SYNOPSIS REPORT
on the public consultation on the
Review of the Significant Market Power (SMP) Guidelines
Policy field: Digital single market

1. Introduction

Article 15(2) of the Framework Directive on a common regulatory framework for electronic communications networks and services\(^1\) requires that the Commission publish the SMP Guidelines, whose content is to be in accordance with the principles of competition law. The currently applicable SMP Guidelines\(^2\) provide that the Commission should amend the Guidelines when appropriate taking into account its experience with applying the regulatory framework and the jurisprudence of the EU Courts.

The open public **consultation on the Review of the Significant Market Power (SMP) Guidelines\(^3\)** - which lasted from 27 March 2017 to 26 June 2017 - gathered input to help evaluate the currently applicable SMP Guidelines and assess to what extent amendments are needed. The consultation was in particular aimed at evaluating the need to update the individual sections of the SMP Guidelines, focusing mainly on the following issues: i) market definition; ii) SMP; iii) collective dominance and iv) regulatory obligations and procedural issues.

In the course of the consultation out of 54 replies, 51 were received online while 3 respondents provided their input by e-mail. Replies were received from respondents from most of the EU Member states, as well as from outside the EU. Umbrella organisations and individual stakeholders contributed. Stakeholders' participation was fairly balanced with contributions from both National Regulatory Authorities (NRAs) and electronic communications networks and services providers – with a strong prevalence of affected operators/industry.

The contributions from the stakeholders who gave their consent to publication are available online. This report also takes account the response of the **Body of European Regulators (BEREC)\(^4\)** to this public consultation.

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(Multiple answers were possible for some question, hence the sum may exceed 55; the statistics only covers submissions via EU Survey)

The **geographical coverage** of respondents includes 22 EU Member states. One respondent from outside the EU submitted a response:

This analysis does not represent the official position of the Commission and its services, and does not bind the Commission in relation to future proposals in this respect.

### 2. Analysis of responses

The analysis in this report is based on the input received from different types of stakeholders.
2.1. Market definition

2.1.1. Product Market

The vast majority of participants in the public consultation acknowledge that the current guidance on the product market definition has served its purpose well and does not call for a major review of the competition law principles underpinning market definition. Some participants ask for some limited adjustments or further guidance on the application of established principles. The respondents underline that the NRAs should continue to apply the three main criteria of the SMP Guidelines (demand-side, supply-side substitutability and potential competition) in order to identify one or more wholesale markets corresponding to a given retail market.

Incumbent operators, in particular, reiterate the importance of wholesale markets being subject to regulation only where the NRA can identify retail market failures. Incumbent operators and some other operators call for guidance on the assessment of competitive constraints exercised by over the top (OTTs) services, as the traditional SSNIP-test would not work for “free-of-charge services”.

The overwhelming majority of participants agree with the principle stated in point 67 of the currently applicable SMP Guidelines, that 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 in question is provided.

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?

Some NRAs ask for the flexibility to ensure that all relevant competitive constraints are captured. In particular, some NRAs underline the need for additional guidance on the indirect constraints test, as it would currently be impractical and costly to apply it.

Some operators and NRAs ask for methodological guidance on the definition of bundle markets, both at retail and wholesale level.
2.1.2. Geographical Market

Overall the current guidance on the geographical market definition is considered to be comprehensive and successfully applied but in need of an update.

Incumbent operators generally call for more granular geographic wholesale markets based on a bottom-up approach, i.e. the starting point of the analysis should be subnational units. The segmented geographic markets should be based on the competitive situation in retail markets. Adjacent markets and global providers should also be considered.

Most of the alternative network operators and some NRAs believe that national markets are still the appropriate geographical unit and that geographically segmented markets would underestimate the market power of the traditional incumbents.

Finally, some NRAs raised concerns about the practicability of properly analysing many relatively small geographic markets.

2.2 SMP assessment

The majority of respondents consider that the criteria in points 78-79 of the Guidelines are still effective for assessing the existence of SMP. However, several respondents suggest specific amendments.

Incumbent operators ask for more guidance on the criteria for assessing SMP. They maintain that NRAs should not establish SMP simply by reference to one or more criteria virtually applicable to all or most providers. NRAs should, in their view, on the basis of a sound and thorough examination of all the individual market circumstances, relate those criteria which are considered of importance back to the definition of SMP. They hold the view that guidance is also needed on the way NRAs should integrate commercial, voluntarily-proposed, negotiated wholesale access agreements in their analysis and that no SMP status can be designated in such circumstances. Furthermore, in their view, it is necessary to take account of digital services provided by OTT actors, digital services offered by IT providers in the business market, alternative provision of Internet connectivity through public Wi-Fi access, and the countervailing power of central and
local public authorities in the provision of access networks in areas where private investment does not occur.

Several operators, including incumbent and alternative operators, argue that market shares should not be considered determinative per se. In particular, alternative operators argue that even lower market shares can support an SMP finding. Some operators add that the size of an undertaking and vertical integration are not indicators of dominance in and of themselves.

Alternative operators stress that combinations of criteria supporting SMP findings can include all criteria adequately reflecting the economic characteristics of the relevant market instead of being limited to those listed in point 78 of the current SMP Guidelines. Furthermore, the alternative operators ask for the inclusion of direct and indirect constraints among the list of SMP criteria and request that the role of self-supply be explicitly addressed.

Internet providers argue that the list of criteria in paragraph 78 of the currently applicable SMP Guidelines should be amended and integrated in order to consider specific factors such as: high fixed costs, increasing economies of scale, large economies of scope, and economies of density. They also highlight that the continuous proliferation of bundled and convergent offers, with the consequent concentrative effects on the market, should be considered for the purpose of applying the first and second criteria of the three criteria test.

Associations of mobile operators ask for guidance to analyse retail markets, but recall that NRAs should focus on the wholesale markets when considering how to remedy a retail market failure. In addition, they stress the need to take account of the new ranges of digital services and of the new types of providers of these services also outside the current perimeter of Electronic Communication Services and Electronic Communication Networks. In this respect, some operators argue that in the mobile markets, the SMP assessment should be less focused on market shares, which tend to underestimate the competitive pressure exercised by OTT services, which are not considered part of the same product market and which do not rely on monetary payments by the retail consumer.
The mobile virtual operators suggest that that the new SMP Guidelines should address issues related to wholesale charge structures and retail price structures. They also consider that NRAs should further examine the role of licensing of radio spectrum, retail bundles and the fixed-mobile integration trend.

Associations of cable, fibre and wireless operators consider that the currently listed criteria for assessing SMP are still effective. However, cable operators ask for an update of the case practice on the calculation of market shares in multi-sided platform markets, while wireless operators consider it more appropriate to place less emphasis on high regulatory barriers to entry. Fibre operators underline the need to consider prospective performance as well as the current situation.

Some operators suggest broadening the list of SMP criteria (paragraph 78 of the current SMP Guidelines) in order to include: i) the presence of co-investments, ii) the presence of asymmetrical information about end customers, and iii) wholesale access agreements between operators. The incumbent operators also submit that the presence of other access networks and of competitive constraints exerted by substitute services should justify the absence of SMP.

As regards the NRAs, one of them stresses the need for reflecting on the impact of bundling in measuring market presence, and in particular in calculating value of sales. Another NRA points out that, from a long-term perspective, it may be necessary to impose access even if dominance has not yet developed, e.g. in fibre markets, but with less stringent price controls. Another NRA considers that in an ex ante regulatory context SMP criteria could be interpreted less narrowly than in ex post/competition law context. Finally, another NRA considers that the SMP assessment, like the geographic market definition, should reflect the growing complexity of markets without any unnecessary regulatory burden.

2.3 Collective dominance

The vast majority of incumbents and some other operators acknowledge that the Airtours\textsuperscript{5} case-law provides for clear and easily applicable criteria to identify the presence of collective dominance (CD) and, thus, there is no need for further guidance.

These participants also pointed out that characteristics and/or developments of the telecommunications sector – which will likely result in oligopolistic structures – do not support, in principle, findings of CD, but competitive dynamics instead.

Incumbents and some other operators and associations (including those representing mobile network operators and fibre investors) also strongly hold the view that no other regulatory intervention beyond the existence of CD is supported by economic theory, competition law, regulatory experience, doctrine or jurisprudence. According to them, in the absence of any SMP, regulation of oligopolies based on the concepts of unilateral market power (UMP), as raised by BEREC, and the 'SIEC' test used in merger control

would not be justified. Moreover, they consider that it would raise legal and economic risks, thus making the telecommunications sector unattractive for investment.

On the other hand, most alternative operators consider that wholesale markets can be subject to forms of jointly held significant market power that may not be fully captured by the Airtours criteria and that the new SMP Guidelines need to evolve in order to reflect this. Most of the alternative operators are of the opinion that it would be appropriate to consider whether the application of the CD standard might be facilitated further by creating a presumption based on a subset of the criteria contained in point 97 of the currently applicable SMP Guidelines, combined with behavioural evidence. They also support, together with different associations, the point that the recourse to symmetrical obligations is not an appropriate alternative to SMP regulation.

In this regard, BEREC proposes that the SMP Guidelines need to be given a wider scope to explicitly address tight oligopolies that lead to a non-competitive outcome without tacit coordination that derive from UMP. Some virtual mobile operators see value in the concept of UMP and ask to address non-competitive oligopolistic mobile communications market structures by introducing: i) a true ex-ante standard of proof; ii) a set of indicators of non-competitive oligopolistic mobile communications market structures, and iii) a set of structural criteria which is specific to the mobile communications sector. Most of the participating NRAs call for powers to address situations of CD as well as unilateral effects, to tackle potential problems of prices above competitive levels, lack of innovation, and poor quality to the detriment of end users.

The incumbent operators consider that, as CD findings can lead to invasive access remedies for network investors, a relatively high standard of proof is appropriate. Conversely, BEREC and some operators argue that the required standard of proof for CD appears to be too high and may not be consistent across markets. NRAs argue that the paucity of CD cases is attributable to the lack of clarity regarding the evidence and standard of proof required, in particular where regulation is in place, and question whether economic reasoning is sufficient or evidence of existing market conduct is necessary.

Moreover, BEREC claims that some Airtours criteria are much more difficult to prove than others (e.g. empirical proof of retaliatory mechanisms) and would require more guidance from the European Commission. Further on, the NRAs advocate that demonstrating stability of tacit coordination should only require demonstrating that adherence to the common policy is profit maximising in the long run, even in the absence of deterrence action by others.

In general, BEREC asks for further guidance on all the Airtours criteria and also suggests that the Commission should, taking into account the Impala cases\(^6\), clarify that there may be different means – beyond the conditions set in the Airtours case – to assess the competitive conditions that prevail at the wholesale and retail levels and that may be conducive to CD. This may be particularly relevant in the context of markets that are already subject to ex ante regulation (in the context of a prospective greenfield analysis),

where it may be helpful to verify whether other parameters (different from those expressly set in the Airtours case) may also be of relevance for proving the existence of an overall economic mechanism of a hypothetical tacit coordination, as referred to by the European Court of Justice in Impala. Instead, the majority of incumbents consider that the Impala judgment does not change the underlying substantive framework (saying that it confirmed the criteria set forth in the Airtours case, elaborating on the role of indirect evidence in showing collective dominance) and thus it does not trigger the need for further guidance by the European Commission.

The participating NRAs and BEREC also asks for more guidance on how to incorporate market circumstances on the retail level in the wholesale CD analysis, while adding that in the retail analysis a finding of a risk of single or CD is not necessary, but that it should be sufficient to demonstrate the (potential) consumer harm.

According to some NRAs the absence of rents to protect at the retail level in a regulated environment should not be considered a reason to withdraw the regulation put in place to remedy the natural inclination of operators not to grant wholesale access. It is therefore important for the European Commission to give guidance on the structural characteristics of retail markets which may render a finding of CD at wholesale level more credible. Some operators observe that, in a functioning market, wholesale access would be provided to use spare capacity in an efficient way and that denial of wholesale access can be an indication of CD. Certain operators also state that co-investment decisions should not be discouraged by oligopoly regulation.

Some operators argue that the market is likely to develop oligopolistic structures and this could well lead to a greater necessity for a CD analysis, especially in relation to specific geographic areas where there is significant infrastructure competition. However, they expect that this will lead to more findings of effective competition than of collective dominance.
The vast majority of incumbents consider that two infrastructure-based operators competing with at least one of them providing voluntary commercial wholesale access indicate effective competition and thus there is no need to impose ex ante regulation.

Many incumbent operators note that: the emergence of new infrastructure-based competitors, the competitive constraints coming from OTT players at the retail level, the transition of the traditional electronic communications sector to a wider ecosystem (that rely on different business models like zero-price, data-driven services), trends towards different types of convergence and the increasing importance of media content, make CD extremely unlikely. In their view, factors such as convergence and other bundled elements will stimulate incentives to deviate from any putative common strategy and add more complexity to the ecosystem, making any tacit agreements unstable.

Incumbent operators ask for more guidance on how NRAs may identify and assess the positive effects of network competition, the consumer welfare and the benefit generated by oligopolistic competition in their market analysis. On the other hand, alternative operators argue that the harm likely to result from CD must be assessed not only with respect to end-users, but with respect to customers at both the wholesale and retail level.

Some NRAs ask for more guidance on the differences between mobile and fixed markets.

2.4 Remedies

**Incumbent operators** suggest that the guidelines should provide clarification with respect to progressivity and proportionality of remedies as proposed in the draft Code. In this context, a cost-benefit analysis would be imperative. Overall, the revised Guidelines should take into account the investment objectives of the draft Code. Incumbents also submit that the current framework gave regulators too much discretionary power. Point 108 of the current Guidelines should be revised to ensure that access regulation only takes place at wholesale level. In general, remedies are only viewed as an adequate tool to rectify a market failure at retail level and they require a rigorous impact assessment.

**Alternative operators** emphasize that the section of the Guidelines on remedies should be in alignment with the objectives of the Code, which makes it necessary to maintain such section at least for the duration of the Code. Furthermore, remedies remain essential for higher levels of competition and investment in the EU.

**One association of cable, fibre and wireless operators** and **one operator** ask for clarification regarding the concept of the leveraging of market power. So far, it is not sufficiently explained whether the concept covers situations in which the upstream input is connected to more than one retail product. The same question applies to a scenario without converged or bundled products. In this context, **NRAs** require further guidance on the extent to which they are allowed to impose obligations across sub-markets.
2.5 Procedural issues

According to one incumbent, the use of the same *ex ante* and *ex post* analyses and practices would ensure a more transparent and predictable process. One fibre operator, one association of mobile operators and one association of network operators ask the Commission to provide guidelines to streamline the deadlines for market analysis procedures. This should include the requirement for NRAs to conduct the market review before the expiry date in a way that ensures the timely conclusion of the examination.