

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

1

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.

2

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

Non-profit Organisation

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.

FTTH 184016132

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.

FTTH Council Europe

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 FTTH Council believes that the issue of potential competition deserves more guidance and also notes the sometimes circular dependency that could apply to this condition. For instance, if a very broad geographic market is identified then the likelihood of a strong entrant in broadband access markets is less than if a narrower geographic market is defined. In turn the metrics that NRAs use to adjudicate the extent to which geographic segmentation might be justified may become self-fulfilling. The pricing differentials, market shares, number of operators etc. are all about the here and now and give little weight to the prospective force of competition. Such an approach risks institutionalising the scope of competition by confining the scope of competition to where it has evolved today rather than where it has the potential to emerge. NRAs also have the possibility to look more to what is possible in a prospective sense rather than what has happened in the past. Prospectively, competition in certain areas may be possible but using regulation to enable easy entry based on virtual products may undermine the threat of capital intensive entry ever happening and so a further self-fulfilling prophecy may result.

Regulation, existing and signalled, has a profound impact on the market operations. Credible, predictable and stable policies create a framework in which capital can make strategic choices over the longer term.

The FTTH Council believe that it is correct and justified to express concern to have market boundaries which are stable, not only for the administrative burden it might impose on Regulators but rather because of the uncertainty it can create in a context where returns may take 20 years to be realised.

It is for this reason that the FTTH Council believes that a broad urban/rural divide is appropriate in regulatory assessments. The most extensive and detailed cost modelling exercise conducted in Europe was commissioned by the FTTH Council (and in which its Members co-operated and participated) and the key cost drivers is density and associated built environment characteristics. The fact is that over a 20 year period, some areas can support competitive entry whilst others have less capacity to do so. An appropriate differentiation of regulation in these areas will be important for investors. The cost drivers identified above will remain stable over time and thus can form the basis of a predictable regulatory delineation of geographic markets.

The nature of regulation therefore both in terms of the impact of current regulation and the identified geographic market have a profound impact on potential competition. This should be elucidated in the guidelines.

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

This is a theoretical paradigm for setting market boundaries and that paradigm is is well understood.

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

The FTTH Council believes that the delineation of markets should be conducted on the basis of an appropriate demand and substitution analysis and this is precisely the basis on which Paragraph 67 of the Guidelines is based. This is true of both Wholesale and Retail markets.

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 FTTH Council notes that there has been considerable experience in the treatment of indirect constraints in broadband markets. An important distinction exists between the treatment of an effective indirect constraint and an in-effective indirect constraint, in terms of the choice as to where those indirect constraints are first considered (at the market definition stage or in the market power assessment) even if it would not affect the outcome on the question of market power. The market can be defined broadly and the firm in question would not have market power within that market, or the market is defined narrowly, but the analysis recognises that the effective indirect constraint that comes from outside the market constrains the behaviour in the market.

Ultimately, from an economic perspective in either approach what is important is that the indirect constraint is strong. A real danger arises in situations where the indirect constraint is not strong and in those circumstances it will matter whether indirect constraints are included in the market definition or not. Where an indirect constraint is not strong and where it is included in the market definition, the broadening of the defined market will serve to understate the degree of market power that a firm has. In the Belgian market, the inclusion of cable in the defined market on the basis of indirect constraints for instance would have the effect of reducing Proximus' market share of the defined market from virtually 100% to 58%. On the other hand, consideration of weak indirect constraints during the SMP assessment is likely to better reflect the actual effect on the operator concerned .

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

The FTTH Council notes the metrics which the current SMP Guidelines adjudges to be appropriate in determining the extent to which geographic segmentation might be justified based on practice under Competition Law based on Article 102. However, those indicators such as the pricing differentials, market shares, number of operators etc. are all about the here and now and give little weight to the prospective force of competition. A principal difference between the ex post definition of geographic markets and the ex ante approach is the prospective nature of that ex ante definition.

The use of such a static approach as that used under an Article 102 analysis risks to institutionalise competition to areas where competition already exists rather than look forward to where it might emerge. There is now a chance to look more to what is possible rather than what has happened in the past. Prospective competition in certain areas is possible but importantly, it is often as much a function of regulation itself as well as factors such as population density and regulatory practice. More guidance should be given on these points.

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

In the context of broadband competition, the FTTH Council believe that more guidance should be given to NRAs on the importance of structural indicators. While NRA's know the potential scope of competition best in their countries, the FTTH Council in its cost modelling work has seen a significant flattening of the cost curve in areas where population density goes above 400 per square kilometre (some exceptions may occur where business density is high). The FTTH Council believes structural indicators such as this should be given a significant weighting in deciding those areas which are susceptible to infrastructure based competition.

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

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

While the FTT Council do not believe the text as it concerns measurement of current market shares needs to be adjusted (volume v value indicators being well understood), it may be appropriate to highlight the need to consider prospective performance as well as the current situation.

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

The FTTH Council is aware of the desire on the part of National regulators in individual Member States and collectively to control oligopolistic markets, irrespective of whether joint dominance exists or not. The proposed Unilateral Market Power test put forward by the BEREC or a lightening of joint dominance threshold result in the same effect, the arbitrary regulation of any telecom market but in particular or broadband markets. The FTTH Council expresses a profound concern at the suggested approach to tight oligopolies put forward by BEREC in their documents lobby on the EECC. The conclusion from the FTTH Council's analysis of the issue of Joint Dominance is that it is not suited to oversight by ex ante regulators and is best left to ex post supervision. The analysis from BEREC also sees the difficulty of imposing ex ante regulation but principally sees this as something that might be circumvented by extending regulation to any tight oligopoly. It is, to quote John Wayne, a 'shoot them all and let God sort them out' approach. Such a blunder bust approach risks creating a massive number of type I errors which, as noted elsewhere, are much more costly to society than type II errors. It also raises a fundamental concern about the nature of regulatory oversight in the sector and its impact on certainty and investment.

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

A number of aspects should be clarified to a greater extent, not least of which is the nature of the market failure which in turn indicates which regulatory authorities should deal with its presence. The FTTH Council takes a view that the regulation of jointly dominant entities is something which, if controlled, is best controlled by ex-post authorities. The FTTH Council believes ex-post regulators are better placed to consider issues of tacit collusion and that ex-ante regulators do not have the appropriate tools to make a full analysis of such behaviour.

This is for a variety of reasons but principally because a competitive market outcome could be misinterpreted and relatively good market outcomes could be undone. Competition Authorities have more checks and balances (e.g. a requirement to show consumer harm) than ex-ante regulators and also have greater powers (eg. the ability to conduct dawn raids and to question witnesses under oath). When dealing with borderline cases, such differences may be crucial.

From a practical perspective as well, the FTTH Council does not believe that broadband telecom markets exhibit the kind of characteristics that would facilitate tacitly collusive co-ordination. Broadband telecommunications markets, both from a supply and from a demand perspective are continuously evolving and morphing. Stability, even if heavily orchestrated and institutionalised as within company groups, is difficult to maintain. Taking that requirement outside a company and seeking to create and maintain a collusive agreement through a 'nod and a wink' looks fanciful.

From a fixed market perspective, the FTTH Council believes that Fibre/Copper/Coax networks do not have common functionality or cost structures and views these asymmetries as extremely prejudicial to the emergence of joint dominance in fixed networks.

The FTTH Council Europe therefore believes that in terms of the incentives to collude, transparency and in terms of the market structure and development, telecom markets are not typically suited to the emergence of joint dominance. It could be that this will change in time, because these markets may stabilise in the future but that is no basis for action today.

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

What would be the focal point of a jointly dominant strategy?

For a finding of joint or collective dominance in the form of tacit collusion, members of the dominant oligopoly must be aware, sufficiently precisely and quickly, of the way in which the other members' market conduct is evolving.

The degree of transparency is important for the purpose of permitting each member of the oligopoly to detect deviation from the common policy and to ascertain whether it is necessary to react to any such deviations by punishing them.

An NRA will need to identify a focal point, around which the tacit collusion can be organised. AS noted by BEREC this collusion is often identified as being around a denial of access and that the incentive will be higher prices (and lower consumption) in the retail market.

An NRA will need to consider a number of characteristics to be present in the focal point including transparency, i.e. that any deviation from this focal point would be immediately visible through the appearance of a service provider on the retail market. An NRA will need to judge the product in question to be homogeneous (so that there is clarity in terms of what is on offer).

The focal point identified will also need to be capable of allocating profits in the market in some fashion. It is only logical to deny access on a collective rather than a unilateral basis if there is an equilibrium to be protected by such a denial. This equilibrium must be achieved either by

reduced competition centred on either price or output. This equilibrium, if it exists, should be observable in the form of high prices, poor choice /quality.

For joint dominance to exist then evidence of conscious parallelism in the market or strategic signalling interactions in the market must be provided. However, in most instances, such company behaviour might be a normal commercial strategy rather than conscious parallelism or tacit collusion. Hence the FTT Council believe that ex-ante regulators are not best placed to interpret that observed behaviour but that ex-post regulators are. Ex-post regulators can examine documents in dawn-raids and normally have the power to examine/interrogate senior executives. This allows a proper understanding of the origin and objective of the commercial behaviour observed.

The FTT Council believes ex-post regulators are better placed to consider issues of tacit collusion and that ex-ante regulators do not have the appropriate tools to make a full analysis of such behaviour.

Transparency

In order to punish deviation, there must first be detection. If there is a pricing focal point, then detection will be difficult as product and pricing plans are generally not homogeneous in telecommunications markets.

The choice of services in the communications sector is large and differentiated. Consumers have to make significant search costs to find the best deal. Although the consumers are helped through comparisons made by consumer unions and independent internet sites, it is likely that market transparency is relatively low. This will inhibit tacit collusion because monitoring the behaviour of the competing firms and the finding of a focal point to collude on becomes more difficult.

More fundamentally, if the focal point identified by an NRA is denial of access by an operator then that is anything but transparent (or logical). In the first instance, for broadband markets, telecom operators make offers in the wholesale market, either of their own volition or on foot of a regulatory obligation. Since access is normally already available, its putative denial would seem rather pointless as a collective action. Nevertheless, it may be that the denial by a cable operator of a third party access product could unilaterally dampen competition in the retail market.

Even if this was accepted, it cannot be known what negotiations with which parties are underway at any given moment in time since any such negotiations are not subject made public and would not be until any agreement was in place. No parties other than those in the negotiations are aware of these discussions. Third parties will only become aware of the discussions if they conclude successfully. In the absence of such transparency, an operator could not make any assessment of how likely entry is from one moment to the next. It is also unclear what the nature of any agreement would be until sometime after agreement.

The issue is even more acute for mobile markets since several parties might be in discussions at any moment in time - at the moment of a request for access the assumption must be that similar requests have been made to others. The game theory possibilities are endless but the observable facts is that there are MVNO agreements in every EU market almost exclusively based on commercial terms.

The FTTH Council does not believe that telecom markets exhibit the kind of transparency that would facilitate tacitly collusive co-ordination.

The Incentive to coordinate and the Sustainability of tacit co-ordination over time

For a finding of collective dominance, the situation of tacit co-ordination must be sustainable over time; in other words, there must not be an incentive to depart from the common policy. Tacit collusion would require that the individual interest of each operator (maximising profits while competing with the others) does not outweigh the common interest of the members of the alleged dominant oligopoly (not to accept any significant wholesale customers or lower pricing in order to grab market share).

To compare whether the alleged common interest not to grant access to third parties outweighs individual profit maximising interests, each operator has to be able to assess the expected profits in the tacit collusion. However, such profits can only be estimated on the basis of expected output and price levels in the market. Therefore, the sustainability of alleged tacit co-ordination would only be possible if there is a common understanding of equilibrium level of output and prices. For such an understanding to exist in any market is unusual - but in markets as dynamic as those in the telecoms sector it is unimaginable.

Any focal point which is to deny access can only be considered as a secondary focal point to facilitate the primary focal point which is to agree a price /output equilibrium.

The evidence of such a primary focal point could only be observed in the retail market and, while it is not an absolute legal necessity to conclude that there is tacit collusion taking place at the retail level, any view of the observable level of competition at the retail level must be consistent with the existence of a primary focal point. In effect, if the retail market is working well enough then there is no basis for believing anything needs to be addressed at the wholesale level.

Mature and Static Markets

Far from these being static markets which are not worth competing for, as suggested by entering an agreement to divide the market, it is clear that there is still significant growth in both fixed and mobile markets in terms of number of users and the value of that market.

Therefore the value of potential future profits will be significant and this in turn will reduce the incentive to collaborate and increasing the incentive

to 'cheat' should a tacit agreement ever be entered into. The likelihood of establishing an agreement is very small given the differences between the network operators in terms of size, cost structures etc.

The FTTH Council Europe notes that in terms of the incentives to collude, transparency and in terms of the market development, telecom markets are not typically suited to the emergence of joint dominance.

continuation at 3.2.1.22

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

The expectation is that significant entry in FTTH markets by new entrants will continue. IF we look back 6 years we can see that the Spanish, French, Lithuanian, Swedish, Portuguese markets all moved from Monopoly/Duopoly to oligopoly structures based on infrastructure market dynamics and entry which was driven by entrant operators.

Provided the correct regulatory measures are taken, the FTTH Council believes that this result can be replicated in all areas of Europe with sufficient population density and technology maturity.

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

The FTTH Council believe that the conditions identified in the *Airtours* case are generally important but that the three conditions highlighted in that case are especially relevant in that case. Depending on the market circumstances and the focal point identified, a selection of the factors above will become more or less important. What is clear is that a simple check list approach cannot be adopted and that a nuanced and careful assessment of the specific elements needs to be analysed, in particular by reference to the focal point identified which will impact greatly on the weight given to those factors listed in the SMP guidelines. The Commission recognised this fact itself in the last review of the regulatory framework when it proposed deleting Annex II:

Annex II to the Framework Directive listed the criteria to be used by the national regulatory authorities when assessing joint dominance in accordance with the second subparagraph of Article 14(2) of that Directive. Since the list in Annex II is neither necessary nor exhaustive, it may be misleading for national regulatory authorities conducting market analysis. Furthermore, the concept of joint dominance also depends on the case law of the European Court of Justice. Annex II is therefore unnecessary and can be repealed. [<http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52007PC0697>]

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 FTTH Council believe that the conditions identified in the Airtours case are generally important but that the three conditions highlighted in that case are especially relevant in that case. Depending on the market circumstances and the focal point identified, a selection of the factors above will become more or less important. What is clear is that a simple check list approach cannot be adopted and that a nuanced and careful assessment of the specific elements needs to be analysed, in particular by reference to the focal point identified which will impact greatly on the weight given to those factors listed in the SMP guidelines. The Commission recognised this fact itself in the last review of the regulatory framework when it proposed deleting Annex II:

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[<http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52007PC0697>]

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

The FTTH Council believe that the conditions identified in the Airtours case are generally important but that the three conditions highlighted in that case are especially relevant in that case. Depending on the market circumstances and the focal point identified, a selection of the factors above will become more or less important. What is clear is that a simple check list approach cannot be adopted and that a nuanced and careful assessment of the specific elements needs to be analysed, in particular by reference to the focal point identified which will impact greatly on the weight given to those factors listed in the SMP guidelines. The Commission recognised this fact itself in the last review of the regulatory framework when it proposed deleting Annex II:

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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

The FTTH Council believe that the conditions identified in the Airtours case are generally important but that the three conditions highlighted in that case are especially relevant in that case. Depending on the market circumstances and the focal point identified, a selection of the factors above will become more or less important. What is clear is that a simple check list approach cannot be adopted and that a nuanced and careful assessment of the specific elements needs to be analysed, in particular by reference to the focal point identified which will impact greatly on the weight given to those factors listed in the SMP guidelines. The Commission recognised this fact itself in the last review of the regulatory framework when it proposed deleting Annex II:

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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

The reference to the Spanish case omits the fact that that case could not be appealed and also overlooks the fact that there was zero apparent benefit to consumers as a result of the intervention. There is no evidence that the market improved as a result of the remedies imposed nor is there any evidence that the Spanish market's performance either improved or dis-improved as a result of the intervention. Producer surplus moved between producers but bringing MVNOs into the market for its own sake cannot the purpose of regulation.

Joint Dominance is a self-creating and self-perpetuating cartel. This is an extraordinary outcome in relation to telecom markets.

The kinds of structural indicators that would have to be considered include:

Identification of the focal point

Transparency

The Incentive to coordinate

Sustainability of tacit co-ordination over time

A Growing Market

Significant market share asymmetry between the Operators

Cost and functional differences

Ease of switching between operators.

Factors facilitating competition, lack of entry barriers and technological change.

But their nature would need to be quite exceptional also.

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

Please see the answer given to 3.2.1.6 above

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 *Im pala* judgement of 10 July 2008?

- Yes
 No

3.2.1.22

Please explain.

8000 character(s) maximum

The Commission should highlight the case by case approach that is necessary, the extreme unlikelihood of a finding and the fact that some assessment of consumer harm should be undertaken.

continuation of 3.2.1.6

Significant symmetries between operators

In order for members of an alleged dominant oligopoly to have common interests to tacitly coordinate their behaviour, it is normally required that the undertakings concerned are sufficiently symmetric in terms of their products, cost structures, market shares and so forth.

Telecom markets typically exhibit large differences in market shares where legacy customer attachment typically means incumbent telecom operators lead with certain altnets and cable operators often being geographically limited - this would a-priori seem to make reaching and enforcing tacit collusion very difficult, even if it does not exclude it.

Traditionally, the alternative operators with the lowest market share have a stronger interest to deviate from any restrictive agreement, since cannibalisation of the margin at retail level by wholesale operators would cost less.

The importance of economies of scale in this industry also entails that large differences in network sizes and in market shares may result in large differences in cost structure and operating at sub-scale levels incurs significant costs.

Some of the main differences between cable networks and DSL based networks is that DSL networks offers a dedicated line in the local loop instead of a shared medium. As currently set-up, the cable network that the customer uses e.g. an Internet access service through a third party will automatically also have access to the other downstream channels (analogue broadcast services).

Another important difference is the fact that the DSL network tends to be national in character and owned and maintained by one operator, as opposed to tens of different cable operators. Although the two largest cable operators pass the vast majority of homes, a third party will still need to negotiate with multiple operators in the absence of a joint initiative by the cable operators. Another difference is the fact that the national DSL network is far more standardized than would the amalgamated cable networks whose technical evolutions differ markedly and this in turn increases the (technical) complexity for a third party seeking national coverage over cable networks.

The net effect of these elements suggests that network operators have networks which have radically different structure, functionality and cost structures which are clearly not conducive to aligned behaviour.

The FTTH Council does not see Fibre/Copper/Coax networks having common functionality or cost structures and views these asymmetries as extremely prejudicial to the emergence of joint dominance in fixed networks.

Product choice and quality.

Pricing is not the only indicator of competition at the retail layer. Product and service innovation, and the quality of service delivered, are also crucial factors in measuring consumer welfare. Both of these indicators in the European market also indicate a very good deal for end users.

Ease of switching between operators.

There are number of factors which impact on the ease of switching in a given market. The most important of these factors concerns search costs, the ready identification of superior products or more advantageous prices, contract terms (including minimum contract duration), and the ease with which consumers can move from one operator to another.

A level of advertising in turn feeds through to a particular level of brand awareness, reflecting the extent to which end users are aware of the firm's presence in the market and the various competitive offers. Special offers from operators to end users are an important part of the competitive dynamic in Telecoms market.

Special offers are normally given in exchange for minimum commitments in terms of contract duration and the European Regulatory Framework has a maximum contract period of 24 months thereby limiting lock in periods. Broadband and mobile customer contracts therefore often have a minimum duration normally reflecting the level of handset-subsidy or other acquisition costs involved.

Therefore, contract terms as a facilitator of switching is driven by two important factors. First, the nature of the contract between the network operator and the end user is important, i.e., whether it is stand-alone contract for broadband/mobile service or a broader contract for multiple services. Second, in the event that the relationship is already in place then

the percentage of consumers which are 'off contract', i.e., that have already met the minimum duration requirement, is also important since they will be the effective switching target group.

The conclusion on this point is that customer switching between operators occurs at a level which is greatly affected by the contract terms. Even if one party sought to put a dramatic offer into the market in order to discipline a rival, the ability to 'punish' is greatly diminished even to the point where it is completely ineffective.

The FTTT Council notes that methods to enforce discipline are not obvious in telecom markets in general.

Factors facilitating competition - entry barriers and technological change.

An NRA will need to show evidence of a combination of entities having the ability to restrict output and thereby raise prices profitably or otherwise, since any reduction in output can easily be met by any other operator in the market simply by either entering, expanding output or availing of any existing regulated access products.

Entry is also facilitated by the general absence of evidence of consistent 'first mover advantages' in telecom markets since the rapid pace of technological change often means that operators entering later are enabled at a lower cost and with greater functionality either in back office functions, deployment methods and so on.

Technological change is also a significant feature of these markets and the implications of such technological change, in terms of capacity, cost structure and future access offerings are not clear or fully understood today. However, such uncertainty creates a destabilising environment in which any possible tacit collusion would find it hard to persist.

While the periodic evolution of mobile networks is a feature of that part of the telecoms market (with 4G still being completed and 5G under development) some rather dramatic evolutions can be observed in those markets where infrastructure based competition has been promoted.

In summary therefore, looking at each of these indicators there is no indicator that suggests telecom markets are prone to Joint Dominance. Furthermore, in the Cases cited as being findings of Joint Dominance the Irish case was overturned on appeal as was the Maltese case. The Spanish case could not be appealed on the merits because of an incorrect transposition of the underlying directive. Nevertheless, there is no indicator that any particular change resulted in that market on foot of regulation, or put differently, there is no indicator that consumers gained even if the distribution of producer surplus was distorted by the NRA.

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

The only change to the suite of remedies available to the NRAs has been the addition of the Functional Separation provision. To a large extent, these remedies still follow the process described in the Guidelines (where an NRA imposes a remedies outside the predesigned remedies) and therefore an update of this aspect is not required.

As noted already there is no evidence that remedies imposed on notional joint-SMP operators in the Spanish market had any impact whatsoever. The nature of the alleged offence makes symmetric remedies counterproductive and theoretically, common remedies are more likely to reinforce the joint SMP rather than alleviate it. The only real evidence we have is from Spain and certainly there, the remedies did not have an impact on consumer outcomes.

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

It is useful to have common guidance (even if many NRAs do not follow the guidance on minimum consultation periods).

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

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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