

Public Consultation on the Review of the Significant Market Power (SMP) Guidelines

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Objective of the public consultation

[Article 15\(2\) of the Framework Directive on a common regulatory framework for electronic communications networks and services](#) requires that the Commission publishes the SMP Guidelines, the contents of which is to be in accordance with the principles of competition law. The SMP Guidelines foresee that the Commission should amend the Guidelines when appropriate taking into account experience with applying the regulatory framework and the jurisprudence of the EU Courts.

In this context, the Commission will review the [SMP guidelines](#) - i.e. the Commission guidelines on market analysis and the assessment of the significant market power under the Community regulatory framework for electronic communications networks and services - which are addressed to the National Regulatory Authorities that have to take them into utmost account when defining relevant markets and assigning telecommunications operators with SMP in view of imposing on them appropriate regulatory obligations to redress competition problems identified on a forward looking basis.

More information on this Commission initiative can be found in the Roadmap published under the following link:

http://ec.europa.eu/smart-regulation/roadmaps/docs/2017_cnect_011_smp_guidelines_en.pdf

The questions are addressed mainly to the Member States, National Regulatory Authorities, National Competition Authorities, electronic communications providers, academics in law and economics as well as consumers.

The Commission is consulting in particular on the need to update individual sections of the SMP Guidelines:

1. Section 2 related to market definition
2. Section 3 on single and joint SMP
3. Section 4 on the relevance of the SMP Guidelines concerning regulatory obligations
4. Section 5 on powers of investigation and cooperation for the purpose of market analysis
5. Section 6 on procedures for consultation and publication of National Regulatory Authorities decisions.

The findings of this consultation and the ongoing Commission study will determine the scope of the review and feed into the Commission's review. Account will be taken of the experience in applying the regulatory framework and developments of EU law.

Please note: In order to ensure a fair and transparent consultation process **only responses received through our online questionnaire will be taken into account** and included in the report summarising the responses. Should you have a problem completing this questionnaire or if you require particular assistance, please contact:

CNECT-B3-CONSULTATION-SMP-GUIDELINES@ec.europa.eu

Contributions will be published on the website of the Directorate General for Communications Networks, Content and Technology. **The responses received will be available on the Commission website unless confidentiality is specifically requested.** To this end we would kindly ask you to clearly indicate for each of your responses if you would not like it to be publicly available. In case your response includes confidential data **please also provide a non-confidential version of your response.**

Please read the [Privacy Statement](#) on how we deal with your personal data and contribution.

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General information

2.1

You answer as:

- Private individual
- Consumer association or user association
- Business (please specify sector)
- Electronic communications network or service provider
- Internet content provider
- Government authority
- National Regulatory Authority
- Other public bodies and institutions (please specify)
- Other (please specify)

2.2

Please specify if applicable.

8000 character(s) maximum

2.3

Is your organisation registered in the Transparency Register of the European Commission and the European Parliament?

- Yes
- No
- Not applicable as I am replying as an individual in my personal capacity or I am a public authority, such as a National Regulatory Authority (NRA) or a National Competition Authority (NCA).

2.4

If yes, please indicate your organisation's registration number in the Transparency Register.

If you are an entity not registered in the Transparency Register, please register in the Transparency Register before answering this questionnaire. If your entity responds without being registered, the Commission will consider its input as that of an individual.

2.5

Please enter the name of your institution/organisation/business.

2.6

If you object to publication of personal data on the grounds that such publication would harm your legitimate interests, please indicate this below and provide the reasons of such objection.

8000 character(s) maximum

2.7

What is your country of residence? (In case of legal entities, please select the primary place of establishment of the entity you represent)

- Austria
- Belgium
- Bulgaria
- Croatia
- Cyprus
- Czech Republic
- Denmark
- Estonia
- Finland
- France
- Germany
- Greece
- Hungary
- Ireland
- Italy
- Latvia
- Lithuania
- Luxembourg
- Malta
- Netherlands
- Poland
- Portugal
- Romania
- Slovak Republic
- Slovenia
- Spain
- Sweden
- United Kingdom
- Other

2.8

If other, please specify.

3

Topics for consultation

3.1

Market Definition (section 2 of the current Guidelines)

3.1.1

Point 38 of the Guidelines specifies the main criteria for defining the relevant product market:

(i) demand-side substitutability

(ii) supply-side substitutability and

(iii) potential competition

Point 62 sets out the notion of "chain substitutability".

Is it necessary to give updated and/or additional guidance in applying those criteria to define the relevant markets in the electronic communications sector?

Yes

No

3.1.2

Please explain.

8000 character(s) maximum

The demand side substitutability and supply side substitutability criteria should take account of the market and technological evolutions having occurred in the digital sector, which have significantly modified the competitive landscape. As a result, in applying both criteria, the EC should not restrict the analysis to ECN and ECS: such restriction would be biased as the market boundaries would not match the new range of alternative digital services.

1) As regards the demand-side substitutability criterion, it should incorporate the new ranges of services from the OTT providers. Otherwise, the extent to which users can substitute their electronic communication services would be too restricted. In addition, the demand side substitutability analysis should not be limited to a short term horizon (which would imply the possibility to switch provider as soon as a price change has occurred) to be consistent with the time scale of actual price evolutions in the market (ex: impact of contract duration).

2) As regards “supply side substitution”, the criterion should not favour actors which do not provide commercial wholesale access while penalizing actors which provide commercial wholesale access by including the latter and excluding the former (and the corresponding infrastructure) from the scope of relevant wholesale markets.

3) As regards potential competition, it should be noted that symmetric regulation is meant to promote entry. Indeed, symmetrical rules for reducing the cost of broadband or for the sharing of nonreplicable fixed access infrastructure, along with co-investment or co-financing access offers, can reduce barriers to entry and foster dynamic competition through network investment.

These new sources of potential competition should be included at the stage of relevant market definition, and not only within the SMP analysis, as such potential competition could emerge within the time horizon for market analysis.

Potential competition should also include confirmed broadband development plans, especially if wholesale access is guaranteed (e.g. investments using public subsidies and notably EU funds). Expected and programmed NGA networks should be included in market analysis even if such networks do not exist yet (real “forward-looking approach” implementation). For instance, planned NGA networks to which EU funds and have been allocated should be considered as potential competitors.

4) The concept of chain substitutability as described in the 2002 Guidelines (§62) should be updated according to the type of access technologies being now deployed and available at the retail level. With the deployment of high-speed broadband, it is possible that different technologies might be linked by a chain of substitution, and thus be part of a same “local” market (ADSL, VDSL, FTTH/B networks might be part of the same market in case of substitution in response of a variation in the price of the offers). Updating the “chain substitutability” is necessary because the link through a chain of substitution prevents market players from exerting market power, as such link prevents from acting independently from buyers, competitors and customers. As

such, "chain substitution" is a driver of market deregulation over the chain links.

3.1.3

Points 40-43 of the current Guidelines specify the "hypothetical monopolist test" as means to assess demand- and supply-side substitutability and set the boundaries of the relevant product markets.

Is it necessary to give updated and/or additional guidance on this test to define the relevant markets in the electronic communications sector?

Yes

No

3.1.4

Please explain.

8000 character(s) maximum

The SSNIP test should be amended in order to take into account new economic models in the digital Economy:

- The new economic models are not following the classical rules and are often based on free services (e.g. Google Search, Whatsapp, etc.). As there is no sale and payment, the actual SSNIP test is not applicable to those situations. Therefore, the SSNIP test evolution should integrate:
 - other criteria, like permanent decrease of quality (e.g. if the consumer of an OTT communication application cannot reach its interlocutor part of the time or if the quality of the voice is unsatisfactory, he will probably switch to another application or a traditional call),
 - other sides of the market, as these new economic models are based on multisided market where other sides have to pay to access the market (e.g. in Whatsapp case, the test could take into account incomes related to the valorisation of the data gathered by one side of the market and look whether the buyer of this data will change his behaviour if there is a permanent increase of the price of the data).
- SSNIP test has to take into account a given geographical area but most OTT applications are available worldwide. This should not prevent NRAs to include these applications in the analysis of retail telecom service markets as there is substitutability between the products or services.
- SSNIP test should take into account imperfect substitutes: new services with extended functionalities can however represent valid alternatives to traditional services and therefore contribute to the intensity of competition in the market.

3.1.5

According to point 67 and the following points of the Guidelines wholesale access markets should generally comprise all types of infrastructure for the provision of a given service. Further segmentation of markets based on existing categories of network infrastructures would depend on the degree of substitutability between such infrastructures and would require evidence as to the class of users to which access to the network is provided.

Is that approach relevant for the future?

- Yes
- No

3.1.6

Please explain.

8000 character(s) maximum

Orange considers that wholesale access markets should generally comprise all types of infrastructures for a given service. The degree of substitutability between different infrastructures, which should determine whether or not to further segment these markets, should be analyzed in a prospective way, at the horizon of the market analysis (5 years in the future Code) and also taking into account the existence of access services provided on these infrastructures in other countries. In other words, the absence of an actual access service for a given infrastructure should not in itself prevent this infrastructure from being included in a wholesale access market.

Today, Orange provides and also relies on a large variety of access across the European Union, and faces a high number of competitors offering different types of access (regarding the underlying infrastructure). However, NRAs do not always act according to the reality of the market competition, especially when regarding the competition of the cable infrastructure.

For the moment, NRA mostly only use the principle of “competitive constraints” when extending the perimeter of a given access market to take into account other existing infrastructures or services instead of taking into account the potential substitutes at the wholesale service level to define markets as they should. This leads to excessive regulation on operators actually providing access.

3.1.7

For the purpose of a robust market analysis, in its Article 7 case practice the Commission considers it necessary to look into direct and indirect constraints. For indirect constraints, if there is competitive pressure from alternative networks substitutable at the retail level (also referred to as alternative retail platforms), then such networks should be included in the wholesale (relevant) markets subject to the following conditions:

- access seekers would be forced to pass a hypothetical wholesale price increase on to their consumers at the retail level based on the wholesale/retail price ratio;
- demand substitution at the retail level based on indirect constraints would be sufficient to render the wholesale price increase unprofitable;
- access seekers' customers would not significantly switch to the retail arm of the integrated hypothetical monopolist, especially if the latter does not raise its own retail prices.

When those criteria are satisfied, constraints should be deemed sufficiently strong to include the platform concerned in the relevant wholesale market.

When indirect constraints are found but are not strong enough, they should be taken into account in the SMP assessment of the relevant wholesale market.

In light of the above, is it necessary to give updated and/or additional guidance on applying the direct and indirect constraints test when defining the relevant markets in the electronic communications sector?

- Yes
- No

3.1.8

Please explain.

8000 character(s) maximum

The conditions to include alternative networks in wholesale markets corresponding to the Commission's Article 7 practice and formulated in question 3.1.7. are unclear and lack justification.

Orange clearly supports the inclusion of alternative networks in wholesale access markets if they generate competitive pressure at retail level and if wholesale access is or can be provided on these networks at the horizon of the market analysis.

In practice and for the time being, NRAs have generally excluded alternative networks from wholesale relevant markets which have been narrowly defined. The narrow definition of wholesale relevant markets (number of products covered, no integration of self-supply, inter alia) have contributed to the development of service competition instead of infrastructure competition. In certain cases, the narrow definition of relevant markets supports the competitiveness of non-regulated technologies, like CATV, to the detriment of the others still regulated. The regulation of narrowly defined wholesale markets has the effect of generating circular regulation, i.e. a regulation preventing investment in regulated activities and preventing deregulation.

The way to define product markets has made it very difficult to take into account infrastructure competition in the market, as self-supply of competing infrastructures has usually not been included. By focusing regulation on incumbents' legacy networks, and extending such "per default regulation" also to new investments by the same operator, the regulatory framework has often lost sight of other actors' activities and their market positions. Indeed, as regards broadband markets, cable operators' broadband activities are clearly substitutes for broadband services (e.g. xDSL and fiber) on which they have a clear impact, but are generally considered being outside regulated relevant markets. This approach can lead to wrongly focused regulation (ex: an incumbent regulated in areas dominated by CATV) and to overregulation (i.e. the competition level is sufficient but the incumbent is still regulated).

It has also deterred the creation of a commercial and competitive wholesale market by creating a risk for the operators freely providing commercial wholesale products to be regulated while protecting the operators refusing to grant such wholesale offers from being regulated, which is counterproductive in terms of market dynamics.

As a consequence, the new Guidelines should give clear guidance on the need to have a correct assessment of market boundaries, and avoid too narrow definition. These elements should be added in the guidelines.

3.1.9

Should the Commission give updated and/or additional guidance on geographic market definition in addition to that in the [Explanatory note to the 2014 Recommendation on relevant markets](#)?

- Yes
 No

3.1.10

Please explain.

8000 character(s) maximum

While the principles detailed in the Explanatory note of the 2014 Recommendation on relevant markets are still accurate, their implementation is not uniform throughout Europe either because they are not always implemented, and when they are it is done in respect of various used criteria partly explained by national circumstances. There is no doubt that the present situation creates inconsistency in ex ante regulation across the European Union.

The elements below present criteria used by NRAs to define competitive areas of BSA market (ex. Market 5 - 2007 or Market 3.b - 2014).

In the following "AO" means Alternative Operators and "PO" means Principal Operators (i.e. the incumbent and its main competitors)

- Number of operators/AOs:

UK: in 2007 4POS (present or forecast), in 2010 4POs/3POs, in 2014 3POS

Portugal: in 2008 2 AOs (LLU and CATV required), in 2016 2 AOs/1AO

Austria: 2 POs

Spain - NGA regulation: 2 AOs

Poland: 3BB providers

- Technology used by AOs:

Portugal: in 2008 CATV (at least 1 of AOs), in 2016 2 NGA (fibre or DOCSIS 3.0)

Spain: 2014, own network, LLU or cable

- Penetration rates of AO:

Portugal: in 2008 above 60% of cable penetration, in 2016 higher than 50% in the parish

Spain - NGA regulation: 20% (ratio between the number of NGA lines and the number of copper pairs)

Poland: 65% of HH having access to at least 3 operators

- SMP market share:

UK: below 50% in case of 3 POs only

Portugal: below 50% (in case of 1 POs only)

Austria: CA 30%-40% (not defined directly)

Spain: below 50%
Poland: below 40%

- Others:

UK: above 10000 end users present in the area
Spain: each AO has a market share of at least 10%
Poland: less than 10% of HH has no access to Internet.

This shows that NRAs use different criteria to assess the competition level in local markets and even if they use the same criterion (like the incumbent's market share) the NRAs' requirements are different (e.g. Polish NRA requires that market share of the incumbent is below 40%, Portuguese NRA below 50%). In practice, the same competition level of local markets can lead to different findings (deregulation or regulation) based only on NRAs discretion.

In any case, there is no doubt that geographic segmentation, through geographic markets or geographic remedies, allows a better focus on remaining bottlenecks. With the multiplication of access networks with local footprints in most countries of the EU, the heterogeneous presence of cable, the intervention of local authorities, considering that a market is still national is highly questionable. Relying on a national market leads to the systematic regulation of the incumbent operator for ever, irrespective of potential high level of infrastructure based competition in numerous areas.

As mentioned by Richard Feasey in a note dated 9 April 2017 (<https://docs.google.com/viewer?>

[a=v&pid=sites&srcid=ZGVmYXVsdGRvbWFpbXxmZWZzZXl3YWxl3xneDozZmI4ZjFiNjc1NGIwMDRm](https://docs.google.com/viewer?a=v&pid=sites&srcid=ZGVmYXVsdGRvbWFpbXxmZWZzZXl3YWxl3xneDozZmI4ZjFiNjc1NGIwMDRm)), a pure national approach would also be counterproductive in respect to the promotion of co-investment and the related regulatory regime proposed in the Code project: this could happen in certain areas and not at a national scale.

As far as the methodology is concerned, providing technical support to NRA would be welcome.

3.1.11

Should the Commission give any other guidance related to market definition that is not mentioned above?

- Yes
 No

3.1.12

Please explain.

8000 character(s) maximum

First of all, it is of primary importance to recall that the process starts with the assessment of the competition in retail markets. The relevance of the definition of the related wholesale markets is correlated to the existence of a competition problem on the retail market, and the components of the retail offers; the wholesale products being intended to build up these retail services. As a result, wholesale markets should be regulated only if there is no efficient competition at retail level.

Too narrow markets definition leads in some cases to regulate specific products. The narrow definitions of wholesale relevant markets like the old market 5 and current market 3b (number of products covered, no integration of self-supply...) have contributed to the development of more service competition than infrastructure competition. Regulating narrowly-defined wholesale markets generates circular regulation: regulation prevents investment in regulated activities, and absence of entry and investment in regulated activities encourage the continuation of regulation.

Furthermore, this has certainly played as a disincentive for access seekers to invent their own services on their own facilities, and to price independently of regulated access price. Where justified, less regulation would have led to a more demanding, but also more rewarding market for everyone.

The narrow segmentation of wholesale sub-markets has generated the obligation to provide a very large number of regulated wholesale access offers, tailored to a large variety of competitors each with its own business model, investment or non-investment strategy, and benefitting from a specific regulatory niche. These obligations have rigidified network architectures and imposed numerous specific functions and interfaces in operators Information Systems, leading to additional costs for the industry as a whole.

3.2

SMP assessment (section 3 of the current Guidelines)

3.2.1

Are the criteria for assessing SMP in points 78-79 of the Guidelines still effective for assessing the existence of SMP?

- Yes
- No, they should be expanded and/or modified.

3.2.2

Please explain.

8000 character(s) maximum

Criteria should be updated and the guidelines could mention that they should not be used alone but be combined in order to have a proper assessment of the SMP.

As far as points 78 and 79 are concerned:

- The overall size of all the undertakings active on the market should be taken into account and not only the assessed undertaking. In respect to market forces and influence, it is important to go beyond the pure telco activities of the undertakings; when this activity is only one among others in a company, the overall size and financial capacity of this company must be taken into account.
- The words "control of non-replicable infrastructure within the time frame of market analysis" should replace "control of not easily duplicated" that is rather unprecise.

Other elements could be added as:

- Retail market power should inform about potential SMP designation on relevant wholesale level. If there is competition on the retail level, there is no need to designate SMP operator on the wholesale one.
- Competing offers outside ECS and ECN perimeter, notably offers including communication, content, distant functionalities. Competing offers covers alternative offers or substitutes; they enhance the competition or the pressure, consequently increase the elasticity of the demand and potentially reduce the market power of the undertaking.
- Alternative offers on alternative networks like wifi or public funded networks.
- On the business market, integrators should also be considered as competitors.

3.2.3

Should points 76-77 of the Guidelines related to measuring market presence (shares) of undertaking(s) depending on the characteristics of the relevant market be modified given the developments in the electronic communications sector?

- Yes
- No

3.2.4

Please explain and provide examples.

8000 character(s) maximum

The guidelines related to the measure of market presence should incorporate the evolutions which have occurred in the electronic communication sectors in terms of technologies, market players and forms of actual and potential competition. Indeed, OTT services have created new competitive constraints on providers of electronic communications, as an example. In order to accurately assess the market position of telecommunications operators, it is necessary to take into account the new ranges of digital services and the new types of providers also outside the perimeter of ECS and ECN.

Such extension would allow to include digital services provided by OTT actors (which entail communications services, instant messaging, online content provision, Apps,...), digital services offered by IT providers in the enterprise market, alternative provision of Internet connectivity through Wi-Fi access, and the countervailing power of public central and local authorities in the provision of access networks. Hence, the actual market presence of telecommunications operators should reflect the competitive pressure from all these forces in order not to overestimate the market position of telecommunications operators.

3.2.1

Collective dominance

3.2.1.1

Are you aware of any decisions finding collective dominance by national competition authorities and/or national courts in the electronic telecommunications sector in the EU markets where you operate?

- Yes
- No

3.2.1.2

Please explain.

8000 character(s) maximum

Orange is aware of one decision regarding the Spanish market.

On 19 December 2012 the Spanish NRA (CNMC) fined Vodafone, Orange and Telefonica for an abuse of dominance in the SMS termination and origination wholesale markets. The CNMC notably found that the three mobile network operators held a collective dominant position in the wholesale markets for access and origination services and that they abused it by applying supra-competitive prices in these markets. According to the CNMC, this wholesale coordinated pricing was consistent with the high termination rates policy and aimed at increasing barriers to entry and expansion for virtual mobile operators in order to keep retail prices for short messages high. This decision has been appealed before the national courts by operators considering that the collective dominance was not actually proven and CNMC decided only relying on the NRA decision. Finally the Supreme Court has confirmed the decision of the CNMC.

3.2.1.3

Do you consider that the conditions and market characteristics to be taken into account for demonstrating collective dominance are sufficiently clear and allow regulatory authorities to identify the presence or absence of all forms of significant market power on relevant wholesale markets likely to lead to harm to end users in the framework of *ex ante* regulation in the electronic communication sector?

Yes

No

3.2.1.4

Please explain.

8000 character(s) maximum

The application of single or collective dominance criteria as derived from the competition law is sufficient and clear enough to allow for ex-ante identification of single or collective SMP on wholesale markets. There is no ground in economic theory to justify regulation of telecommunications oligopolies outside the specific context of simple SMP or joint SMP.

In particular, Orange considers that the current framework provides the necessary regulatory means to address the specific case of fixed duopolies. First, as it will be demonstrated in the answers to the following questions, it is possible to show that the Airtours criteria necessary for a market structure to be conducive of collective dominance are fulfilled in the case

of a fixed retail national broadband market when it is served nearly everywhere by a duopoly of a cable and a telecom operator. Second, economic literature proves that a tacit collusion equilibrium naturally happens in a duopolistic market structure when retail products are substitutable (see "Upstream Competition Between Vertically Integrated Firms" The Journal of Industrial Economics 0022-1821, Volume LIX December 2011 No. 4, Bourreau, Hombert, Pouyet, Schutz): more precisely, the tacit collusion emerges from two complementary strategies of the two operators, monopoly wholesale price from one operator, refusal of access with a price higher than the monopoly price from the other operator.

Therefore, collective dominance based on tacit collusion can effectively be proven when appropriate, and is the appropriate approach by which non-competitive duopolies can be analysed. No other concept is needed or justified.

In particular, the concepts of "Unilateral Market Power", UMP and "Significant Impediment of Effective Competition", "SIEC" should not be considered as relevant instruments to regulate market structure in addition to SMP criteria, as they are not relevant in the context of an ex ante market analysis conducted by NRAs. The scope of "SIEC" approach applies in the context of merger control analysis. The "SIEC" approach is designed to assess the variation of competition which may result from the occurrence of a merger (the level of competition as observed before the merger and the level of competition as expected after the merger has occurred), and not to analyse the extent to which a market is prone to competitive constraints, in absolute terms, as it would be required under a regulatory market analysis.

The context of a merger analysis gives the authority the ability to observe the functioning of the market before merger and in particular to assess the viability of the players and their ability to finance investments. In principle, if the situation before the merger is sustainable, the competition authority in charge will not threaten the viability of the players or the financing of investments, even if it rejects the merger or if it accepts the merger with remedies.

This would not be true if a regulatory authority regulates an oligopoly, except in cases of tacit collusion, as the outcome of such an intervention would be unknown. There are economic foundations supporting the regulation of a monopoly. In this respect it should be reminded that joint dominance allows undertakings to behave collectively as a monopoly through tacit collusion. But no robust economic theory can anticipate the effects of imposing regulation on something else than a monopoly, and ensure that, absent joint dominance, a regulated oligopoly would provide a better outcome than an unregulated oligopoly.

This is why, in market economies such as those required by European treaties, the oligopolistic structures that characterize most sectors of the economy are not subject to any specific ex ante regulation. Therefore, complying with BEREC's demands for specific regulation for telecommunications oligopolies would subject the telecom sector to a specific and more stringent competition

policy than any other sector of the whole economy, well beyond the requirements of the transition from monopoly to competition. It would no longer be a matter of preventing the existence of conduct, which would be prohibited by competition law, but of prohibiting or regulating in telecommunications markets situations which are common place in all other sectors of the economy where they do not generate any intervention.

This would run against the primary principle of European competition policy which is to be a horizontal policy that does not privilege or disadvantage any economic sector in order to support efficient resources allocation between economic sectors. Unequal pressure to the disadvantage of the telecom sector would thus lead to a sub-allocation of financial resources to telecom industry, exactly the opposite outcome of the policy desired by the European Union, which is to make telecommunications attractive for investment.

3.2.1.5

Do you consider that the relative paucity of regulatory decisions establishing collective dominance in the framework of *ex ante* regulation in the electronic communication sector (four NRAs, i.e. the Irish in case IE/2004/0121, the Spanish in case ES/2005/0330, the Maltese in case MT/2006/0443, all as regards market 15 of the 2003 Recommendation on relevant markets, and Italy in case IT/2006/0424, as regards market 18 of the 2003 Recommendation on relevant markets, have adopted final measures based on a finding of collective dominance in the past) is attributable to the following factors:

- the characteristics and/or developments of the markets in question do not support such findings
- difficulties in obtaining sufficiently probative evidence on one or more of the elements of the collective SMP test in the specific regulated environment of the electronic communications sector
- other?

3.2.1.6

Please explain.

8000 character(s) maximum

The fact that there have not been many collective dominance cases so far cannot be linked to the difficulty to apply the Airtours test to electronic communications markets, but rather to the structure of the markets concerned.

This is confirmed by the analysis of the main Commission precedents of article 7 cases on collective dominance. In most of these cases, in fact, the Commission's comments are mainly related to the specific features of the cases and of the analysis carried out by NRAs. There is no evidence that the type of test to be applied is a barrier to the finding of SMP in cases where there are clear and evident market failures. On the contrary, most Commission's comments regard the way data has been collected by NRAs and the need to better analyze the interrelation between retail and wholesale markets (and/or the relevance of fringe competitors).

This leads to the conclusion that NRAs or NCAs are perfectly able to find the presence of collective dominance where the characteristics of the relevant markets are coherent with the relevant case law of the European Courts. The number of cases is limited because tacit collusion is rather uncommon in real markets.

The four cases mentioned in the question actually demonstrate that this is possible also in the application of the present regulatory framework. They confirm that the same test does not constitute a too high barrier to the correct usage of collective dominance in the context of Article 7 procedures. The reason why there have not been many collective dominance cases in Article 7 procedures simply follows from the structural characteristics and latest developments of the telecommunications sector which are:

- i) frequent technological changes in networks' roll out that have contributed to prevent markets equilibria favorable to tacit collusion;
- ii) (more) recent technological changes and challenges coming from OTTs and affecting both the wholesale level and, in particular, the retail level;
- iii) uncertain demand, new product designs based on convergence;
- iv) threat of existing and potential infrastructure-based entrants especially in urban / dense geographic areas;
- v) the existence of various complex sets of contractual offerings / services (being multi-dimensional) at the retail level.

Altogether, the mentioned elements have a relevant impact on transparency, sustainability over time (incentive and ability) as well as the existing and potential respondents' reactions such that it has been and probably will be difficult to attain and maintain tacit collusion allowing collective dominance.

3.2.1.7

Are market developments in the two forthcoming regulatory periods (i.e. 6 years in line with Article 16(6)(a) of the Framework Directive) likely to result in an oligopolistic market structure in one or more of the markets in the electronic communications sector which would require the application of the collective dominance test by the NRA in any geographic area of your concern?

- Yes. Please specify which markets may develop such an oligopolistic structure in your country.
- No

3.2.1.8

Please explain.

8000 character(s) maximum

As mentioned in the question 3.2.1.9, wholesale markets in the electronic communication sector are characterized by a fast rate of technological progress and a high level of investment (which entails high fixed investment costs) that incorporates innovation in the networks and access products. As the level of investments needed to permanently incorporate technological change into the network is high, market concentration is likely to be observed. In addition, the cost structure of the local loop is characterized by economies of scale which are also a driver of market concentration.

The deployment of NGA networks is not a driver which leads to limiting potential competition and maintaining high barriers to entry (contrary to what is stated in point 80 of the SMP Guidelines); it is on the contrary a driver of sustainable dynamic competition. A permanent competitive constraint is imposed on network operators which need to upgrade their infrastructure in order to maintain their technological and competitive edges. Consequently, the deployment of VHCN will in general develop in a competitive oligopolistic environment not prone to tacit collusion.

However, one case should attract the attention of the regulators that is the presence, on the fixed access market, of only two actors being a cable and telco operator with comparable market shares. This specific case has not been sufficiently addressed in the past under the angle of joint SMP related to potential tacit collusion. As Orange's answers to the following questions will show, the Airtours conditions to characterize a market structure conducive of tacit collusive are likely to be satisfied in that case.

3.2.1.9

In paragraph 62 of its *Airtours* judgment of 6 June 2002, the General Court laid down 3 criteria to find collective dominance. The first criterion is a high degree of market transparency where members of the dominant oligopoly have *‘the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy’*. In this regard, the Court argues that it is not sufficient for each member of the dominant oligopoly to be aware that interdependent market conduct is profitable for the parties involved, but that each member must also have a means of knowing whether the other members are adopting the same strategy and whether they are maintaining it.

Is Commission guidance needed to explain how to apply this criterion in the framework of *ex ante* regulation in the electronic communications sector?

- Yes. Please clarify how in your opinion this criterion can be sufficiently justified.
- No

3.2.1.10

Please explain.

8000 character(s) maximum

For collective dominance to be established, “the ability” of the members “to know how the other members are behaving in order to monitor whether or not they are adopting the common policy” obviously is one of the relevant criteria.

Let us first address the specific case of where the domestic fixed broadband market of a country is served by the duopoly of the cable operator and the incumbent telecommunications operator. In this case, the criterion on transparency is likely to be fulfilled notably because the total number of customers in this market varies very little: the market is saturated in number of customers and it is inelastic because internet access is essential to households and mobile is not a satisfactory alternative. Consequently, any variation in the number of customers of one of the two operators of the duopoly corresponds to an opposite variation in the number of customers of the other operator. Each operator thus knows exactly the level of activity of the other operator. Moreover, in all European countries, regulators, public authorities and financial analysts publish detailed statistics of fixed broadband markets which reinforce the transparency of the market.

Besides the specific case of telco-cablo duopoly addressed in the paragraph above, Orange would like to make the following remarks on market transparency.

It is worth observing however that the question whether a given market is transparent or not depends not only on the market participants themselves and their behavior (“endogenous elements”) but might also depend on other

elements such as the actions of public authorities, including of regulators themselves (“exogenous elements”). For instance, regulators asking operators to communicate (often very) detailed information on their infrastructure, including on the (envisaged or planned) future roll-out of their infrastructure, and making this information public, in any form whatsoever (maps, search engines, etc.), might induce a high level of transparency; this risk could be strengthened by the proposed article 22 in the draft Electronic Communications Code (geographic survey). Consequently, regulators should be careful when asking operators to communicate too often information or communication with high level of details and avoid making this information public. In addition, would regulators assess the “transparency criterion” in a market analysis, they should do it with care and cannot decide that the “transparency criterion” is met if the fact of this criterion being met finds its origin in public authority intervention.

The European Commission is invited to ensure that regulators do not ask for more information than strictly needed and that the information they receive is not made public or only made public to the necessary extent and provided that the publication of the information does not contribute to a level of transparency that is incompatible with the sound functioning of the markets. In particular any regulatory requirement of transparency regarding commercial wholesale agreement between undertakings should be discarded for this reason.

The European Commission is also invited to closely monitor the application of the “transparency criterion” – and obviously the other criteria as well – by regulators in order to avoid an unjustified finding of joint dominance, causing harm to market dynamics and competition.

3.2.1.11

According to the second criterion set out by the Court in its *Airtours* judgment, a tacit coordination must be sustainable over time: *‘that is to say, there must be an incentive not to depart from the common policy on the market’* for the members of the dominant oligopoly.

The Court ruled that it is not necessary to prove that there is a specific retaliation mechanism, but it has to be established that deterrents exist to ensure that there is a long-term incentive for each member of the dominant oligopoly not to depart from the common policy, which means that each member of the dominant oligopoly must be aware that highly competitive action on its part designed to increase its market share would provoke identical action from others, so it would derive no benefit from its initiative.

Is it sufficient to meet this criterion that adherence to the common policy would be in any circumstances profit-maximising for each of the members of the oligopoly, i.e. that there are sufficiently strong incentives for adherence even in the absence of specific deterrent action by others?

- Yes
- No

3.2.1.12

Please explain.

8000 character(s) maximum

The cablo-telco duopoly case:

In the specific case of a duopoly with balanced market share (ca.50%/50%) with a telecommunications operator and a cable operator, the second criterion can be met. There exist sufficient incentives not to depart from the stable collusive equilibrium:

- Sector-specific regulation of telecommunications provides a compelling motivation for each of the two parties of a duopoly not to seek a decisive strategic competitive advantage over the other. Telecom regulation implies that if one of the two parties of the duopoly obtains a strategic competitive edge over the other, it risks to be considered dominant and to enjoy SMP on the broadband access market and consequently be subject to asymmetric regulation. This asymmetrical regulation would have the object and the effect of annihilating its competitive advantage, reducing the value of its infrastructure and encouraging the entry of other players. This ultimate outcome implies that each party of a fixed duopoly has much more to lose rather than to gain in seeking to dominate the other by lowering price or improving service. Hence, due to telecom regulation, each party of a duopoly which considers an aggressive competitive strategy should expect retaliation not only from the other party, but also from regulatory authorities.

- Besides regulation, pure market forces support the same collusive equilibrium. This is because in a duopoly with balanced market shares and when the market is saturated, the economic incentives to collude are higher than the incentives to compete. The gain in the relative size of the customer base which can be expected from a competitive strategy can only be small (because the existing customer base is already very large) and a competitive strategy is likely to be very costly (because the opponent is of equivalent strength and has a vital need not to become undersized). By contrast, the expected benefit of a collusive strategy is high, as increasing prices on a large customer base up to monopoly price generates large gains, and the risks are low, as the other party has more to gain than to lose by following the same strategy.

Other cases:

In other telecommunications oligopoly markets, i.e. outside the specific case of fixed duopoly, it is likely that each market player has incentives to compete on prices or services because of fixed cost structures, of larger potential than retained market and of the low credibility of retaliation, notably due to the high level of innovation which makes market evolutions irreversible. Hence, the expected gain from a price or service competition is likely to exceed both the outcome of a stable equilibrium and the expected loss from the competitive reaction of the other market players. Moreover, with more than two players, the structure of the market makes the identification of the operator deviating from a collusive equilibrium ambiguous. This notably applies to mobile markets where at least three players operate.

3.2.1.13 Is Commission guidance necessary to explain how to apply the second criterion in the framework of *ex ante* regulation in the electronic communications sector?

- Yes. Please clarify how in your opinion this criterion can be sufficiently justified.
- No

3.2.1.14

Please explain.

8000 character(s) maximum

In the case of a fixed duopoly with a telecommunications operator and a cable operator (in the meaning mentioned above), with full market coverage, inelastic demand, balanced market shares, and absent efficient symmetric regulation promoting market entry: any profitable competitive deviation would result in being subject to asymmetric regulation, which would offset the expected profit from the individual competitive deviation. As a result, each operator has incentives to stick to tacit collusive stable equilibrium, because any deviation would result in both competitive reaction and individual SMP remedies. The prospect of being subject to single dominance regulation is a driver of tacit collusion behaviour. Each operator of the duopoly has incentives to maintain their market shares, increase prices and profit margins, limit investments expenditures, and also to leverage their dominance in the mobile markets.

On the contrary, mobile markets with three players or more are structurally not prone to tacit collusion as these incentives to stick to "common policy" are absent.

3.2.1.15

The third criterion of the Airtours judgment requires evidence that *'foreseeable reaction of current and future competitors, as well as consumers, would not jeopardise the results expected from the common policy'*.

Is Commission guidance necessary to explain how to apply this criterion in the framework of *ex ante* regulation in the electronic communications sector?

- Yes. Please clarify how in your opinion this criterion can be sufficiently justified.
- No

3.2.1.16

Please explain.

8000 character(s) maximum

In the specific case of a duopoly with a telecommunications operator and a cable operator as defined in previous questions 3.2.1.12 and 3.2.1.14 sufficient reaction from undertakings might not exist. Indeed, inelastic demand in the retail market for fixed broadband services and the absence of any available technological substitutes for data services will make any shift in consumer demand unlikely. In the absence of an efficient symmetric regulation (obligation to sharing non-replicable fixed infrastructures, co-investment or co-financing offers) or of appropriate commercial access offers, entry is unlikely, which hinders sources of potential competition. Both duopoly undertakings have therefore individual incentives to favour stable tacit collusion equilibrium over competition. This would not be the case if a symmetric access regulation was put in place or if adequate commercial wholesale access offer was available, as it would allow entry and prevent the emergence of any coordinated strategy.

For other markets not characterised by duopoly, recent evolutions of electronic communication markets, with competitive constraints imposed also from outside of the traditional market boundaries have increased the intensity and the sources of current and potential competition (MVNOs, maverick entry, OTT services, Wi-Fi Internet access...). As a result, the elasticity of consumer demand has increased, which has reduced market power of providers of telecom services. It is therefore likely that expected moves from current or potential competitors would induce significant competitive constraints on incumbents. For instance, mobile markets with at least three network operators are subject to strong competitive constraints and high price-demand elasticity, factors that offset any expected rewards from a tacit collusive strategy, as profit margins are permanently under competitive pressure and continuous investment is needed in order to sustain such competition over time.

Markets for electronic communication services are prone to continuous and irreversible improvement of capacities, continuous enrichment of offers, technology disruption and disruptive market entry, all factors which hinder the likelihood that a coordinated aligned strategy (high stable prices, attempts to prevent retail entry through refusal to grant access...) would prove sustainably enforceable and profitable.

So, NRAs should take account of all sources of potential competition in order to accurately assess the third criterion.

3.2.1.17

In Article 7 case practice on collective dominance findings by individual NRAs (see for example case ES/2005/0330) the Commission considered that retail market conditions may inform an NRA of the structure of the wholesale market, but may and need not in themselves be conclusive as to the finding of SMP at the wholesale level.

To make credible the finding of collusion as regards the refusal, price or other conditions of access at the wholesale level, the Commission has considered that the NRA needs to demonstrate that the rents at the retail level are high enough to incentivise the collective refusal of access to third operators.

The incentive of operators not to grant access was considered difficult to demonstrate if at the retail level there were no rents to protect. In the Spanish case mentioned above the retail market showed some structural features – high prices, limited price evolution and high profitability for the operators concerned - which appear to have provided sufficient incentives to the three operators concerned to collectively refuse access at the wholesale level.

Should the Commission give updated and/or additional guidance on the structural characteristics of the retail market which may render a collective dominance finding at wholesale level more or less credible?

- Yes. Please specify which structural characteristics of the retail markets should be in your opinion present in order to support a collective dominance finding at wholesale level.
- No

3.2.1.18

Please explain.

8000 character(s) maximum

As regards the specific situation of fixed telecom-cable duopoly, high, stable or increasing profit margins can provide incentives for refusal to grant access to potential competitors. It can also be an indicator of a collective dominance at the retail and wholesale level, as preserving high or increasing profitability at the retail level is a strong incentive to stick to tacit collusion equilibrium.

In addition, economic literature proves that a tacit collusion equilibrium naturally happens in a duopolistic market structure when retail products are substitutable (see "Upstream Competition Between Vertically Integrated Firms" The Journal of Industrial Economics 0022-1821, Volume LIX December 2011 No. 4, Bourreau, Hombert, Pouyet, Schutz). More precisely, the tacit collusion emerges from two complementary strategies by the two infrastructure operators: refusal of access from one operator, monopoly wholesale price from the other operator. This can typically happen in a telco-cable duopoly case.

The identification of such tacit collusion can be further confirmed if the symptoms are apparent on the market: high and growing prices, stable market shares, limited level of investment and leverage of joint dominance on related markets. In particular, both fixed operators may own a mobile network operator and develop fixed-mobile convergent offers for which the incremental price of mobile service cannot be matched by pure MNOs, which therefore risk being driven out of the market. Such a move would confirm that jointly dominant fixed operators can cross-subsidise their mobile service with the profits made on their fixed activity.

Outside the specific case of cable-telco duopoly, tacit collusion is very unlikely for markets with at least 3 network players, like mobile markets, which are subject to intense price and investment competition.

3.2.1.19 Are there any specific features of wholesale markets in the electronic communications sector which would have an impact on fulfilment of one or more of the criteria for establishing the existence of collective dominance, and which should be the subject of additional guidance regarding the satisfaction of the evidentiary burden, on a prospective basis for the purposes of *ex ante* market regulation?

- Yes. Please specify which market features could tend to support either a positive or a negative conclusion regarding one or more of the criteria.
- No

3.2.1.20

Please explain.

8000 character(s) maximum

All three cumulative criteria needed to create and evidence collective dominance are likely to be verified in the case of a fixed telecom and cable duopoly in the absence of efficient appropriate access to the fixed infrastructure which could foster entry. Notably, the prospect of being subject to asymmetric simple SMP regulation deters both operators to deviate from the collusive equilibrium and from attempting to achieve a competitive advantage.

Besides this specific case of duopolies, markets in the electronic communication sector are characterised by a fast rate of technological progress and a high level of investment (which entail high fixed investment costs) which incorporates innovation in the networks and access products. As the level of investments needed to permanently incorporate technological change into the network is high, market concentration is likely to be observed. The cost structure is also characterised by economies of scale which are also a driver of market concentration, which do not relate to any lack of effective competition. High level of investment in infrastructure is viewed as a barrier to entry into the relevant market (as stated in point 80 of the SMP Guidelines), however, for high-speed broadband, dynamic competition occurs through investment which incorporates technology.

Deployments of NGA networks are not drivers which lead to limiting potential competition and maintaining high barriers to entry, they are on the contrary drivers of sustainable dynamic competition. A permanent competitive constraint is imposed on network operators which need to upgrade their infrastructure in order to maintain their technological and competitive edge.

Electronic communication markets are also subject to sector specific regulation. The Commission and NRAs should be cautious about possible interrelations between telecom regulation and incentives for tacit collusion, and should refrain from imposing regulation which may incentivise collusion, making regulation circular. For instance:

- Imposing detailed transparency on network investment or non-discrimination on wholesale contracts may facilitate the fulfilment of the first "Airtours" criterion.
- The risk of being regulated as enjoying single dominance may deter competitive strategies in a duopolistic market and help fulfil the second "Airtours" criterion.
- By contrast, bottleneck sharing obligations or regulatory support for commercial access provisions may avoid meeting the third "Airtours" criterion.

3.2.1.21

Should the Commission give any other guidance related to the finding of SMP not mentioned above, such as to the relevance of "the overall economic mechanism of hypothetical tacit coordination" to the application of the *Airtours* criteria in the light of the *Impala* judgement of 10 July 2008?

- Yes
- No

3.2.1.22

Please explain.

8000 character(s) maximum

The Impala judgement concerns the standard of proof, i.e. the level of evidence to be provided in the procedure, when establishing the Airtours criteria.

For the rest, it does not provide any further substantive guidance. Therefore, there is no need for further guidance in the SMP Guidelines.

3.3

Remedies (section 4 of the current Guidelines)

3.3.1

Is section 4.1 of the SMP Guidelines dealing with the imposition, maintenance, amendment or withdrawal of regulatory obligations related to SMP operators still necessary given the experience of the NRAs since 2002 in the imposition of appropriate regulatory obligations?

- Yes
- No

3.3.2

Please explain.

8000 character(s) maximum

Keeping guidelines is necessary in order to restate important elements of the process and adapt it with the new provisions of the Code notably.

It is important to restate that the process starts with the analysis of the competition status on retail markets.

The progressivity and proportionality of the remedies, with cost/benefit analysis as proposed in the draft Code should be clearly explained in the guidelines; especially the principle that when the least intrusive remedy, that is access to civil works, is efficient there is no need to impose another layer of obligation.

One of the main objectives in the draft Code is to support investment in very high capacity networks. The Guidelines should be made consistent with that new objective notably by emphasizing that some remedies like cost orientation can play as a disincentive.

Beyond the section 4.1, the section related to symmetric obligations should be reviewed in respect to the proposed art 59.2 of the draft Code; this could be done in the light of existing symmetric obligations already implemented in certain countries like France or Portugal. Relying on symmetric regulation of bottlenecks allows the decrease of barriers to entry and makes the market structure endogenous. Consequently, this makes market entry easier in circumstances like high prices, non-competitive markets and lack of investment.

The current Guidelines mention that at least one remedy should be imposed to the SMP operator. This should be amended to take into account the presence of commercial wholesale offers or co- investment offers that could answer the identified competition problem making useless a regulatory obligation, as stated in the draft Code.

3.4

Procedural issues (sections 5 and 6 of the current Guidelines)

3.4.1

Is guidance related to procedures, i.e. powers of investigation and cooperation for market analysis, consultation and publication of proposed NRA decision, still necessary given the fact that it mostly summarizes the procedural provisions of the Framework Directive? Since the adoption of the SMP Guidelines in 2002 NRAs have developed extensive rules in this respect e.g. duration of a national consultation at national level.

- Yes
- No

3.4.2

Please explain.

8000 character(s) maximum

3.5

Other

3.5.1

Are there other areas of the SMP Guidelines with a need for improvement, clarification and/or (further) guidance?

- Yes
- No

3.5.2

Please explain.

8000 character(s) maximum

The finding of SMP is a key step in any market analysis. Only if SMP is found, be it single or collective SMP, remedies are imposed on the operators concerned for the duration of the market analysis. If no SMP is found, no remedy can be imposed.

Remedies, if imposed in a competitive environment, without operators having (single or collective) SMP, are likely to cause irreparable harm to market dynamics, innovations, competition and investment development.

In order to avoid that remedies are imposed on operators that don't have or have no longer SMP, the regulatory framework provides that regulators have the obligation to perform market analyses on a regular basis and in due time, to further closely monitor the markets concerned and, if necessary, to remove remedies.

The European Commission is invited to closely monitor whether regulators actually respect the relevant provisions of the regulatory framework and to promptly intervene in order to preserve market dynamics and competition.

We are of the position that SMP Guidelines should be more focused on:

- inter-platform substitution (wide market definition, incl. role of OTT and cable networks)
- the correlation between retail market power and wholesale regulation (SMP at wholesale level should be designated only in case of no competition at retail level)
- real forward-looking approach including confirmed investments which guarantee wholesale access
- the implementation of the Cost Reduction Directive should be taken into account as a support of competition development
- consistency of local market analysis (criteria used by NRAs should be consistent across the EU countries).
- the European Commission should also closely monitor that regulators are fulfilling their obligations regarding the market analysis, definition procedure and their terms. In certain cases a specific market regulation has been applied without any review during almost 11 years.

3.5.3

How often should the future SMP Guidelines be reviewed?

- 10 years
- as appropriate, given the developments in the relevant jurisprudence
- other

3.5.4

Please explain.

8000 character(s) maximum

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