
ITU Telecommunications Development Bureau:

Primer of the EU's Framework and Significant Market Power Test

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European Legal Standards of Dominance

"The dominant position referred to in Article [82] relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately consumers".

- **Case 27/76, *United Brands v. Commission***

"The existence of a dominant position may derive from several factors, which, taken separately, are not necessarily determinative but among these factors a highly important one is the existence of very large market shares".

- **Case 85/76, *Hoffmann-La Roche / Commission***

[Other factors include: size of operations, wide geographical presence, financial resources, vertical integration, product range, essential facilities.]

Background on EU Competition Regulation

The EC **Framework Directive** 2002/21/EC of 7 March 2002 detailed on a common regulatory framework for electronic communications networks and services in Europe and took effect in July 2003.

In addition, the EC issued:

- The **EC Directive on Competition** 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services. Competition is embraced for all such networks in Europe.
- The Commission Guidelines on market analysis and the assessment of **significant market power** under the Community regulatory framework for electronic communications networks and services (2002/C 165/03).
- **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 on a common regulatory framework for electronic communication networks and services and Explanatory Memorandum
- **The Report on Market Definitions for Regulatory Obligations in Communications Markets A Study for the European Commission** by Squire, Sanders & Dempsey

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Comparison of EU Competition Regulation

	1998 Framework	2003 Framework
• 1a. Market selection	In directives, political criteria Council+EP	Insufficiency of antitrust remedies Cion+NRAs
1b. Market delineation	Technical basis	Economic basis SSNIP test
2. SMP assessment	Presumption at 25% market share	Dominant position (single or joint)
3. Remedies choice	Automatically full suite	Based on market failure, justified, proportionate

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The aims of the Directive on competition in the markets for electronic communications networks and services

The focal point of the new regulatory package is to address relevant markets that are characterised by a lack of effective competition.

- In particular, the Directives have aimed to resolve the conceptual distinctions between the *ex ante* & *ex post* approach to competition law.
- Effective competition is defined in terms of the existence of a **dominant market actor or actors** with **significant market power “SMP”**.
- **Ex ante obligations only imposed if following a market analysis, the market is not effectively competitive, that is there is no single or collective dominance**
- The identification of relevant markets requires an **economic assessment, consistent with EU competition rules** of the **range of services which act as competitive substitutes to certain other services**. One way to assess demand and supply-side substitution is to apply the “**hypothetical monopolist test**” (SSNIP)
- The presence of substitutable services acts as a competitive restraint on any single or collective market actor(s) wishing to raise prices and/or limit production for those services. 5

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The SSNIP Test explained

- First set out in 1982 US Department of Justice Merger Guidelines.
- SSNIP test seeks to identify smallest market within which a hypothetical monopolist could impose a **Small Significant Non-transitory Increase in Price**
- Usually defined as a price increase of 5% for at least 12 months.

Applying the SSNIP test

- Start with smallest possible market and ask if 5% price increase profitable
- If not, then firm does not have sufficient market power to raise price.
- Next closest substitute is added to the relevant market and test repeated.
- Process continues until the point is reached where a hypothetical monopolist could profitably impose a 5% price increase.
- **Market is then defined.**

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Market areas and competition law areas in Europe (i)

Market areas listed in Annex I of the Framework Directive	Corresponding competition law market set out in Annex I of the Recommendation
Retail	
The provision of connection to and use of the public telephone network at fixed locations.	1. Access to the public telephone network at a fixed location - residential 2. Access to the public telephone network at a fixed location - business 3. Publicly available local/and or national telephone services provided at a fixed location-residential 4. Publicly available local/and or national telephone services provided at a fixed location - business 5. Publicly available international telephone services provided at a fixed location- business 6. Publicly available international telephone services provided at a fixed location Residential
The provision of leased lines to end users.	7. The minimum set of leased lines
Wholesale	
call origination in the fixed public telephone network	8. Call origination on the public telephone network provided at a fixed location
call termination in the fixed public telephone network	9. Call termination on individual public telephone networks provided at a fixed location
transit services in the fixed public telephone network	10. transit services in the public telephone network provided at fixed locations
call origination on public mobile telephone networks	15. Access and call origination on public mobile telephone networks

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Market areas and competition law areas in Europe (ii)

Market areas listed in Annex I of the Framework Directive	Corresponding competition law market set out in Annex I of the Recommendation
Call termination on public mobile telephone networks	16. Voice Call termination on individual mobile networks
leased line interconnection (interconnection of part circuits)	13. Wholesale terminating segments of leased lines 14. Wholesale Trunk segments of leased lines
access to the fixed public telephone network, including unbundled access to the local loop	11. Wholesale unbundled access (including shared access) to metallic loops and sub-loops, for the purpose of providing broadband and voice services - 12. Wholesale broadband access
access to public mobile telephone networks, including carrier selection	15. Access and call origination on public mobile telephone networks
Wholesale provision of leased line capacity to other suppliers of electronic communications networks or services	13. Wholesale or terminating segments of leased lines 14. Wholesale Trunk segments of leased lines
Services provided over unbundled (twisted metallic pair) loops.	11. Wholesale unbundled access (including shared access) to metallic loops and sub-loops, for the purpose of providing broadband Internet services
The national market for international roaming services on public mobile telephone networks.	17. The wholesale national market for international roaming on public mobile networks

+ Broadcasting

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The role of National Regulatory Authorities (NRAs)

The Directive requires that the NRAs conduct their market analyses consistent with the Commission's Recommendation.

- The Recommendation identifies those **product and service markets** within the electronic communications sector which may be the subject of *ex ante* regulation, and a Decision on transnational markets.
- The Commission has also published a set of **SMP Guidelines** on market analysis and the assessment of the concept of SMP.
- **NRA's must take the "utmost account" of the Commission's Recommendation and SMP Guidelines** when analysing the relevant markets and identifying SMP operators therein.
- This process takes considerable resources and time (cf Europe with 18 markets and Malaysia with 7 defined markets)

Thank You

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I would be pleased to answer any questions you might have