

ROADMAP			
TITLE OF THE INITIATIVE	Review of the Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (SMP Guidelines)		
LEAD DG – RESPONSIBLE UNIT – AP NUMBER	DG CNECT B.3	DATE OF ROADMAP	14/02/2017
LIKELY TYPE OF INITIATIVE	Communication from the Commission		
INDICATIVE PLANNING	2 th quarter 2018		
ADDITIONAL INFORMATION	-		
This indicative roadmap is provided for information purposes only and can be subject to change. It does not prejudice the final decision of the Commission on whether this initiative will be pursued or on its final content and structure.			

A. Context, Subsidiarity Check and Objectives
Context
<p>(1) On 6 May 2015, the Commission announced 16 initiatives in order to make a Digital Single Market for Europe happen. Under Pillar II (Creating the right conditions and a level playing field for digital networks and innovative services to flourish), the Commission promised to present an ambitious overhaul of EU telecoms rules, including more effective spectrum coordination, and common EU-wide criteria for spectrum assignment at national level; creating incentives for investment in high-speed broadband; ensuring a level playing field for all market players, traditional and new; and creating an effective institutional framework.</p> <p>At present, the Framework Directive of the Regulatory Framework for electronic communications¹ establishes a set of procedures to ensure the harmonised application of the regulatory framework throughout the Union.</p> <p>Article 15(2) of the Framework Directive stipulates that the Commission must publish guidelines for market analysis and the assessment of significant market power (SMP Guidelines) which shall be in accordance with the principles of competition law. The legal concept of the SMP is laid down in Article 14(2) of the Framework Directive. Accordingly, any undertaking that enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers is regarded to have a significant market power. This position can be held alone (single SMP) or jointly with other undertakings (joint SMP/collective dominance). It also further stipulates that national regulatory authorities (NRAs) shall, when identifying whether one or more undertakings holds individually or jointly dominant position in a relevant market, act in accordance with EU law and take into utmost account the guidelines for market analysis and the assessment of significant market power published by the Commission pursuant to Article 15 of the Framework Directive (i.e. the SMP Guidelines).</p> <p>The SMP Guidelines are one of the key instruments that guide the NRAs in carrying out their duties related to market analysis procedures under the Regulatory Framework since they serve the NRAs to define the relevant markets and SMP of one or more undertakings in line with the principles of the competition law in the framework of ex ante regulation in the electronic communications sector. Furthermore, as NRAs can impose regulatory obligations on undertakings (companies providing electronic communication services) which hold individually or jointly SMP on a relevant market(s), providing up-to-date guidance on how to define markets and find SMP is hence of paramount importance.</p> <p>The SMP Guidelines in force (the Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services) were published by the Commission in the OJEU in 2002 (C 156, 11.7.2002, p. 6), soon after the adoption of the Framework Directive. However, these rules are not up to date, given the changes in the markets and the Court of Justice of the EU (CJEU) case law.</p>

¹ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

This is the first time that the Commission proposes to review whether the SMP Guidelines require amendment. Such review has also been requested by BEREC, the Body of European Regulators for Electronic Communications, in its report on oligopoly analysis and regulation².

(2) The Framework Directive is now under review. However, the legal basis for the SMP Guidelines – together with definition of relevant markets and significant market power as a basis for imposing regulatory obligations – remains valid under the Commission's proposal for new legal Framework for the electronic communications adopted in 2016 (in the form of proposal for Directive of the European Parliament and of the Council establishing European Electronic Communications Code). In fact, the SMP concept is a corner stone of a market based regulation providing legal certainty for the entire regulatory community. Since the adoption of the Regulatory Framework in 2009, the aim of ex ante regulation has been to reduce sector specific regulation progressively as competition in markets develops, and ultimately for electronic communication markets to be governed by competition law only. Existing SMP Guidelines complement the framework and should be therefore up to date and operational in time for the implementation of the new legal Framework.

Issue

The SMP Guidelines were adopted in 2002. As they were drafted at the beginning of the period of application of the Framework Directive, and therefore without experience of its application, their update is warranted in order to reflect the experience of over a decade of application of the market definition and SMP concepts to the electronic communications sector. Moreover, the Guidelines no longer reflect the current status of the CJEU jurisprudence, in particular, as regards the concept of joint dominance in the electronic communications sector. Finally, market developments in particular in the wholesale broadband markets justify a need for a more mirror guidance on these two concepts by the Commission. The aim is thus to provide the best possible and up-to-date support to NRAs in their analysis of relevant markets for the purpose of ex ante regulation.

Existing SMP Guidelines complement the Regulatory Framework and should be therefore up to date and operational in time for the implementation of the new legal Framework.

Subsidiarity check

Article 15(2) of the Framework Directive stipulates that the Commission shall publish guidelines for market analysis and the assessment of significant market power (SMP Guidelines) which shall be in accordance with the principles of competition law. The Guidelines are not binding however the NRAs are obliged to take them into an utmost account in carrying out their obligations under the Regulatory Framework. They guide NRAs in performing their duties within the market analysis procedure under the Regulatory Framework. In addition, they set out the principles on which the Commission relies when assessing the notifications of the market analysis submitted by the NRAs under Article 7 of the Framework Directive.

Still, if a NRA finds a SMP on a relevant market susceptible to ex ante regulation in any Member States, in line with the overall approach to regulation in the Framework, it is for that NRA to implement regulatory obligations at the national level in accordance with national circumstances to prevent that SMP undertaking(s) abuse(s) its/their position on such markets, assuring effective competition on the underlying retail markets(s) for the benefit of consumers.

The Guidelines therefore fully reflect the distribution of tasks between the Commission and Member States, with the Commission providing guidance on how to interpret the binding principles of the Framework, which Member States have to adapt to national circumstances. One of these binding principles is the definition of SMP in accordance with competition law principles. The Commission is best placed to provide assistance to NRAs in how to best apply such EU-law based principles in a consistent manner across Member States.

Main policy objectives

The scope of the SMP Guidelines is to set out principles for use by the NRAs under the Regulatory Framework

² http://berec.europa.eu/eng/document_register/subject_matter/berec/reports/5581-berec-report-on-oligopoly-analysis-and-regulation.

<p>in relation to market based analysis and assessment of SMP under Article 7 of the Framework Directive.</p> <p>The assessment of SMP has to be in line with competition law principles as set out in the jurisprudence of the CJEU. The policy objective of this review is to ensure that the Guidelines, which the Commission is required to provide, are fully up to date and can provide the best possible guidance to national regulatory authorities in time for the adoption of the revised legal Framework.</p>
B. Option Mapping
<p>The legal basis requires a specific legal instrument: COMMUNICATION.</p> <p>The Commission is obliged under the Framework Directive to adopt the Guidelines, which should be updated as appropriate. The evolution of jurisprudence and of the sector and the rich regulatory experience since the implementation of the Framework call for the first review of the Guidelines.</p>
Proportionality check
<p>Under Article 15(3) of the Framework Directive, National Regulatory Authorities should take the utmost account of these Guidelines which guide them in exercising their responsibilities for defining the relevant markets and assessing SMP.</p> <p>The Guidelines assist national regulators in interpreting competition law principles. The proportionality assessment of the individual measures imposed by national regulators is conducted at the national level on a case by case basis.</p>
C. Data collection and Better Regulation instruments
Data collection
<p>An expert study will be commissioned to gather information that would allow the Commission to update the present SMP Guidelines in line with the developments of EU law in particular in relation to single and collective dominance and to further clarify the correct application of the joint SMP concept in the electronic communications sector.</p> <p>The study will be launched and finalised in 2017.</p> <p>It should be underlined that appropriateness of this instrument to provide further guidelines to the NRAs while assessing SMP concept within market analysis procedure for the purpose of ex ante regulation in the electronic communications market was subject to the evaluation and the impact assessment report in the framework of the REFIT exercise (a proposal for Directive of the European Parliament and of the Council establishing European Electronic Communications Code).</p>
Consultation approach
<p>The review of the SMP Guidelines will directly affect the undertakings providing electronic communications services. The institutional actors in the process include the NRAs and BEREC – Body of European Regulators for Electronic Communications. The initiative is aimed to enhance consumer welfare.</p> <p>The launch of stakeholder consultations related to this initiative will be announced in the consultation planning that can be found at http://ec.europa.eu/yourvoice/consultations/docs/planned-consultations_en.pdf. The proposal for the revised Guidelines will be published in view to ensure that the relevant stakeholders will be able to provide their feedback.</p>

Will an Implementation plan be established?
<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
National regulators must take the Guidelines into utmost account when conducting market analyses. They will continue to take into utmost account the current Guidelines until the updated Guidelines are adopted. When the updated Guidelines will be adopted, they will supersede the previous version.
Will an impact assessment be carried out for this initiative and/or possible follow-up initiatives?
The Impact assessment implies policy choices. The current exercise merely relates to updating the present Guidelines in view of the development of jurisprudence of the CJEU as regards market analysis and, more specifically, significant market power. The legal basis provides no discretion on the content of the guidelines (which have to be based on applicable law), nor on their scope, since the Commission is required to provide guidelines to assist NRAs in the application of the SMP concept. Further, the baseline scenario is not an option because if the Commission's analysis confirms that Guidelines are outdated, then the Commission cannot justify not updating them. It should be underlined that appropriateness of this instrument to provide further guidelines to the NRAs while assessing SMP concept within market analysis procedure for the purpose of ex ante regulation in the electronic communications market was subject to the evaluation and the impact assessment report in the framework of the REFIT exercise (a proposal for Directive of the European Parliament and of the Council establishing European Electronic Communications Code).