN/NGA”? </div>

10 Different geographical markets in Belgium?

In the electronic communications sector, the geographical scope of the relevant market has traditionally been determined by reference to two main criteria: the area covered by the network and the scope of application of legal and other regulatory instruments. This corresponds generally to the territory of the Member State concerned since the consideration centres on the scope of the potential SMP operator's network and whether that potential SMP operator acts uniformly across its network area or whether it faces such different conditions of competition that its activity is constrained in some areas but not in others.

If there are competing infrastructures across the country, an NRA could in principle find sub-national geographic markets. The NRA would need to identify the competitors of the potential SMP operator(s) and assess the area of supply of these competitors.

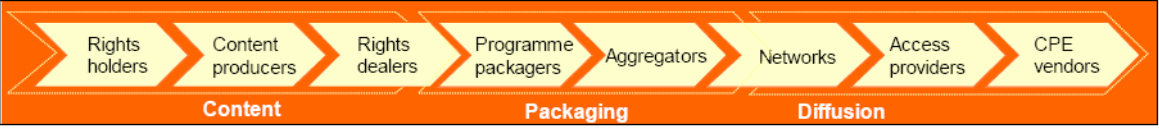
The fact that competitors have a supply area which is not national is not sufficient to conclude that there are distinct markets. Further evidence relating to demand-side and supply-side substitutability on the relevant market will have to be considered. Regional competitors can indeed exercise a competitive pressure reaching beyond the area in which they are present when the potential SMP operator applies uniform tariffs and the regional competitor is too large to ignore.

In the second review of the wholesale broadband access market, the selected approach by OFCOM is very interesting for our reflexion (case UK/2007/0733). OFCOM proposes to regionally segment the wholesale broadband access market and identify 4 separate geographic markets: Hull area (areas where only operates the incumbent company Kingston), Market 1 (areas where only operates the incumbent company British Telecom), Market 2 (areas where there are 2 or 3 significant operators) and Market 3 (areas where there are 4 or more significant operators).

This geographic market definition allows the identification of separate significant market power findings, and allows the regulator to impose different remedies in the three markets: OFCOM concludes that there is no SMP in market 3, but identifies SMP in markets 1 and 2 (BT) and in the Hull area (Kingston). For these SMP findings, OFCOM proposes to impose the following obligations: a requirement to provide network access upon reasonable request; a requirement not to discriminate unduly; a requirement to publish a reference offer; a requirement to notify terms and conditions; a requirement to notify technical information; and accounting separation.

OFCOM's objective is to take into account the geographic variations in competitive conditions and to apply an adequate ex ante regulation.

- What is/are, in your opinion, the relevant geographical market(s) (in Belgium)?
- To what extent does the market analysis need to take geographical differences into account?
- In your opinion, what are the elements that justify the differences?
- Do you think that the regulation must investigate this aspect? Please develop.

<p>11</p>	<p><i>Indirect Price Constraint</i></p> <p>According to some regulators, even if in the relevant wholesale market, the direct substitutability between two technologies or products is limited, an indirect pricing constraint derived from substitutability at the retail level could be taken into consideration to include the two technologies or products in the same relevant market. This is why OPTA in the Netherlands and OFCOM in the UK, inter alia, had included cable in the wholesale broadband access market.</p> <p>However, for the Commission, the indirect pricing constraint has to be used to identify the SMP operator but not at the stage of the definition of the relevant market.</p> <div style="border: 1px solid black; padding: 5px;"> <ul style="list-style-type: none"> • Do you think that the indirect pricing constraint on the xDSL providers, offering wholesale broadband access, exercised by the cable operators, could be strong enough to limit the incumbent’s market power? • Is this effect significant enough to reduce the market power of the DSL operator to a non-SMP level? </div>
<p>12</p>	<p><i>Differentiation of remedies</i></p> <p>In the absence of sub-national markets, the existence of geographically differentiated constraints on a SMP operator who operates nationally, such as different levels of infrastructure competition in different parts of the territory, could be taken into account in the context of remedies.</p> <p>In its second review of the wholesale broadband access market, Telekom-Control-Kommission, the Austrian regulator, proposes to define a national geographic market, albeit recognising certain geographic variations in competitive conditions when imposing the remedies. The country is divided in two areas and in the most competitive, the existing obligations on Telekom Austria will be removed with the exception of accounting separation (case AT/2008/0757).</p> <div style="border: 1px solid black; padding: 5px;"> <ul style="list-style-type: none"> • If the relevant market corresponds to the national territory, do you think that the remedies have to be differentiated, taking into account the different regions and levels of infrastructure competition? Can you substantiate your opinion? </div>
<p>13</p>	<p style="text-align: center;">Questions relating to broadcasting</p> <p>Figure 2. Value chain of the audio-visual industry</p>  <p>Source: Arthur Andersen: Outlook of the development of technologies and markets for the European Audio-visual sector up to 2010 (2002)</p>
<p>14</p>	<p><i>Place of the broadcasting services</i></p> <p>No market analysis for broadcasting transmission services has been carried out in Belgium</p>

	<p>so far. The publication of the European Commission’s new recommendation, has lead us to carry out a thorough reflexion about the place of the audiovisual services in the new relevant markets identified by the European Commission.</p> <div style="border: 1px solid black; padding: 5px; margin-top: 10px;"> <ul style="list-style-type: none"> • Does the BIPT’s decision on markets 4 and 5 allow alternative operators to require the use of broadcast services through the WBA and LLU? • Economically and technically, what are the principal differences between markets 4 and 5 for the wholesale broadcasting services regulation? </div>
15	<p><i>Sub-market 4 and 5 or new ex-market 18?</i></p> <p>The NRA must base the <i>ex ante</i> regulation on the new recommendation. The removal of market 18 from the relevant markets has to be seen in the context of a competitive situation of broadcasting transmission markets in the majority of EU countries. But the broadcast transmission market in Belgium, like in Austria or Netherlands, is not the same as in most EU countries, because of the strong presence of cable. This difference can justify an adapted regulation as reflected in OPTA’s latest draft decision on broadcast transmission services.</p> <div style="border: 1px solid black; padding: 5px; margin-top: 10px;"> <ul style="list-style-type: none"> • Could broadcast transmission services be a relevant sub-market of markets 4 and 5 or should a specific relevant market 18 be defined? </div>
16	<p><i>Three criteria test</i></p> <p>1/ Two types of barriers to entry to the development of competition in the electronic communications sector appear to be relevant: structural barriers and legal or regulatory barriers.</p> <p>A structural barrier to entry exists when the state of the technology, and its associated cost structure, and/or the level of demand, are such that they create asymmetric conditions between incumbents and new entrants impeding or preventing market entry of the latter. For instance, high structural barriers may be found to exist when the market is characterised by absolute cost advantages, substantial economies of scale and/or economies of scope, capacity constraints, and high sunk cost. Such barriers can still be identified with respect to the widespread deployment and/or provision of local access networks to fixed locations.</p> <p>Legal or regulatory barriers are not based on economic conditions, but result from legislative, administrative or other state measures that have a direct effect on the conditions of entry and/or the positioning of operators on the relevant market.</p> <p>2/ If a market tends towards effective competition without <i>ex ante</i> regulatory intervention, it is not susceptible to <i>ex-ante</i> regulation. The application of this criterion involves examining the state of competition behind the barrier to entry, taking account of the fact that even when a market is characterised by high barriers to entry, other structural factors or market characteristics and developments may mean that the market tends towards effective competition.</p> <p>Market dynamics may also be changed by technological developments or by the convergence of products and markets. Innovation-driven markets characterised by ongoing technological progress may indeed tend towards effective competition.</p>

	<p>3/The final decision to identify a market that fulfils the first two criteria (high and persistent entry barriers and absence of indications that the market would tend towards effective competition) as justifying possible ex ante regulation, should depend on an assessment of the insufficiency of competition law by itself (without ex ante regulation) to address the market failure.</p> <p>Ex ante regulation would be considered to constitute an appropriate complement to competition law in circumstances where the application of competition law would not adequately address the market failures concerned.</p> <div style="border: 1px solid black; padding: 5px;"> <ul style="list-style-type: none"> • Which objections/ barriers could prevent an operator from supplying broadcasting services over broadband-coax cable and DSL? (Technical, economical feasibility, legal, practical...?) • According to you, does the market tend towards effective competition without ex-ante regulatory intervention? • Is the competition law sufficient by itself to address the market failure? </div>
<p>17</p>	<p><i>Product market</i></p> <p>According to settled case-law, the relevant product/service market comprises all those products or services that are sufficiently interchangeable or substitutable, not only in terms of their objective characteristics, by virtue of which they are particularly suitable for satisfying the constant needs of consumers, their prices or their intended use, but also in terms of the conditions of competition and/or the structure of supply and demand on the market in question. Products or services which are only to a small or relative degree interchangeable with each other do not form part of the same market.</p> <div style="border: 1px solid black; padding: 5px;"> <ul style="list-style-type: none"> • If a market 18 is defined as a relevant market, are the DSL, coax cable, DVB-C, DVB-S, DVB-T and DVB-H technologies substitutable and do they belong to the same market? </div>
<p>18</p>	<p><i>Fixed versus mobile or platform convergence?</i></p> <p>Although different services are provided at fixed locations and those provided to non-fixed locations, new hybrid or converged offerings are emerging. On the basis of technical neutrality, some services may become substitutes for one another. But, it is also necessary to recognise that different services may be characterised by different technical requirements within a given network, for example in terms of delay and bandwidth. In Belgium, the television broadcasting on DVB-H standards is currently tested and will be officially launched in following years.</p> <div style="border: 1px solid black; padding: 5px;"> <ul style="list-style-type: none"> • Will customers' consumption patterns evolve significantly (fixed towards mobile) and influence the strategy of operators? • What is your opinion on the convergence of services offered by operators (package fixed and mobile broadband services)? • Do you think that a DVB-H offer could be a real and attractive alternative to IPTV or cable digital television? </div>

<p>19</p>	<p><i>Development and competition of the broadcast transmission services: strong or not?</i></p> <p>In Belgium at the moment, broadcast transmission services are offered through vertically integrated companies: Belgacom on DSL network; Telenet, Tecteo, NewIco, AIESH on coax cable; VRT and the RTBF on the terrestrial digital network (DVB-T) or TAT (terrestrial analogue television) (although VRT’s broadcasting infrastructure is at the present in the course of being outsourced.); TV Vlaanderen on satellite.</p> <div style="border: 1px solid black; padding: 5px;"> <ul style="list-style-type: none"> • Have you already received some demands from alternative operators to launch a broadcast transmission service on your network? • Do you foresee any demands from alternative operators to launch a broadcast transmission service on your network in the near future? </div>
<p>20</p>	<p><i>Different geographical markets in Belgium</i></p> <p>In its previous proposed decision on market 18, the “Conseil supérieur de l’audiovisuel” (CSA) said that the wholesale broadband xDSL network is characterized by its unity at the national level, the retail broadcasting services on offer are differentiated by linguistic area, and even at the local level (with French-speaking local televisions).</p> <p>The regulatory conditions (the legal framework applicable to the broadcasting services offer concern the constitutional autonomy of the Community capacities), the practical conditions (the geographical footprint of the services can be differentiated by linguistic coverage, the content offer can be segmented between basic offer and optional offers), the economic conditions (contracts concluded with broadcasters) and the platform competition (the development of alternative platforms, wire and wireless) vary according to whether an operator carries out activities in the bilingual Brussels-Capital Region, in Flanders, in the German-speaking Community or in the French speaking Community.</p> <p>In addition, the CSA has considered that the only platform which could justify a local geographical segmentation is the coax cable with a non overlapping territory, where each operator has access to subscribers on an exclusive basis. The replication possibility is very limited mainly because of the irrecoverable costs related to end-users connections.</p> <div style="border: 1px solid black; padding: 5px;"> <ul style="list-style-type: none"> • What should be the relevant geographic scope for market 18? </div>
<p>21</p>	<p><i>Significant market power</i></p> <p>According to Article 14 of the Framework Directive ‘an undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors customers and ultimately consumers’.</p> <div style="border: 1px solid black; padding: 5px;"> <ul style="list-style-type: none"> • Could an operator behave in Belgium to an appreciable extent independently of competitors, customers and consumers, in spite of the countervailing buying power? • What would be the effect of a countervailing buying power? • Could an operator in Belgium obtain a significant market power position and behave independently of competitors, customers and consumers? </div>

22	<p>Remedies</p> <p>After finding of a undertaking's significant market power position, the NRA must impose, at least, one of this following regulatory obligations: transparency; non-discrimination; accounting separation; obligations for access to and use of specific network facilities; and price control and cost accounting obligations (articles 9-13 Access Directive).</p> <p>On 19 Augustus 2008, OPTA, the Dutch regulator, published 4 broadcasting transmission market decisions. On basis of the market analysis, 4 cable companies are identified as holding a significant market power and various remedies are imposed to them.</p> <ul style="list-style-type: none"> • Do you think that the situation in Belgium with regard to market 18 is similar to the situation in any particular European country that has regulated this market (e.g. the Netherlands). Is it advisable to impose some remedies and which ones?
23	<p style="text-align: center;">Subsidiary questions to consumer associations</p> <p>One of the main objectives of the regulation is to promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by ensuring, inter alia, that users, including disabled users, derive maximum benefit in terms of choice, price, and quality.</p>
24	<p>Implementation of the current regulation</p> <ul style="list-style-type: none"> • What are your views on the implementation and effectiveness of the current regulation on the broadcasting and the broadband markets?
25	<p>Situation of the retail market: prices, penetration, customer service, speeds...</p> <ul style="list-style-type: none"> • What do you think about the quality of the different broadcasting transmission services available in Belgium: offer, prices, customer service, speed...? • Do you think that at the retail level, IPTV, DVB-T, satellite and cable television are competing services?