

European Commission: Guidelines on Market Analysis and Assessment of Significant Market Power

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*Natali Helberger
Institute for Information Law (IViR), University of Amsterdam*

Following the recent publication of its Draft Recommendation on relevant product and service markets, the European Commission has now also issued the Guidelines on market analysis and assessment of significant market power under the Community regulatory framework for electronic communications networks and services that were required under Article 15(2) of the Framework Directive (see IRIS 2002-3:4 and 2002-1:5). Market analysis and the assessment of the state of competition on national markets are the necessary preconditions for any intervention by National Regulatory Authorities (NRAs) with the goal of ensuring or restoring effective competition on, and the contestability of, European communication markets. In its Draft Recommendation on relevant product and service markets, the Commission has identified the markets that will be subject to supervision by NRAs. The purpose of the Guidelines is to set out the principles which the NRAs shall apply:

- when analysing the geographic dimension of markets, as identified in the Recommendation;
- when identifying, where necessary, national or sub-national product and service markets which are not listed in the Recommendation;
- when analysing the extent to which national markets are sufficiently competitive, and in particular:
 - when identifying the existence of single or joint dominance (significant market power, SMP) on one particular market and
 - when imposing proportionate ex-ante measures on undertakings with SMP (NRAs must impose at least one regulatory obligation once an undertaking has been designated as having SMP).

NRAs shall take "utmost account" of the Recommendation and the Guidelines when performing their tasks (Article 15(3) of the Framework Directive).

The European Commission emphasises that the definition of markets and the identification of SMP follows the same methodology as under general competition law. One important difference, however, is the prospective character of market

analysis under the new communications framework: unlike under general competition law, the starting point for the analysis is not necessarily an agreement, a concerted practice, concentrations or the abuse of dominance, but rather an anticipation of the future development of the market and the likely existence of effective competition, which is also the reason why the decisions of NRAs have to be reviewed on a regular basis. The prospective approach is also a consequence of the lack of evidence and records of past conduct, especially in newly emerging markets. Accordingly, the outcome of the analysis by NRAs can eventually differ from the outcome of general competition law procedures. Notably, National Competition Authorities (NCAs) may perform their own market analysis and impose adequate remedies, alongside the obligations imposed by NRAs. The European Commission explains this by the fact that ex-ante obligations imposed by NRAs on undertakings with SMP have the aim of fulfilling the specific objectives of the new communications framework, whereas competition law remedies would sanction anti-competitive behaviour.

After a general introduction, the Guidelines give criteria and describe the methods to be used by NRAs when defining national markets and identifying SMP. This includes reference to existing decisions of the European Court of Justice and existing Commission documents and practice. The Guidelines also discuss the possible actions which NRAs can undertake and what aspects have to be taken into account when doing so. Another section is dedicated to procedural questions, in particular NRAs' powers of investigation and the mutual coordination and cooperation between NRAs, NCAs and the European Commission. The Commission stresses the importance of those cooperation procedures. The final section tackles the procedures of public consultation and the publication of the proposed NRA decisions.

Commission guidelines on market analysis and the assesment of significant market power under the Community regulatory framework for electronic communications networks and services, 11 July 2002, OJ C 165/6

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52002XC0711%2802%29:EN:HTML>

European Commission, Draft Working Document, Public consultation on a draft Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, Brussels, 17 June 2002

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