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| United States of America |
| Views on WTSA-16 Doc.40 – Recommendation ITU-T D.261 (Principles for market definition and identification of operators with significant market power - SMP) |

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| **Abstract:** | The United States does not support the approval of the draft new Recommendation ITU-T D.261 (Principles for market definition and identification of operators with significant market power - SMP) contained in WTSA-16 Document 40. |

Introduction

WTSA-16 Document 40 contains a draft new Recommendation ITU-T D.261 (Principles for market definition and identification of operators with significant market power - SMP) from Study Group 3. As the United States explained in its response to TSB Circular 209, and contained in WTSA-16 Document 49, this proposed new Recommendation was determined by Study Group 3 following a number of procedural irregularities and process failures. As a result, the United States was of the view that this document was neither stable nor mature. Moreover, the draft Recommendation in Document 40 is substantively flawed.

Discussion

During the meeting when Study Group 3 considered this draft Recommendation, the ITU-D information demonstrating that without an ITU-T Recommendation, an SMP framework to measure competition in markets “has been adopted around the world since 2002” was not adequately considered. Study Group 3 likewise did not review or consider the extensive practical guidance on measuring competition contained in the ITU-D ICT Regulation Toolkit. For example, the Toolkit, in section 2.2, explains the purpose of measuring competition in markets and the possible remedies that might be applied if anti-competitive actions are found. These remedies may have no implications for telecommunications regulators, but in all events, will be national decisions. At no time was the proposed Recommendation liaised with any relevant organizations, most particularly, ITU-D. As such, it is at best duplicative of work being done by ITU-D contrary to numerous ITU Resolutions, the ITU Strategic Plan, and the Basic Instruments of the Union requiring the avoidance of duplication, for example No. 215 of the Convention and Resolution 191 (Busan, 2014).

Moreover, this draft Recommendation is at best a national, not a technical international telecommunications standard as required by the ITU-T Strategic Plan. Although the United States promotes convergence on sound competition law approaches, ITU-D data clearly indicates that the manner in which SMP is implemented “varies a lot, showing that each country has its own particularities in defining SMP.” Consequently, this confirms that a one-size-fits-all international Recommendation for this purely national and sovereign decision is not appropriate.

This draft Recommendation thus conflicts with provisions of the ITU-T Strategic Plan, which, in objective T1, states that ITU-T is to “[d]evelop non-discriminatory international standards (ITU-T recommendations), in a timely manner, and foster interoperability and improved performance of equipment, networks, services and applications” (emphasis added). Similarly, No. 193 of the Convention states that ITU-T study groups study “technical, operating, and tariff questions” to “prepare recommendations on them with a view to standardizing telecommunications on a worldwide basis” (emphasis added). This Recommendation does not advance interoperability or standardization of telecommunications. Rather, this proposed national Recommendation addresses issues that are subject to the soverign rights of Member States and contravenes both the ITU-T Strategic Plan and the ITU Convention.

Finally, this draft new Recommendation is outside the scope of Study Group 3, impermissibily trying to expand its mandate to include national competition policy questions.

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Proposal

For all of these reasons, draft new Recommendation ITU-T D.261 in Document 40 should not be approved.