

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)

(Text with EEA relevance)

1. INTRODUCTION

1.1. Scope and purpose of the guidelines

1. These guidelines set out the principles for use by national regulatory authorities (NRAs) in the analysis of markets and effective competition under the new regulatory framework for electronic communications networks and services.
2. This new regulatory framework comprises five Directives: 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 ⁽¹⁾, hereinafter the framework Directive; Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services ⁽²⁾, hereinafter the authorisation Directive; Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities ⁽³⁾, hereinafter the access Directive; Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services ⁽⁴⁾, hereinafter the universal service Directive; a Directive of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector ⁽⁵⁾. However, until this last Directive is formally adopted, Directive 97/66/EC of the European Parliament and the Council concerning the processing of personal data and protection of privacy in the telecommunications sector ⁽⁶⁾, hereinafter the data protection Directive, remains the relevant Directive.
3. Under the 1998 regulatory framework, the market areas of the telecommunications sector that were subject to *ex-ante* regulation were laid down in the relevant directives, but were not markets defined in accordance with the principles of competition law. In these areas defined under the 1998 regulatory framework, NRAs had the power to designate undertakings as having significant market power when they possessed 25 % market share, with the possibility to deviate from this threshold taking into account the undertaking's ability to influence the market, its turnover relative to the size of the market, its control of the means of access to end-users, its access to financial resources and its experience in providing products and services in the market.
4. Under the new regulatory framework, the markets to be regulated are defined in accordance with the principles of European competition law. They are identified by the

Commission in its recommendation on relevant product and service markets pursuant to Article 15(1) of the framework Directive (hereinafter 'the Recommendation'). When justified by national circumstances, other markets can also be identified by the NRAs, in accordance with the procedures set out in Articles 6 and 7 of the framework Directive. In case of transnational markets which are susceptible to *ex-ante* regulation, they will where appropriate be identified by the Commission in a decision on relevant transnational markets pursuant to Article 15(4) of the framework Directive (hereinafter 'the Decision on transnational markets').

5. On all of these markets, NRAs will intervene to impose obligations on undertakings only where the markets are considered not to be effectively competitive ⁽⁷⁾ as a result of such undertakings being in a position equivalent to dominance within the meaning of Article 82 of the EC Treaty ⁽⁸⁾. The notion of dominance has been defined in the case-law of the Court of Justice as a position of economic strength affording an undertaking the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers. Therefore, under the new regulatory framework, in contrast with the 1998 framework, the Commission and the NRAs will rely on competition law principles and methodologies to define the markets to be regulated *ex-ante* and to assess whether undertakings have significant market power ('SMP') on those markets.
6. These guidelines are intended to guide NRAs in the exercise of their new responsibilities for defining markets and assessing SMP. They have been adopted by the Commission in accordance with Article 15(2) of the framework Directive, after consultation of the relevant national authorities and following a public consultation, the results of which have been duly taken into account.
7. Under Article 15(3) of the framework Directive, NRAs should take the utmost account of these guidelines. This will be an important factor in any assessment by the Commission of the proportionality and legality of proposed decisions by NRAs, taking into account the policy objectives laid down in Article 8 of the framework Directive.
8. These guidelines specifically address the following subjects: (a) market definition; (b) assessment of SMP; (c) SMP designation; and (d) procedural issues related to all of these subjects.

9. The guidelines have been designed for NRAs to use as follows:

- to define the geographical dimension of those product and service markets identified in the Recommendation. NRAs will not define the geographic scope of any transnational markets, as any Decision on transnational markets will define their geographic dimension,
- to carry out, using the methodology set out in Section 3 of the guidelines, a market analysis of the conditions of competition prevailing in the markets identified in the Recommendation and Decision and by NRAs,
- to identify relevant national or sub-national product and service markets which are not listed in the Recommendation when this is justified by national circumstances and following the procedures set out in Articles 6 and 7 of the framework Directive,
- to designate, following the market analysis, undertakings with SMP in the relevant market and to impose proportionate *ex-ante* measures consistent with the terms of the regulatory framework as described in Sections 3 and 4 of the guidelines,
- to assist Member States and NRAs in applying Article 11(1f) of the authorisation Directive, and Article 5(1) of the framework Directive, and thus ensure that undertakings comply with the obligation to provide information necessary for NRAs to determine relevant markets and assess significant market power thereon,
- to guide NRAs when dealing with confidential information, which is likely to be provided by:
 - undertakings under Article 11(1f) of the authorisation Directive and Article 5(1) of the framework Directive,
 - national competition authorities (NCAs) as part of the cooperation foreseen in Article 3(5) of the framework Directive, and
 - the Commission and a NRA in another Member State as part of the cooperation foreseen in Article 5(2) of the framework Directive.

10. The guidelines are structured in the following way:

Section 1 provides an introduction and overview of the background, purpose, scope and content of the guidelines. **Section 2** describes the methodology to be used by NRAs to define the geographic scope of the markets identified in the market Recommendation as

well as to define relevant markets outside this Recommendation. **Section 3** describes the criteria for assessing SMP in a relevant market. **Section 4** outlines the possible conclusions that NRAs may reach in their market analyses and describes the possible actions that may result. **Section 5** describes the powers of investigation of NRAs, suggests procedures for coordination between NRAs and between NRAs and NCAs, and describes coordination and cooperation procedures between NRAs and the Commission. Finally, **Section 6** describes procedures for public consultation and publication of NRAs' proposed decisions.

11. The major objective of these guidelines is to ensure that NRAs use a consistent approach in applying the new regulatory framework, and especially when designating undertakings with SMP in application of the provisions of the regulatory framework.
12. By issuing these guidelines, the Commission also intends to explain to interested parties and undertakings operating in the electronic communications sector how NRAs should undertake their assessments of SMP under the framework Directive, thereby maximising the transparency and legal certainty of the application of the sector specific legislation.
13. The Commission will amend these guidelines, whenever appropriate, taking into account experience with the application of the regulatory framework and future developments in the jurisprudence of the Court of First Instance and the European Court of Justice.
14. These guidelines do not in any way restrict the rights conferred by Community law on individuals or undertakings. They are entirely without prejudice to the application of Community law, and in particular of the competition rules, by the Commission and the relevant national authorities, and to its interpretation by the European Court of Justice and the Court of First Instance. These guidelines do not prejudice any action the Commission may take or any guidelines the Commission may issue in the future with regard to the application of European competition law.

1.2. Principles and policy objectives behind sector specific measures

15. NRAs must seek to achieve the policy objectives identified in Article 8(2), (3) and (4) of the framework Directive. These fall into three categories:
 - promotion of an open and competitive market for electronic communications networks, services and associated facilities,
 - development of the internal market, and
 - promotion of the interests of European citizens.

16. The purpose of imposing *ex-ante* obligations on undertakings designated as having SMP is to ensure that undertakings cannot use their market power either to restrict or distort competition on the relevant market, or to leverage such market power onto adjacent markets.
 17. These regulatory obligations should only be imposed on those electronic communications markets whose characteristics may be such as to justify sector-specific regulation and in which the relevant NRA has determined that one or more operators have SMP.
 18. The product and service markets whose characteristics may be such as to justify sector-specific regulation are identified by the Commission in its Recommendation and, when the definition of different relevant markets is justified by national circumstances, by the NRAs following the procedures set out in Articles 6 and 7 of the framework Directive⁽⁹⁾. In addition, certain other markets are specifically identified in Article 6 of the access Directive and Articles 18 and 19 of the universal service Directive.
 19. In respect of each of these relevant markets, NRAs will assess whether the competition is effective. A finding that effective competition exists on a relevant market is equivalent to a finding that no operator enjoys a single or joint dominant position on that market. Therefore, for the purposes of applying the new regulatory framework, effective competition means that there is no undertaking in the relevant market which holds alone or together with other undertakings a single or collective dominant position. When NRAs conclude that a relevant market is not effectively competitive, they will designate undertakings with SMP on that market, and will either impose appropriate specific obligations, or maintain or amend such obligations where they already exist, in accordance with Article 16(4) of the framework Directive.
 20. In carrying out the market analysis under the terms of Article 16 of the framework Directive, NRAs will conduct a forward looking, structural evaluation of the relevant market, based on existing market conditions. NRAs should determine whether the market is prospectively competitive, and thus whether any lack of effective competition is durable⁽¹⁰⁾, by taking into account expected or foreseeable market developments over the course of a reasonable period. The actual period used should reflect the specific characteristics of the market and the expected timing for the next review of the relevant market by the NRA. NRAs should take past data into account in their analysis when such data are relevant to the developments in that market in the foreseeable future.
 21. If NRAs designate undertakings as having SMP, they must impose on them one or more regulatory obligations, in accordance with the relevant Directives and taking into account the principle of proportionality. Exceptionally, NRAs may impose obligations for access and interconnection that go beyond those specified in the access Directive, provided this is done with the prior agreement of the Commission, as provided by Article 8(3) of that Directive.
 22. In the exercise of their regulatory tasks under Article 15 and 16 of the framework Directive, NRAs enjoy discretionary powers which reflect the complexity of all the relevant factors that must be assessed (economic, factual and legal) when identifying the relevant market and determining the existence of undertakings with SMP. These discretionary powers remain subject, however, to the procedures provided for in Article 6 and 7 of the framework Directive.
 23. Regulatory decisions adopted by NRAs pursuant to the Directives will have an impact on the development of the internal market. In order to prevent any adverse effects on the functioning of the internal market, NRAs must ensure that they implement the provisions to which these guidelines apply in a consistent manner. Such consistency can only be achieved by close coordination and cooperation with other NRAs, with NCAs and with the Commission, as provided in the framework Directive and as recommended in Section 5.3 of these guidelines.
- ### 1.3. Relationship with competition law
24. Under the regulatory framework, markets will be defined and SMP will be assessed using the same methodologies as under competition law. Therefore the definition of the geographic scope of markets identified in the Recommendation, the definition where necessary of relevant product/services markets outside the Recommendation, and the assessment of effective competition by NRAs should be consistent with competition case-law and practice. To ensure such consistency, these guidelines are based on (1) existing case-law of the Court of First Instance and the European Court of Justice concerning market definition and the notion of dominant position within the meaning of Article 82 of the EC Treaty and Article 2 of the merger control Regulation⁽¹¹⁾; (2) the 'Guidelines on the application of EEC competition rules in the telecommunications sector'⁽¹²⁾; (3) the 'Commission notice on the definition of relevant markets for the purposes of Community competition law'⁽¹³⁾, hereinafter the 'Notice on market definition'; and (4) the 'Notice on the application of competition rules to access agreements in the telecommunications sector'⁽¹⁴⁾, hereinafter the 'Access notice'.

25. The use of the same methodologies ensures that the relevant market defined for the purpose of sector-specific regulation will in most cases correspond to the market definitions that would apply under competition law. In some cases, and for the reasons set out in Section 2 of these guidelines, markets defined by the Commission and competition authorities in competition cases may differ from those identified in the Recommendation and Decision, and/or from markets defined by NRAs under Article 15(3) of the framework Directive. Article 15(1) of the framework Directive makes clear that the markets to be defined by NRAs for the purpose of *ex-ante* regulation are without prejudice to those defined by NCAs and by the Commission in the exercise of their respective powers under competition law in specific cases.
26. For the purposes of the application of Community competition law, the Commission's Notice on market definition explains that the concept of the relevant market is closely linked to the objectives pursued under Community policies. Markets defined under Articles 81 and 82 EC Treaty are generally defined on an *ex-post* basis. In these cases, the analysis will consider events that have already taken place in the market and will not be influenced by possible future developments. Conversely, under the merger control provisions of EC competition law, markets are generally defined on a forward-looking basis.
27. On the other hand, relevant markets defined for the purposes of sector-specific regulation will always be assessed on a forward looking basis, as the NRA will include in its assessment an appreciation of the future development of the market. However, NRAs' market analyses should not ignore, where relevant, past evidence when assessing the future prospects of the relevant market (see also Section 2, below). The starting point for carrying out a market analysis for the purpose of Article 15 of the framework Directive is not the existence of an agreement or concerted practice within the scope of Article 81 EC Treaty, nor a concentration within the scope of the Merger Regulation, nor an alleged abuse of dominance within the scope of Article 82 EC Treaty, but is based on an overall forward-looking assessment of the structure and the functioning of the market under examination. Although NRAs and competition authorities, when examining the same issues in the same circumstances and with the same objectives, should in principle reach the same conclusions, it cannot be excluded that, given the differences outlined above, and in particular the broader focus of the NRAs' assessment, markets defined for the purposes of competition law and markets defined for the purpose of sector-specific regulation may not always be identical.
28. Although merger analysis is also applied *ex ante*, it is not carried out periodically as is the case with the analysis of the NRAs under the new regulatory framework. A competition authority does not, in principle, have the opportunity to conduct a periodic review of its decision in the light of market developments, whereas NRAs are bound to review their decisions periodically under Article 16(1) of the framework Directive. This factor can influence the scope and breadth of the market analysis and the competitive assessment carried out by NRAs, and for this reason, market definitions under the new regulatory framework, even in similar areas, may in some cases, be different from those markets defined by competition authorities.
29. It is considered that markets which are not identified in the Recommendation will not warrant *ex-ante* sector specific regulation, except where the NRA is able to justify such regulation of an additional or different relevant market in accordance with the procedure in Article 7 of the framework Directive.
30. The designation of an undertaking as having SMP in a market identified for the purpose of *ex-ante* regulation does not automatically imply that this undertaking is also dominant for the purpose of Article 82 EC Treaty or similar national provisions. Moreover, the SMP designation has no bearing on whether that undertaking has committed an abuse of a dominant position within the meaning of Article 82 of the EC Treaty or national competition laws. It merely implies that, from a structural perspective, and in the short to medium term, the operator has and will have, on the relevant market identified, sufficient market power to behave to an appreciable extent independently of competitors, customers, and ultimately consumers, and this, solely for purposes of Article 14 of the framework Directive.
31. In practice, it cannot be excluded that parallel procedures under *ex-ante* regulation and competition law may arise with respect to different kinds of problems in relevant markets⁽¹⁵⁾. Competition authorities may therefore carry out their own market analysis and impose appropriate competition law remedies alongside any sector specific measures applied by NRAs. However, it must be noted that such simultaneous application of remedies by different regulators would address different problems in such markets. *Ex-ante* obligations imposed by NRAs on undertakings with SMP aim to fulfil the specific objectives set out in the relevant directives, whereas competition law remedies aim to sanction agreements or abusive behaviour which restrict or distort competition in the relevant market.

32. As far as emerging markets are concerned, recital 27 of the framework Directive notes that emerging markets, where *de facto* the market leader is likely to have a substantial market share, should not be subject to inappropriate *ex-ante* regulation. This is because premature imposition of *ex-ante* regulation may unduly influence the competitive conditions taking shape within a new and emerging market. At the same time, foreclosure of such emerging markets by the leading undertaking should be prevented. Without prejudice to the appropriateness of intervention by the competition authorities in individual cases, NRAs should ensure that they can fully justify any form of early, *ex-ante* intervention in an emerging market, in particular since they retain the ability to intervene at a later stage, in the context of the periodic re-assessment of the relevant markets.

2. MARKET DEFINITION

2.1. Introduction

33. In the Competition guidelines issued in 1991⁽¹⁶⁾, the Commission recognised the difficulties inherent in defining the relevant market in an area of rapid technological change, such as the telecommunications sector. Whilst this statement still holds true today as far as the electronic communications sector is concerned, the Commission since the publication of those guidelines has gained considerable experience in applying the competition rules in a dynamic sector shaped by constant technological changes and innovation, as a result of its role in managing the transition from monopoly to competition in this sector. It should however be recalled that the present guidelines do not purport to explain how the competition rules apply, generally, in the electronic communications sector, but focus only on issues related to (i) market definition; and (ii) the assessment of significant market power within the meaning of Article 14 of the framework Directive (hereafter SMP).
34. In assessing whether an undertaking has SMP, that is whether it 'enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately consumers'⁽¹⁷⁾, the definition of the relevant market is of fundamental importance since effective competition can only be assessed by reference to the market thus defined⁽¹⁸⁾. The use of the term 'relevant market' implies the description of the products or services that make up the market and the assessment of the geographical scope of that market (the terms 'products' and 'services' are used interchangeably throughout this text). In that regard, it should be recalled that relevant markets defined under the 1998 regulatory framework were distinct from those identified for competition-law purposes, since they were based on certain specific aspects of end-to-end communications rather than on the demand and supply criteria used in a competition law analysis⁽¹⁹⁾.
35. Market definition is not a mechanical or abstract process but requires an analysis of any available evidence of past market behaviour and an overall understanding of the mechanics of a given sector. In particular, a dynamic rather than a static approach is required when carrying out a prospective, or forward-looking, market analysis⁽²⁰⁾. In this respect, any experience gained by NRAs, NCAs and the Commission through the application of competition rules to the telecommunication sector clearly will be of particular relevance in applying Article 15 of the framework Directive. Thus, any information gathered, any findings made and any studies or reports commissioned or relied upon by NRAs (or NCAs) in the exercise of their tasks, in relation to the conditions of competition in the telecommunications markets (provided of course that market conditions have since remained unchanged), should serve as a starting point for the purposes of applying Article 15 of the framework Directive and carrying out a prospective market analysis⁽²¹⁾.
36. The main product and service markets whose characteristics may be such as to justify the imposition of *ex-ante* regulatory obligations are identified in the Recommendation which the Commission is required to adopt pursuant to Article 15(1) of the framework Directive, as well as any Decision on transnational markets which the Commission decides to adopt pursuant to Article 15(4) of the framework Directive. Therefore, in practice the task of NRAs will normally be to define the geographical scope of the relevant market, although NRAs have the possibility under Article 15(3) of the framework Directive to define markets other than those listed in the Recommendation in accordance with Article 7 of the framework Directive (see below, Section 6).
37. Whilst a prospective analysis of market conditions may in some cases lead to a market definition different from that resulting from a market analysis based on past behaviour⁽²²⁾, NRAs should nonetheless seek to preserve, where possible, consistency in the methodology adopted between, on the one hand, market definitions developed for the purposes of *ex-ante* regulation, and on the other hand, market definitions developed for the purposes of the application of the competition rules. Nevertheless, as stated in Article 15(1) of the framework Directive and Section 1 of the guidelines, markets defined under sector-specific regulation are defined without prejudice to markets that may be defined in specific cases under competition law.

2.2. Main criteria for defining the relevant market

38. The extent to which the supply of a product or the provision of a service in a given geographical area constitutes the relevant market depends on the existence of competitive constraints on the price-setting behaviour of the producer(s) or service provider(s)

concerned. There are two main competitive constraints to consider in assessing the behaviour of undertakings on the market, (i) demand-side; and (ii) supply-side substitution. A third source of competitive constraint on an operator's behaviour exists, namely potential competition. The difference between potential competition and supply-substitution lies in the fact that supply-side substitution responds promptly to a price increase whereas potential entrants may need more time before starting to supply the market. Supply substitution involves no additional significant costs whereas potential entry occurs at significant sunk costs⁽²³⁾. The existence of potential competition should thus be examined for the purpose of assessing whether a market is effectively competitive within the meaning of the framework Directive, that is whether there exist undertakings with SMP⁽²⁴⁾.

39. Demand-side substitutability is used to measure the extent to which consumers are prepared to substitute other services or products for the service or product in question⁽²⁵⁾, whereas supply-side substitutability indicates whether suppliers other than those offering the product or services in question would switch in the immediate to short term their line of production or offer the relevant products or services without incurring significant additional costs.

40. One possible way of assessing the existence of any demand and supply-side substitution is to apply the so-called 'hypothetical monopolist test'⁽²⁶⁾. Under this test, an NRA should ask what would happen if there were a small but significant, lasting increase in the price of a given product or service, assuming that the prices of all other products or services remain constant (hereafter, 'relative price increase'). While the significance of a price increase will depend on each individual case, in practice, NRAs should normally consider customers' (consumers or undertakings) reactions to a permanent price increase of between 5 to 10 %⁽²⁷⁾. The responses by consumers or undertakings concerned will aid in determining whether substitutable products do exist and, if so, where the boundaries of the relevant product market should be delineated⁽²⁸⁾.

41. As a starting point, an NRA should apply this test firstly to an electronic communications service or product offered in a given geographical area, the characteristics of which may be such as to justify the imposition of regulatory obligations, and having done so, add additional products or areas depending on whether competition from those products or areas constrains the price of the main product or service in question. Since a relative price increase of a set of products⁽²⁹⁾ is likely to lead to some sales being lost, the key issue is to determine whether the loss of sales would be sufficient to offset the increased profits which would otherwise be made from sales made following the price increase. Assessing the demand-side and supply-side substitution

provides a way of measuring the quantity of the sales likely to be lost and consequently of determining the scope of the relevant market.

42. In principle, the 'hypothetical monopolist test' is relevant only with regard to products or services, the price of which is freely determined and not subject to regulation. Thus, the working assumption will be that current prevailing prices are set at competitive levels. If, however, a service or product is offered at a regulated, cost-based price, then such price is presumed, in the absence of indications to the contrary, to be set at what would otherwise be a competitive level and should therefore be taken as the starting point for applying the 'hypothetical monopolist test'⁽³⁰⁾. In theory, if the demand elasticity of a given product or service is significant, even at relative competitive prices, the firm in question lacks market power. If, however, elasticity is high even at current prices, that may mean only that the firm in question has already exercised market power to the point that further price increases will not increase its profits. In this case, the application of the hypothetical monopoly test may lead to a different market definition from that which would be produced if the prices were set at a competitive level⁽³¹⁾. Any assessment of market definition must therefore take into account this potential difficulty. However, NRAs should proceed on the basis that the prevailing price levels provide a reasonable basis from which to start the relevant analysis unless there is evidence that this is not in fact the case.

43. If an NRA chooses to have recourse to the hypothetical monopolist test, it should then apply this test up to the point where it can be established that a relative price increase within the geographic and product markets defined will not lead consumers to switch to readily available substitutes or to suppliers located in other areas.

2.2.1. *The relevant product/service market*

44. According to settled case-law, the relevant product/service market comprises all those products or services that are sufficiently interchangeable or substitutable, not only in terms of their objective characteristics, by virtue of which they are particularly suitable for satisfying the constant needs of consumers, their prices or their intended use, but also in terms of the conditions of competition and/or the structure of supply and demand on the market in question⁽³²⁾. Products or services which are only to a small, or relative degree interchangeable with each other do not form part of the same market⁽³³⁾. NRAs should thus commence the exercise of defining the relevant product or service market by grouping together products or services that are used by consumers for the same purposes (end use).

45. Although the aspect of the end use of a product or service is closely related to its physical characteristics, different kind of products or services may be used for the same end. For instance, consumers may use dissimilar services such as cable and satellite connections for the same purpose, namely to access the Internet. In such a case, both services (cable and satellite access services) may be included in the same product market. Conversely, paging services and mobile telephony services, which may appear to be capable of offering the same service, that is, dispatching of two-way short messages, may be found to belong to distinct product markets in view of their different perceptions by consumers as regards their functionality and end use.
46. Differences in pricing models and offerings for a given product or service may also imply different groups of consumers. Thus, by looking into prices, NRAs may define separate markets for business and residential customers for essentially the same service. For instance, the ability of operators engaged in providing international retail electronic communications services to discriminate between residential and business customers, by applying different sets of prices and discounts, has led the Commission to decide that these two groups form separate markets as far as such services are concerned (see below). However, in order for products to be viewed as demand-side substitutes it is not necessary that they are offered at the same price. A low quality product or service sold at a low price could well be an effective substitute to a higher quality product sold at higher prices. What matters in this case is the likely responses of consumers following a relative price increase ⁽³⁴⁾.
47. Furthermore, product substitutability between different electronic communications services will arise increasingly through the convergence of various technologies. Use of digital systems leads to an increasing similarity in the performance and characteristics of network services using distinct technologies. A packet-switched network, for instance, such as Internet, may be used to transmit digitised voice signals in competition with traditional voice telephony services ⁽³⁵⁾.
48. In order, therefore, to complete the market-definition analysis, an NRA, in addition to considering products or services whose objective characteristics, prices and intended use make them sufficiently interchangeable, should also examine, where necessary, the prevailing conditions of demand and supply substitution by applying the hypothetical monopolist test.
- 2.2.1.1. Demand-side substitution
49. Demand-side substitution enables NRAs to determine the substitutable products or range of products to which consumers could easily switch in case of a relative price increase. In determining the existence of demand substitutability, NRAs should make use of any previous evidence of consumers' behaviour. Where available, an NRA should examine historical price fluctuations in potentially competing products, any records of price movements, and relevant tariff information. In such circumstances evidence showing that consumers have in the past promptly shifted to other products or services, in response to past price changes, should be given appropriate consideration. In the absence of such records, and where necessary, NRAs will have to seek and assess the likely response of consumers and suppliers to a relative price increase of the service in question.
50. The possibility for consumers to substitute a product or a service for another because of a small, but significant lasting price increase may, however, be hindered by considerable switching costs. Consumers who have invested in technology or made any other necessary investments in order to receive a service or use a product may be unwilling to incur any additional costs involved in switching to an otherwise substitutable service or product. In the same vein, customers of existing providers may also be 'locked in' by long-term contracts or by the prohibitively high cost of switching terminals. Accordingly, in a situation where end users face significant switching costs in order to substitute product A for product B, these two products should not be included in the same relevant market ⁽³⁶⁾.
51. Demand substitutability focuses on the interchangeable character of products or services from the buyer's point of view. Proper delineation of the product market may, however, require further consideration of potential substitutability from the supply side.
- 2.2.1.2. Supply-side substitution
52. In assessing the scope for supply substitution, NRAs may also take into account the likelihood that undertakings not currently active on the relevant product market may decide to enter the market, within a reasonable time frame ⁽³⁷⁾, following a relative price increase, that is, a small but significant, lasting price increase. In circumstances where the overall costs of switching production to the product in question are relatively negligible, then that product may be incorporated into the product market definition. The fact that a rival firm possesses some of the assets required to provide a given service is immaterial if significant additional investment is needed to market and offer profitably the services in question ⁽³⁸⁾. Furthermore, NRAs will need to ascertain whether a given supplier would actually use or switch its productive assets to produce the relevant product or offer the relevant service (for instance, whether their capacity is committed under long-term supply agreements, etc.). Mere hypothetical supply-side substitution is not sufficient for the purposes of market definition.

53. Account should also be taken of any existing legal, statutory or other regulatory requirements which could defeat a time-efficient entry into the relevant market and as a result discourage supply-side substitution. For instance, delays and obstacles in concluding interconnection or co-location agreements, negotiating any other form of network access, or obtaining rights of ways for network expansion ⁽³⁹⁾, may render unlikely in the short term the provision of new services and the deployment of new networks by potential competitors.
54. As can be seen from the above considerations, supply substitution may serve not only for defining the relevant market but also for identifying the number of market participants.
- 2.2.2. *Geographic market*
55. Once the relevant product market is identified, the next step to be undertaken is the definition of the geographical dimension of the market. It is only when the geographical dimension of the product or service market has been defined that a NRA may properly assess the conditions of effective competition therein.
56. According to established case-law, the relevant geographic market comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which area the conditions of competition are similar or sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different ⁽⁴⁰⁾. The definition of the geographic market does not require the conditions of competition between traders or providers of services to be perfectly homogeneous. It is sufficient that they are similar or sufficiently homogeneous, and accordingly, only those areas in which the conditions of competition are 'heterogeneous' may not be considered to constitute a uniform market ⁽⁴¹⁾.
57. The process of defining the limits of the geographic market proceeds along the same lines as those discussed above in relation to the assessment of the demand and supply-side substitution in response to a relative price increase.
58. Accordingly, with regard to demand-side substitution, NRAs should assess mainly consumers' preferences as well as their current geographic patterns of purchase. In particular, linguistic reasons may explain why certain services are not available or marketed in different language areas. As far as supply-side substitution is concerned, where it can be established that operators which are not currently engaged or present on the relevant market, will, however, decide to enter that market in the short term in the event of a relative price increase, then the market definition should be expanded to incorporate those 'outside' operators.
59. In the electronic communications sector, the geographical scope of the relevant market has traditionally been determined by reference to two main criteria ⁽⁴²⁾:
- (a) the area covered by a network ⁽⁴³⁾; and
 - (b) the existence of legal and other regulatory instruments ⁽⁴⁴⁾.
60. On the basis of these two main criteria ⁽⁴⁵⁾, geographic markets can be considered to be local, regional, national or covering territories of two or more countries (for instance, pan-European, EEA-wide or global markets).
- 2.2.3. *Other issues of market definition*
61. For the purposes of *ex-ante* regulation, in certain exceptional cases, the relevant market may be defined on a route-by-route basis. In particular, when considering the dimension of markets for international retail or wholesale electronic communications services, it may be appropriate to treat paired countries or paired cities as separate markets ⁽⁴⁶⁾. Clearly, from the demand side, the delivery of a call to one country is not a substitute for the delivery of the same to another country. On the other hand, the question of whether indirect transmission services, that is, re-routing or transit of the same call via a third country, represent effective supply-side substitutes depends on the specificities of the market and should be decided on a case-by-case basis ⁽⁴⁷⁾. However, a market for the provision of services on a bilateral route would be national in scope since supply and demand patterns in both ends of the route would most likely correspond to different market structures ⁽⁴⁸⁾.
62. In its Notice on market definition, the Commission drew attention to certain cases where the boundaries of the relevant market may be expanded to take into consideration products or geographical areas which, although not directly substitutable, should be included in the market definition because of so-called 'chain substitutability' ⁽⁴⁹⁾. In essence, chain substitutability occurs where it can be demonstrated that although products A and C are not directly substitutable, product B is a substitute for both product A and product C and therefore products A and C may be in the same product market since their pricing might be constrained by the substitutability of product B. The same reasoning also applies for defining the geographic market. Given the inherent risk of unduly widening the scope of the relevant market, findings of chain substitutability should be adequately substantiated ⁽⁵⁰⁾.

2.3. The Commission's own practice

63. The Commission has adopted a number of decisions under Regulation No 17 and the merger control Regulation relating to the electronic communications sector. These decisions may be of particular relevance for NRAs with regard to the methodology applied by the Commission in defining the relevant market⁽⁵¹⁾. As stated above, however, in a sector characterised by constant innovation and rapid technological convergence, it is clear that any current market definition runs the risk of becoming inaccurate or irrelevant in the near future⁽⁵²⁾. Furthermore, markets defined under competition law are without prejudice to markets defined under the new regulatory framework as the context and the timeframe within which a market analysis is conducted may be different⁽⁵³⁾.
64. As stated in the Access notice, there are in the electronic communications sector at least two main types of relevant markets to consider, that of services provided to end users (services market) and that of access to facilities necessary to provide such services (access market)⁽⁵⁴⁾. Within these two broad market definitions further market distinctions may be made depending on demand and supply side patterns.
65. In particular, in its decision-making practice, the Commission will normally make a distinction between the provision of services and the provision of underlying network infrastructure. For instance, as regards the provision of infrastructure, the Commission has identified separate markets for the provision of local loop, long distance and international infrastructure⁽⁵⁵⁾. As regards fixed services, the Commission has distinguished between subscriber (retail) access to switched voice telephony services (local, long distance and international), operator (wholesale) access to networks (local, long distance and international) and business data communications services⁽⁵⁶⁾. In the market for fixed telephony retail services, the Commission has also distinguished between the initial connection and the monthly rental⁽⁵⁷⁾. Retail services are offered to two distinct classes of consumers, namely, residential and business users, the latter possibly being broken down further into a market for professional, small and medium sized business customers and another for large businesses⁽⁵⁸⁾. With regard to fixed telephony retail services offered to residential users, demand and supply patterns seem to indicate that two main types of services are currently being offered, traditional fixed telephony services (voice and narrowband data transmissions) on the one hand, and high speed communications services (currently in the form of xDSL services) on the other hand⁽⁵⁹⁾.
66. As regards the provision of mobile communications services, the Commission has found that, from a demand-side point of view, mobile telephony services and fixed telephony services constitute separate markets⁽⁶⁰⁾. Within the mobile market, evidence gathered from the Commission has indicated that the market for mobile communications services encompasses both GSM 900 and GSM 1800 and possibly analogue platforms⁽⁶¹⁾.
67. The Commission has found that with regard to the 'access' market, the latter comprises all types of infrastructure that can be used for the provision of a given service⁽⁶²⁾. Whether the market for network infrastructures should be divided into as many separate submarkets as there are existing categories of network infrastructure, depends clearly on the degree of substitutability among such (alternative) networks⁽⁶³⁾. This exercise should be carried out in relation to the class of users to which access to the network is provided. A distinction should, therefore, be made between provision of infrastructure to other operators (wholesale level) and provision to end users (retail level)⁽⁶⁴⁾. At the retail level, a further segmentation may take place between business and residential customers⁽⁶⁵⁾.
68. When the service to be provided concerns only end users subscribed to a particular network, access to the termination points of that network may well constitute the relevant product market. This will not be the case if it can be established that the same services may be offered to the same class of consumers by means of alternative, easily accessible competing networks. For example, in its Communication on unbundling the local loop⁽⁶⁶⁾, the Commission stated that although alternatives to the PSTN for providing high speed communications services to residential consumers exist (fibre optic networks, wireless local loops or upgradable TV networks), none of these alternatives may be considered as a substitute to the fixed local loop infrastructure⁽⁶⁷⁾. Future innovative and technological changes may, however, justify different conclusions⁽⁶⁸⁾.
69. Access to mobile networks may also be defined by reference to two potentially separate markets, one for call origination and another for call termination. In this respect, the question whether the access market to mobile infrastructure relates to access to an individual mobile network or to all mobile networks, in general, should be decided on the basis of an analysis of the structure and functioning of the market⁽⁶⁹⁾.

3. ASSESSING SIGNIFICANT MARKET POWER (DOMINANCE)

70. According to Article 14 of the framework Directive 'an undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the

power to behave to an appreciable extent independently of competitors customers and ultimately consumers'. This is the definition that the Court of Justice case-law ascribes to the concept of dominant position in Article 82 of the Treaty ⁽⁷⁰⁾. The new framework has aligned the definition of SMP with the Court's definition of dominance within the meaning of Article 82 of the Treaty ⁽⁷¹⁾. Consequently, in applying the new definition of SMP, NRAs will have to ensure that their decisions are in accordance with the Commission's practice and the relevant jurisprudence of the Court of Justice and the Court of First Instance on dominance ⁽⁷²⁾. However, the application of the new definition of SMP, *ex-ante*, calls for certain methodological adjustments to be made regarding the way market power is assessed. In particular, when assessing *ex-ante* whether one or more undertakings are in a dominant position in the relevant market, NRAs are, in principle, relying on different sets of assumptions and expectations than those relied upon by a competition authority applying Article 82, *ex post*, within a context of an alleged committed abuse ⁽⁷³⁾. Often, the lack of evidence or of records of past behaviour or conduct will mean that the market analysis will have to be based mainly on a prospective assessment. The accuracy of the market analysis carried out by NRAs will thus be conditioned by information and data existing at the time of the adoption of the relevant decision.

71. The fact that an NRA's initial market predictions do not finally materialise in a given case does not necessarily mean that its decision at the time of its adoption was inconsistent with the Directive. In applying *ex ante* the concept of dominance, NRAs must be accorded discretionary powers relative to the complex character of the economic, factual and legal situations that will need to be assessed. In accordance with the framework Directive, market assessments by NRAs will have to be undertaken on a regular basis. In this context, therefore, NRAs will have the possibility to react at regular intervals to any market developments and to take any measure deemed necessary.

3.1. Criteria for assessing SMP

72. As the Court has stressed, a finding of a dominant position does not preclude some competition in the market. It only enables the undertaking that enjoys such a position, if not to determine, at least to have an appreciable effect on the conditions under which that competition will develop, and in any case to act in disregard of any such competitive constraint so long as such conduct does not operate to its detriment ⁽⁷⁴⁾.
73. In an *ex-post* analysis, a competition authority may be faced with a number of different examples of market behaviour each indicative of market power within the meaning of Article 82. However, in an *ex-ante* environment, market power is essentially measured by reference of the power of the undertaking concerned to raise prices by restricting output without incurring a significant loss of sales or revenues.
74. The market power of an undertaking can be constrained by the existence of potential competitors ⁽⁷⁵⁾. An NRA should thus take into account the likelihood that undertakings not currently active on the relevant product market may in the medium term decide to enter the market following a small but significant non-transitory price increase. Undertakings which, in case of such a price increase, are in a position to switch or extend their line of production/services and enter the market should be treated by NRAs as potential market participants even if they do not currently produce the relevant product or offer the relevant service.
75. As explained in the paragraphs below, a dominant position is found by reference to a number of criteria and its assessment is based, as stated above, on a forward-looking market analysis based on existing market conditions. Market shares are often used as a proxy for market power. Although a high market share alone is not sufficient to establish the possession of significant market power (dominance), it is unlikely that a firm without a significant share of the relevant market would be in a dominant position. Thus, undertakings with market shares of no more than 25 % are not likely to enjoy a (single) dominant position on the market concerned ⁽⁷⁶⁾. In the Commission's decision-making practice, single dominance concerns normally arise in the case of undertakings with market shares of over 40 %, although the Commission may in some cases have concerns about dominance even with lower market shares ⁽⁷⁷⁾, as dominance may occur without the existence of a large market share. According to established case-law, very large market shares — in excess of 50 % — are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position ⁽⁷⁸⁾. An undertaking with a large market share may be presumed to have SMP, that is, to be in a dominant position, if its market share has remained stable over time ⁽⁷⁹⁾. The fact that an undertaking with a significant position on the market is gradually losing market share may well indicate that the market is becoming more competitive, but it does not preclude a finding of significant market power. On the other hand, fluctuating market shares over time may be indicative of a lack of market power in the relevant market.
76. As regards the methods used for measuring market size and market shares, both volume sales and value sales provide useful information for market measurement ⁽⁸⁰⁾. In the case of bulk products preference is given to volume whereas in the case of differentiated products (i.e. branded products) sales in value and their associated market share will often be considered to reflect better the relative position and strength of each provider. In bidding markets the number of bids won and lost may also be used as approximation of market shares ⁽⁸¹⁾.

77. The criteria to be used to measure the market share of the undertaking(s) concerned will depend on the characteristics of the relevant market. It is for NRAs to decide which are the criteria most appropriate for measuring market presence. For instance, leased lines revenues, leased capacity or numbers of leased line termination points are possible criteria for measuring an undertaking's relative strength on leased lines markets. As the Commission has indicated, the mere number of leased line termination points does not take into account the different types of leased lines that are available on the market — ranging from analogue voice quality to high-speed digital leased lines, short distance to long distance international leased lines. Of the two criteria, leased lines revenues may be more transparent and less complicated to measure. Likewise, retail revenues, call minutes or numbers of fixed telephone lines or subscribers of public telephone network operators are possible criteria for measuring the market shares of undertakings operating in these markets⁽⁸²⁾. Where the market defined is that of interconnection, a more realistic measurement parameter would be the revenues accrued for terminating calls to customers on fixed or mobile networks. This is so because the use of revenues, rather than for example call minutes, takes account of the fact that call minutes can have different values (i.e. local, long distance and international) and provides a measure of market presence that reflects both the number of customers and network coverage⁽⁸³⁾. For the same reasons, the use of revenues for terminating calls to customers of mobile networks may be the most appropriate means to measure the market presence of mobile network operators⁽⁸⁴⁾.
78. It is important to stress that the existence of a dominant position cannot be established on the sole basis of large market shares. As mentioned above, the existence of high market shares simply means that the operator concerned might be in a dominant position. Therefore, NRAs should undertake a thorough and overall analysis of the economic characteristics of the relevant market before coming to a conclusion as to the existence of significant market power. In that regard, the following criteria can also be used to measure the power of an undertaking to behave to an appreciable extent independently of its competitors, customers and consumers. These criteria include amongst others:
- overall size of the undertaking,
 - control of infrastructure not easily duplicated,
 - technological advantages or superiority,
 - absence of or low countervailing buying power,
 - easy or privileged access to capital markets/financial resources,
 - product/services diversification (e.g. bundled products or services),
 - economies of scale,
 - economies of scope,
 - vertical integration,
 - a highly developed distribution and sales network,
 - absence of potential competition,
 - barriers to expansion.
79. A dominant position can derive from a combination of the above criteria, which taken separately may not necessarily be determinative.
80. A finding of dominance depends on an assessment of ease of market entry. In fact, the absence of barriers to entry deters, in principle, independent anti-competitive behaviour by an undertaking with a significant market share. In the electronic communications sector, barriers to entry are often high because of existing legislative and other regulatory requirements which may limit the number of available licences or the provision of certain services (i.e. GSM/DCS or 3G mobile services). Furthermore, barriers to entry exist where entry into the relevant market requires large investments and the programming of capacities over a long time in order to be profitable⁽⁸⁵⁾. However, high barriers to entry may become less relevant with regard to markets characterised by on-going technological progress. In electronic communications markets, competitive constraints may come from innovative threats from potential competitors that are not currently in the market. In such markets, the competitive assessment should be based on a prospective, forward-looking approach.
81. As regards the relevance of the notion of 'essential facilities' for the purposes of applying the new definition of SMP, there is for the moment no jurisprudence in relation to the electronic communications sector. However, this notion, which is mainly relevant with regard to the existence of an abuse of a dominant position under Article 82 of the EC Treaty, is less relevant with regard to the *ex-ante* assessment of SMP within the meaning of Article 14 of the framework Directive. In particular, the doctrine of 'essential facilities' is complementary to existing general obligations imposed on dominant undertaking, such as the obligation not to discriminate among customers and has been applied in cases under Article 82 in exceptional circumstances, such as where the refusal to supply or to grant access to third parties would limit or prevent the emergence of new markets, or new products, contrary to Article 82(b) of the Treaty. It has thus primarily been associated with

access issues or cases involving a refusal to supply or to deal under Article 82 of the Treaty, without the presence of any discriminatory treatment. Under existing case-law, a product or service cannot be considered 'necessary' or 'essential' unless there is no real or potential substitute. Whilst it is true that an undertaking which is in possession of an 'essential facility' is by definition in a dominant position on any market for that facility, the contrary is not always true. The fact that a given facility is not 'essential' or 'indispensable' for an economic activity on some distinct market, within the meaning of the existing case-law⁽⁸⁶⁾ does not mean that the owner of this facility might not be in a dominant position. For instance, a network operator can be in a dominant position despite the existence of alternative competing networks if the size or importance of its network affords him the possibility to behave independently from other network operators⁽⁸⁷⁾. In other words, what matters is to establish whether a given facility affords its owner significant market power in the market without thus being necessary to further establish that the said facility can also be considered 'essential' or 'indispensable' within the meaning of existing case-law.

82. It follows from the foregoing that the doctrine of the 'essential facilities' is less relevant for the purposes of applying *ex ante* Article 14 of the framework Directive than applying *ex-post* Article 82 of the EC Treaty.

3.1.1. Leverage of market power

83. According to Article 14(3) of the framework Directive, 'where an undertaking has significant market power on a specific market, it may also be deemed to have significant market power on a closely related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the undertaking'.

84. This provision is intended to address a market situation comparable to the one that gave rise to the Court's judgment in *Tetra Pak II*⁽⁸⁸⁾. In that case, the Court decided that an undertaking that had a dominant position in one market, and enjoyed a leading position on a distinct but closely associated market, was placed as a result in a situation comparable to that of holding a dominant position on the markets in question taken as a whole. Thanks to its dominant position on the first market, and its market presence on the associated, secondary market, an undertaking may thus leverage the market power which it enjoys in the first market and behave independently of its customers on the latter market⁽⁸⁹⁾. Although in *Tetra Pak* the markets taken as a

whole in which *Tetra Pak* was found to be dominant were horizontal, close associative links, within the meaning of the Court's case-law, will most often be found in vertically integrated markets. This is often the case in the telecommunications sector, where an operator often has a dominant position on the infrastructure market and a significant presence on the downstream, services market⁽⁹⁰⁾. Under such circumstances, an NRA may consider it appropriate to find that such operator has SMP on both markets taken together. However, in practice, if an undertaking has been designated as having SMP on an upstream wholesale or access market, NRAs will normally be in a position to prevent any likely spill-over or leverage effects downstream into the retail or services markets by imposing on that undertaking any of the obligations provided for in the access Directive which may be appropriate to avoid such effects. Therefore, it is only where the imposition of *ex-ante* obligations on an undertaking which is dominant in the (access) upstream market would not result in effective competition on the (retail) downstream market that NRAs should examine whether Article 14(3) may apply.

85. The foregoing considerations are also relevant in relation to horizontal markets⁽⁹¹⁾. Moreover, irrespective of whether the markets under consideration are vertical or horizontal, both markets should be electronic communications markets within the meaning of Article 2 of the framework Directive and both should display such characteristics as to justify the imposition of *ex-ante* regulatory obligations⁽⁹²⁾.

3.1.2. Collective dominance

86. Under Article 82 of the EC Treaty, a dominant position can be held by one or more undertakings ('collective dominance'). Article 14(2) of the framework Directive also provides that an undertaking may enjoy significant market power, that is, it may be in a dominant position, either individually or jointly with others.

87. In the Access notice, the Commission had stated that, although at the time both its own practice and the case-law of the Court were still developing, it would consider two or more undertakings to be in a collective dominant position when they had substantially the same position vis-à-vis their customers and competitors as a single company has if it is in a dominant position, provided that no effective competition existed between them. The lack of competition could be due, in practice, to the existence of certain links between those companies. The Commission had also stated, however, that the existence of such links was not a prerequisite for a finding of joint dominance⁽⁹³⁾.

88. Since the publication of the Access notice, the concept of collective dominance has been tested in a number of decisions taken by the Commission under Regulation No 17 and under the merger control Regulation. In addition, both the Court of First Instance (CFI) and the Court of Justice of the European Communities (ECJ) have given judgments which have contributed to further clarifying the exact scope of this concept.

3.1.2.1. The jurisprudence of the CFI/ECJ

89. The expression 'one or more undertakings' in Article 82 of the EC Treaty implies that a dominant position may be held by two or more economic entities which are legally and economically independent of each other⁽⁹⁴⁾.

90. Until the ruling of the ECJ in *Compagnie maritime belge*⁽⁹⁵⁾ and the ruling of the CFI in *Gencor*⁽⁹⁶⁾ (see below), it might have been argued that a finding of collective dominance was based on the existence of economic links, in the sense of structural links, or other factors which could give rise to a connection between the undertakings concerned⁽⁹⁷⁾. The question of whether collective dominance could also apply to an oligopolistic market, that is a market comprised of few sellers, in the absence of any kind of links among the undertakings present in such a market, was first raised in *Gencor*. The case concerned the legality of a decision adopted by the Commission under the merger control Regulation prohibiting the notified transaction on the grounds that it would lead to the creation of a duopoly market conducive to a situation of oligopolistic dominance⁽⁹⁸⁾. Before the CFI, the parties argued that the Commission had failed to prove the existence of 'links' between the members of the duopoly within the meaning of the existing case-law.

91. The CFI dismissed the application by stating, *inter alia*, that there was no legal precedent suggesting that the notion of 'economic links' was restricted to the notion of structural links between the undertakings concerned: According to the CFI, 'there is no reason whatsoever in legal or economic terms to exclude from the notion of economic links the relationship of interdependence existing between the parties to a tight oligopoly within which, in a market with the appropriate characteristics, in particular in terms of market concentration, transparency and product homogeneity, those parties are in a position to anticipate one another's behaviour and are therefore strongly encouraged to align their conduct in the market, in particular in such a way as to maximise their joint profits by restricting production with a view to increasing prices. In such a context, each trader is aware that highly competitive action on its part designed to increase its market share (for example a price cut) would provoke identical action by the others, so that it would derive no benefit from its initiative. All the traders

would thus be affected by the reduction in price levels'⁽⁹⁹⁾. As the Court pointed out, market conditions may be such that 'each undertaking may become aware of common interests and, in particular, cause prices to increase without having to enter into an agreement or resort to concerted practice'⁽¹⁰⁰⁾.

92. The CFI's ruling in *Gencor* was later endorsed by the ECJ in *Compagnie maritime belge*, where the Court gave further guidance as to how the term of collective dominance should be understood and as to which conditions must be fulfilled before such finding can be made. According to the Court, in order to show that two or more undertakings hold a joint dominant position, it is necessary to consider whether the undertakings concerned together constitute a collective entity vis-à-vis their competitors, their trading partners and their consumers on a particular market⁽¹⁰¹⁾. This will be the case when (i) there is no effective competition among the undertakings in question; and (ii) the said undertakings adopt a uniform conduct or common policy in the relevant market⁽¹⁰²⁾. Only when that question is answered in the affirmative, is it appropriate to consider whether the collective entity actually holds a dominant position⁽¹⁰³⁾. In particular, it is necessary to ascertain whether economic links exist between the undertakings concerned which enable them to act independently of their competitors, customers and consumers. The Court recognised that an implemented agreement, decision or concerted practice (whether or not covered by an exemption under Article 81(3) of the Treaty) may undoubtedly result in the undertakings concerned being linked in a such way that their conduct on a particular market on which they are active results in them being perceived as a collective entity vis-à-vis their competitors, their trading partners and consumers⁽¹⁰⁴⁾.

93. The mere fact, however, that two or more undertakings are linked by an agreement, a decision of associations of undertakings or a concerted practice within the meaning of Article 81(1) of the Treaty does not, of itself, constitute a necessary basis for such a finding. As the Court stated, 'a finding of a collective dominant position may also be based on other connecting factors and would depend on an economic assessment and, in particular, on an assessment of the structure of the market in question'⁽¹⁰⁵⁾.

94. It follows from the *Gencor* and *Compagnie maritime belge* judgments that, although the existence of structural links can be relied upon to support a finding of a collective dominant position, such a finding can also be made in relation to an oligopolistic or highly concentrated market whose structure alone in particular, is conducive to coordinated effects on the relevant market⁽¹⁰⁶⁾.

3.1.2.2. The Commission's decision-making practice and Annex II of the framework Directive

95. In a number of decisions adopted under the merger control Regulation, the Commission considered the concept of collective dominance. It sought in those cases to ascertain whether the structure of the oligopolistic markets in question was conducive to coordinated effects on those markets ⁽¹⁰⁷⁾.
96. When assessing *ex-ante* the likely existence or emergence of a market which is or could become conducive to collective dominance in the form of tacit coordination, NRAs, should analyse:
- (a) whether the characteristics of the market makes it conducive to tacit coordination; and
- (b) whether such form of coordination is sustainable that is, (i) whether any of the oligopolists have the ability and incentive to deviate from the coordinated outcome, considering the ability and incentives of the non-deviators to retaliate; and (ii) whether buyers/fringe competitors/potential entrants have the ability and incentive to challenge any anti-competitive coordinated outcome ⁽¹⁰⁸⁾.
97. This analysis is facilitated by looking at a certain number of criteria which are summarised in Annex II of the framework Directive, which have also been used by the Commission in applying the notion of collective dominance under the merger control Regulation. According to this Annex, 'two or more undertakings can be found to be in a joint dominant position within the meaning of Article 14 if, even in the absence of structural or other links between them, they operate in a market, the structure of which is considered to be conducive to coordinated effects ⁽¹⁰⁹⁾. Without prejudice to the case-law of the Court of Justice on joint dominance, this is likely to be the case where the market satisfies a number of appropriate characteristics, in particular in terms of market concentration, transparency and other characteristics mentioned below:
- mature market,
 - stagnant or moderate growth on the demand side,
 - low elasticity of demand,
 - homogeneous product,
 - similar cost structures,
 - similar market shares,
 - lack of technical innovation, mature technology,
 - absence of excess capacity,
 - high barriers to entry,
 - lack of countervailing buying power,
 - lack of potential competition,
 - various kind of informal or other links between the undertakings concerned,
 - retaliatory mechanisms,
 - lack or reduced scope for price competition'.
98. Annex II of the framework Directive expressly states that the above is not an exhaustive list, nor are the criteria cumulative. Rather, the list is intended to illustrate the sorts of evidence that could be used to support assertions concerning the existence of a collective (oligopolistic) dominance in the form of tacit coordination ⁽¹¹⁰⁾. As stated above, the list also shows that the existence of structural links among the undertakings concerned is not a prerequisite for finding a collective dominant position. It is however clear that where such links exist, they can be relied upon to explain, together with any of the other abovementioned criteria, why in a given oligopolistic market coordinated effects are likely to arise. In the absence of such links, in order to establish whether a market is conducive to collective dominance in the form of tacit coordination, it is necessary to consider a number of characteristics of the market. While these characteristics are often presented in the form of the abovementioned list, it is necessary to examine all of them and to make an overall assessment rather than mechanically applying a 'check list'. Depending on the circumstances of the case, the fact that one or another of the structural elements usually associated with collective dominance may not be clearly established is not in itself decisive to exclude the likelihood of a coordinated outcome ⁽¹¹¹⁾.
99. In an oligopolistic market where most, if not all, of the abovementioned criteria are met, it should be examined whether, in particular, the market operators have a strong incentive to converge to a coordinated market outcome and refrain from reliance on competitive conduct. This will be the case where the long-term benefits of an anti-competitive conduct outweigh any short-term gains resulting from a resort to a competitive behaviour.
100. It must be stressed that a mere finding that a market is concentrated does not necessarily warrant a finding that its structure is conducive to collective dominance in the form of tacit coordination ⁽¹¹²⁾.

101. Ultimately, in applying the notion of collective dominance in the form of tacit coordination, the criteria which will carry the most sway will be those which are critical to a coordinated outcome in the specific market under consideration. For instance, in Case COMP/M.2499 — Norske Skog/Parengo/Walsum, the Commission came to the conclusion that even if the markets for newsprint and wood-containing magazine paper were concentrated, the products were homogeneous, demand was highly inelastic, buyer power was limited and barriers to entry were high, nonetheless the limited stability of market shares, the lack of symmetry in costs structures and namely, the lack of transparency of investments decisions and the absence of a credible retaliation mechanism rendered unlikely and unsustainable any possibility of tacit coordination among the oligopolists⁽¹¹³⁾.

3.1.2.3. Collective dominance and the telecommunications sector

102. In applying the notion of collective dominance, NRAs may also take into consideration decisions adopted under the merger control Regulation in the electronic communications sector, in which the Commission has examined whether any of the notified transactions could give rise to a finding of collective dominance.

103. In *MCI WorldCom/Sprint*, the Commission examined whether the merged entity together with Concert Alliance could be found to enjoy a collective dominant position on the market for global telecommunications services (GTS). Given that operators on that market competed on a bid basis where providers were selected essentially in the first instances of the bidding process on the basis of their ability to offer high quality, tailor-made sophisticated services, and not on the basis of prices, the Commission's investigation was focused on the incentives for market participants to engage in parallel behaviour as to who wins what bid (and who had won what bids)⁽¹¹⁴⁾. After having examined in depth the structure of the market (homogenous product, high barriers of entry, customers countervailing power, etc.) the Commission concluded that it was not able to show absence of competitive constraints from actual competitors, a key factor in examining whether parallel behaviour can be sustained, and thus decided not to pursue further its objections in relation to that market⁽¹¹⁵⁾.

104. In *BT/Esat*⁽¹¹⁶⁾, one of the issues examined by the Commission was whether market conditions in the Irish market for dial-up Internet access lent themselves to the emergence of a duopoly consisting of the incumbent operator, Eircom, and the merged entity. The Commission concluded that this was not the case for the following reasons. First, market shares were not stable; second, demand was doubling every six months; third, internet access products were not considered homogeneous; and finally, technological developments were one of the main characteristics of the market⁽¹¹⁷⁾.

105. In *Vodafone/Airtouch*⁽¹¹⁸⁾, the Commission found that the merged entity would have joint control of two of the four mobile operators present on the German mobile market (namely D2 and E-Plus, the other two being T-Mobil and VIAG Interkom). Given that entry into the market was highly regulated, in the sense that licences were limited by reference to the amount of available radio frequencies, and that market conditions were transparent, it could not be ruled out that such factors could lead to the emergence of a duopoly conducive to coordinated effects⁽¹¹⁹⁾.

106. In *France Telecom/Orange* the Commission found that, prior to the entry of Orange into the Belgian mobile market, the two existing players, Proximus and Mobistar, were in a position to exercise joint dominance. As the Commission noted, for the four years preceding Orange's entry, both operators had almost similar and transparent pricing, their prices following exactly the same trends⁽¹²⁰⁾. In the same decision the Commission further dismissed claims by third parties as to the risk of a collective dominant position of Vodafone and France Telecom in the market for the provision of pan-European mobile services to internationally mobile customers. Other than significant asymmetries between the market shares of the two operators, the market was considered to be emerging, characterised by an increasing demand and many types of different services on offer and on price⁽¹²¹⁾.

4. IMPOSITION, MAINTENANCE, AMENDMENT OR WITHDRAWAL OF OBLIGATIONS UNDER THE REGULATORY FRAMEWORK

107. Section 3 of these guidelines dealt with the analysis of relevant markets that NRAs must carry out under Article 16 of the framework Directive to determine whether a market is effectively competitive, i.e. whether there are undertakings in that market who are in a dominant position. This section aims to provide guidance for NRAs on the action they should take following that analysis, i.e. the imposition, maintenance, amendment or withdrawal, as appropriate, of specific regulatory obligations on undertakings designated as having SMP. This section also describes the circumstances in which similar obligations than those that can be imposed on SMP operators may, exceptionally, be imposed on undertakings who have not been designated as having SMP.

108. The specific regulatory obligations which may be imposed on SMP undertakings can apply both to wholesale and retail markets. In principle, the obligations related to wholesale markets are set out in Articles 9 to 13 of the access Directive. The obligations related to retail markets are set out in Articles 17 to 19 of the universal service Directive.

109. The obligations set out in the access Directive are: transparency (Article 9); non-discrimination (Article 10); accounting separation (Article 11), obligations for access to and use of specific network facilities (Article 12), and price control and cost accounting obligations (Article 13). In addition, Article 8 of the access Directive provides that NRAs may impose obligations outside this list. In order to do so, they must submit a request to the Commission, which will take a decision, after seeking the advice of the Communications Committee, as to whether the NRA concerned is permitted to impose such obligations.
110. The obligations set out in the universal service Directive are: regulatory controls on retail services (Article 17), availability of the minimum set of leased lines (Article 18 and Annex VII) and carrier selection and preselection (Article 19).
111. Under the regulatory framework, these obligations should only be imposed on undertakings which have been designated as having SMP in a relevant market, except in certain defined cases, listed in Section 4.3.
- 4.1. Imposition, maintenance, amendment or withdrawal of obligations on SMP operators**
112. As explained in Section 1, the notion of effective competition means that there is no undertaking with dominance on the relevant market. In other words, a finding that a relevant market is effectively competitive is, in effect, a determination that there is neither single nor joint dominance on that market. Conversely, a finding that a relevant market is not effectively competitive is a determination that there is single or joint dominance on that market.
113. If an NRA finds that a relevant market is subject to effective competition, it is not allowed to impose obligations on any operator on that relevant market under Article 16. If the NRA has previously imposed regulatory obligations on undertaking(s) in that market, the NRA must withdraw such obligations and may not impose any new obligation on that undertaking(s). As stipulated in Article 16(3) of the framework Directive, where the NRA proposes to remove existing regulatory obligations, it must give parties affected a reasonable period of notice.
114. If an NRA finds that competition in the relevant market is not effective because of the existence of an undertaking or undertakings in a dominant position, it must designate in accordance with Article 16(4) of the framework Directive the undertaking or undertakings concerned as having SMP and impose appropriate regulatory obligations on the undertaking(s) concerned. However, merely designating an undertaking as having SMP on a given market, without imposing any appropriate regulatory obligations, is inconsistent with the provisions of the new regulatory framework, notably Article 16(4) of the framework Directive. In other words, NRAs must impose at least one regulatory obligation on an undertaking that has been designated as having SMP. Where an NRA determines the existence of more than one undertaking with dominance, i.e. that a joint dominant position exists, it should also determine the most appropriate regulatory obligations to be imposed, based on the principle of proportionality.
115. If an undertaking was previously subject to obligations under the 1998 regulatory framework, the NRA must consider whether similar obligations continue to be appropriate under the new regulatory framework, based on a new market analysis carried out in accordance with these guidelines. If the undertaking is found to have SMP in a relevant market under the new framework, regulatory obligations similar to those imposed under the 1998 regulatory framework may therefore be maintained. Alternatively, such obligations could be amended, or new obligations provided in the new framework might also be imposed, as the NRA considers appropriate.
116. Except where the Community's international commitments under international treaties prescribe the choice of regulatory obligation (see Section 4.4) or when the Directives prescribe particular remedies as under Article 18 and 19 of the universal service Directive, NRAs will have to choose between the range of regulatory obligations set out in the Directives in order to remedy a particular problem in a market found not to be effectively competitive. Where NRAs intend to impose other obligations for access and interconnection than those listed in the access Directive, they must submit a request for Commission approval of their proposed course of action. The Commission must seek the advice of the Communications Committee before taking its decision.
117. Community law, and in particular Article 8 of the framework Directive, requires NRAs to ensure that the measures they impose on SMP operators under Article 16 of the framework Directive are justified in relation to the objectives set out in Article 8 and are proportionate to the achievement of those objectives. Thus any obligation imposed by NRAs must be proportionate to the problem to be remedied. Article 7 of the framework Directive requires NRAs to set out the reasoning on which any proposed measure is based when they communicate that measure to other NRAs and to the Commission. Thus, in addition to the market analysis supporting the finding of SMP, NRAs need to include in their decisions a justification of the proposed measure in relation to the objectives of Article 8, as well as an explanation of why their decision should be considered proportionate.

118. Respect for the principle of proportionality will be a key criterion used by the Commission to assess measures proposed by NRAs under the procedure of Article 7 of framework Directive. The principle of proportionality is well-established in Community law. In essence, the principle of proportionality requires that the means used to attain a given end should be no more than what is appropriate and necessary to attain that end. In order to establish that a proposed measure is compatible with the principle of proportionality, the action to be taken must pursue a legitimate aim, and the means employed to achieve the aim must be both necessary and the least burdensome, i.e. it must be the minimum necessary to achieve the aim.

119. However, particularly in the early stages of implementation of the new framework, the Commission would not expect NRAs to withdraw existing regulatory obligations on SMP operators which have been designed to address legitimate regulatory needs which remain relevant, without presenting clear evidence that those obligations have achieved their purpose and are therefore no longer required since competition is deemed to be effective on the relevant market. Different remedies are available in the new regulatory framework to address different identified problems and remedies should be tailored to these specified problems.

120. The Commission, when consulted as provided for in Article 7(3) of the framework Directive, will also check that any proposed measure taken by the NRAs is in conformity with the regulatory framework as a whole, and will assess the impact of the proposed measure on the single market.

121. The Commission will assist NRAs to ensure that as far as possible they adopt consistent approaches in their choice of remedies where similar situations exist in different Member States. Moreover, as noted in Article 7(2) of the framework Directive, NRAs shall seek to agree on the types of remedies best suited to address particular situations in the marketplace.

4.2. Transnational markets: joint analysis by NRAs

122. Article 15(4) of the framework Directive gives the Commission the power to issue a Decision identifying product and service markets that are transnational, covering the whole of the Community or a substantial part thereof. Under the terms of Article 16(5) of the framework Directive, the NRAs concerned must jointly conduct the market analysis and decide whether obligations need to be imposed. In practice, the European Regulators Group is expected to provide a suitable forum for such a joint analysis.

123. In general, joint analysis by NRAs would follow similar procedures (e.g. for public consultation) to those required when a single national regulatory authority is conducting a market analysis. Precise arrangements for collective analysis and decision-making will need to be drawn up.

4.3. Imposition of certain specific regulatory obligations on non-SMP operators

124. The preceding parts of this section set out the procedures whereby certain specific obligations may be imposed on SMP undertakings, under Articles 7 and 8 of the access Directive and Article 16-19 of the universal service Directive. Exceptionally, similar obligations may be imposed on operators other than those that have been designated as having SMP, in the following cases, listed in Article 8(3) of the access Directive:

- obligations covering *inter alia* access to conditional access systems, obligations to interconnect to ensure end-to-end interoperability, and access to application program interfaces and electronic programme guides to ensure accessibility to specified digital TV and radio broadcasting services (Article 5(1), 5(2) and 6 of the access Directive),
- obligations that NRAs may impose for co-location where rules relating to environmental protection, health, security or town and country planning deprive other undertakings of viable alternatives to co-location (Article 12 of the framework Directive),
- obligations for accounting separation on undertakings providing electronic communications services who enjoy special or exclusive rights in other sectors (Article 13 of the framework Directive),
- obligations relating to commitments made by an undertaking in the course of a competitive or comparative selection procedure for a right of use of radio frequency (Condition B7 of the Annex to the authorisation Directive, applied via Article 6(1) of that Directive),
- obligations to handle calls to subscribers using specific numbering resources and obligations necessary for the implementation of number portability (Articles 27, 28 and 30 of the universal service Directive),
- obligations based on the relevant provisions of the data protection Directive, and
- obligations to be imposed on non-SMP operators in order to comply with the Community's international commitments.

4.4. Relationship to WTO commitments

125. The EC and its Member States have given commitments in the WTO in relation to undertakings that are 'major suppliers' of basic telecommunications services⁽¹²²⁾. Such undertakings are subject to all of the obligations set out in the EC's and its Member States' commitments in the WTO for basic telecommunications services. The provisions of the new regulatory framework, in particular relating to access and interconnection, ensure that NRAs continue to apply the relevant obligations to undertakings that are major suppliers in accordance with the WTO commitments of the EC and its Member States.

5. POWERS OF INVESTIGATION AND COOPERATION PROCEDURES FOR THE PURPOSE OF MARKET ANALYSIS

5.1. Overview

126. This section of the guidelines covers procedures in respect of an NRA's powers to obtain the information necessary to conduct a market analysis.

127. The regulatory framework contains provisions to enable NRAs to require undertakings that provide electronic communications networks and services to supply all the information, including confidential information, necessary for NRAs to assess the state of competition in the relevant markets and impose appropriate *ex-ante* obligations and thus to ensure compliance with the regulatory framework.

128. This section of the guidelines also includes guidance as to measures to ensure effective cooperation between NRAs and NCAs at national level, and among NRAs and between NRAs and the Commission at Community level. In particular this section deals with the exchange of information between those authorities.

129. Many electronic communication markets are fast-moving and their structures are changing rapidly. NRAs should ensure that the assessment of effective competition, the public consultation, and the designation of operators having SMP are all carried out within a reasonable period. Any unnecessary delay in the decision could have harmful effects on incentives for investment by undertakings in the relevant market and therefore on the interests of consumers.

5.2. Market analysis and powers of investigation

130. Under Article 16(1) of the framework Directive, NRAs must carry out an analysis of the relevant markets identified in the Recommendation and any Decision as soon as possible after their adoption or subsequent revision. The conclusions of the analysis of each of the relevant markets, together with the proposed regulatory action, must be published and a public consultation must be conducted, as described in Section 6.

131. In order to carry out their market analysis, NRAs will first need to collect all the information they consider necessary to assess market power in a given market. To the extent that such information needs to be obtained directly from undertakings, Article 11 of the authorisation Directive provides that undertakings are required by the terms of their general authorisation to supply the information necessary for NRAs to conduct a market analysis within the meaning of Article 16(2) of the framework Directive. This is reinforced by the more general obligation in Article 5(1) of the framework Directive which provides that Member States shall ensure that undertakings providing electronic communications networks and services provide all the information necessary for NRAs to ensure conformity with Community law.

132. When NRAs request information from an undertaking, they should state the reasons justifying the request and the time limit within which the information is to be provided. As provided for in Article 10(4) of the authorisation Directive, NRAs may be empowered to impose financial penalties on undertakings for failure to provide information.

133. In accordance with Article 5(4) of the framework Directive, NRAs must publish all information that would contribute to an open and competitive market, acting in accordance with national rules on public access to information and subject to Community and national rules on commercial confidentiality.

134. However, as regards information that is confidential in nature, the provisions of Article 5(3) of the framework Directive, require NRAs to ensure the confidentiality of such information in accordance with Community and national rules on business confidentiality. This confidentiality obligation applies equally to information that has been received in confidence from another public authority.

5.3. Cooperation procedures

Between NRAs and NCAs

135. Article 16(1) of the framework Directive requires NRAs to associate NCAs with the market analyses as appropriate. Member States should put in place the necessary procedures to guarantee that the analysis under Article 16 of the framework Directive is carried out effectively. As the NRAs conduct their market analyses in accordance with the methodologies of competition law, the views of NCAs in respect of the assessment of competition are highly relevant. Cooperation between NRAs and NCAs will be essential, but NRAs remain legally responsible for conducting the relevant analysis. Where under national law the tasks assigned under Article 16 of the framework Directive are carried out by two or more separate regulatory bodies, Member States should ensure clear division of tasks and set up procedures for consultation and cooperation between regulators in order to assure coherent analysis of the relevant markets.

136. Article 3(5) of the framework Directive requires NRAs and NCAs to provide each other with the information necessary for the application of the regulatory framework, and the receiving authority must ensure the same level of confidentiality as the originating authority. NCAs should therefore provide NRAs with all relevant information obtained using the former's investigatory and enforcement powers, including confidential information.

137. Information that is considered confidential by an NCA, in accordance with Community and national rules on business confidentiality, should only be exchanged with NRAs where such exchange is necessary for the application of the provisions of the regulatory framework. The information exchanged should be limited to that which is relevant and proportionate to the purpose of such exchange.

Between the Commission and NRAs

138. For the regulatory framework to operate efficiently and effectively, it is vital that there is a high level of cooperation between the Commission and the NRAs. It is particularly important that effective informal cooperation takes place. The European Regulators Group will be of great importance in providing a framework for such cooperation, as part of its task of assisting and advising the Commission. Cooperation is likely to be of mutual benefit, by minimising the likelihood of divergences in approach between different NRAs, in particular divergent remedies to deal with the same problem⁽¹²³⁾.

139. In accordance with Article 5(2) of the framework Directive, NRAs must supply the Commission with information necessary for it to carry out its tasks under the Treaty. This covers information relating to the regulatory framework (to be used in verifying compatibility of NRA action with the legislation), but also information that the Commission might require, for example, in considering compliance with WTO commitments.

140. NRAs must ensure that, where they submit information to the Commission which they have requested undertakings to provide, they inform those undertakings that they have submitted it to the Commission.

141. The Commission can also make such information available to another NRA, unless the original NRA has made an explicit and reasoned request to the contrary. Although there is no legal requirement to do so, the Commission will normally inform the undertaking which originally provided the information that it has been passed on to another NRA.

Between NRAs

142. It is of the utmost importance that NRAs develop a common regulatory approach across Member States that will contribute to the development of a true single market for electronic communications. To this end, NRAs are required under Article 7(2) of the framework Directive to cooperate with each other and with the Commission in a transparent manner to ensure the consistent application, in all Member States, of the new regulatory framework. The European Regulators' Group is expected to serve as an important forum for cooperation.

143. Article 5(2) of the framework Directive also foresees that NRAs will exchange information directly between each other, as long as there is a substantiated request. This will be particularly necessary where a transnational market needs to be analysed, but it will also be required within the framework of cooperation in the European Regulators' Group. In all exchanges of information, the NRAs are required to maintain the confidentiality of information received.

6. PROCEDURES FOR CONSULTATION AND PUBLICATION OF PROPOSED NRA DECISIONS

6.1. Public consultation mechanism

144. Except in the urgent cases as explained below, an NRA that intends to take a measure which would have a significant impact on the relevant market should give the interested parties the opportunity to comment on the draft measure. To this effect, the NRA must hold a public consultation on its proposed measure. Where the draft measure concerns a decision relating to an SMP designation or non-designation it should include the following:

- the market definition used and reasons therefor, with the exception of information that is confidential in accordance with European and national law on business confidentiality,
- evidence relating to the finding of dominance, with the exception of information that is confidential in accordance with European and national law on business confidentiality together with the identification of any undertakings proposed to be designated as having SMP,
- full details of the sector-specific obligations that the NRA proposes to impose, maintain, modify or withdraw on the abovementioned undertakings together with an assessment of the proportionality of that proposed measure.

145. The period of the consultation should be reasonable. However, NRAs' decisions should not be delayed excessively as this can impede the development of the market. For decisions related to the existence and designation of undertakings with SMP, the Commission considers that a period of two months would be reasonable for the public consultation. Different periods could be used in some cases if justified. Conversely, where a draft SMP decision is proposed on the basis of the results of an earlier consultation, the length of consultation period for these decisions may well be shorter than two months.

6.2. Mechanisms to consolidate the internal market for electronic communications

146. Where an NRA intends to take a measure which falls within the scope of the market definition or market analysis procedures of Articles 15 and 16 of the framework Directive, as well as when NRAs apply certain other specific Articles in the regulatory framework⁽¹²⁴⁾ and where the measures have an effect on trade between Member States, the NRAs must communicate the measures, together with their reasoning, to NRAs in other Member States and to the Commission in accordance with Article 7(3) of the framework Directive. It should do this at the same time as it begins its public consultation. The NRA must then give other NRAs and the Commission the chance to comment on the NRA's proposed measures, before adopting any final decision. The time available for other NRAs and the Commission to comment should be the same time period as that set by the NRA for its national public consultation, unless the latter is shorter than the minimum period of one month provided for in Article 7(3). The Commission may decide in justified circumstances to publish its comments.

147. With regard to measures that could affect trade between Member States, this should be understood as meaning measures that may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in a manner which might create a barrier to the single European market⁽¹²⁵⁾. Therefore, the notion of an effect on trade between Member States is likely to cover a broad range of measures.

148. NRAs must make public the results of the public consultation, except in the case of information that is confidential in accordance with Community and national law on business confidentiality.

149. With the exception of two specific cases, explained in the following paragraph, the NRA concerned may adopt the final measure after having taken account of views expressed during its mandatory consultation. The final measure must then be communicated to the Commission without delay.

6.3. Commission power to require the withdrawal of NRAs' draft measures

150. Under the terms of Article 7(4) of the framework Directive, there are two specific situations where the Commission has the possibility to require an NRA to withdraw a draft measure which falls within the scope of Article 7(3):

- the draft measure concerns the definition of a relevant market which differs from that identified in the Recommendation, or
- the draft measure concerns a decision as to whether to designate, or not to designate, an undertaking as having SMP, either individually or jointly with others.

151. In respect of the above two situations, where the Commission has indicated to the NRA in the course of the consultation process that it considers that the draft measure would create a barrier to the single European market or where the Commission has serious doubts as to the compatibility of the draft measure with Community law, the adoption of the measure must be delayed by a maximum of an additional two months.

152. During this two-month period, the Commission may, after consulting the Communications Committee following the advisory procedure⁽¹²⁶⁾, take a decision requiring the NRA to withdraw the draft measure. The Commission's decision will be accompanied by a detailed and objective analysis of why it considers that the draft measure should not be adopted together with specific proposals for amending the draft measure. If the Commission does not take a decision within that period, the draft measure may be adopted by the NRA.

6.4. Urgent cases

153. In exceptional circumstances, NRAs may act urgently in order to safeguard competition and protect the interest of users. An NRA may therefore, exceptionally, adopt proportionate and provisional measures without consulting either interested parties, the NRAs in other Member States, or the Commission. Where an NRA has taken such urgent action, it must, without delay, communicate these measures, with full reasons, to the Commission, and to the other NRAs. The Commission will verify the compatibility of those measures with Community law and in particular will assess their proportionality in relation to the policy objectives of Article 8 of the framework Directive.

154. If the NRA wishes to make the provisional measures permanent, or extends the time for which it is applicable, the NRA must go through the normal consultation procedure set out above. It is difficult to foresee any circumstances that would justify urgent action to define a market or designate an SMP operator, as such measure are not those that can be carried out immediately. The Commission therefore does not expect NRAs to use the exceptional procedures in such cases.

6.5. Adoption of the final decision

155. Once an NRA's decision has become final, NRAs should notify the Commission of the names of the undertakings that have been designated as having SMP and the obligations imposed on them, in accordance with the requirements of Article 36(2) of the universal service Directive and Articles 15(2) and 16(2) of the access Directive. The Commission will thereafter make this information available in a readily accessible form, and

will transmit the information to the Communications Committee as appropriate.

156. Likewise, NRAs should publish the names of undertakings that they have designated as having SMP and the obligations imposed on them. They should ensure that up-to-date information is made publicly available in a manner that guarantees all interested parties easy access to that information.

(1) OJ L 108, 24.4.2002, p. 33.

(2) OJ L 108, 24.4.2002, p. 21.

(3) OJ L 108, 24.4.2002, p. 7.

(4) OJ L 108, 24.4.2002, p. 51.

(5) To be adopted.

(6) OJ L 24, 30.1.1998, p. 1.

(7) Except where the new regulatory framework expressly permits obligations to be imposed independently of the competitive state of the market.

(8) Article 14 of the framework Directive.

(9) In addition, transnational markets whose characteristics may be such as to justify sector-specific regulation may be identified by the Commission in a Decision on transnational markets.

(10) Recital 27 of the framework Directive.

(11) Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ L 395, 30.12.1989, p. 1), as last amended by Regulation (EC) No 1310/97 of 30 June 1997 (OJ L 180, 9.7.1997, p. 1) (hereafter the merger control Regulation).

(12) Guidelines on the application of EEC competition rules in the telecommunications sector (OJ C 233, 6.9.1991, p. 2).

(13) Commission notice on the definition of relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).

(14) Notice on the application of the competition rules to access agreements in the telecommunications sector (OJ C 265, 22.8.1998, p. 2).

(15) It is expected that effective cooperation between NRAs and NCAs would prevent the duplication of procedures concerning identical market issues.

(16) Guidelines on the application of EEC competition rules in the telecommunications sector (OJ C 233, 6.9.1991, p. 2).

(17) Article 14(2) of the framework Directive.

(18) Case C-209/98, *Entreprenørforeningens Affalds* [2000] ECR I-3743, paragraph 57, and Case C-242/95 *GT-Link* [1997] ECR I-4449, paragraph 36. It should be recognised that the objective of market definition is not an end in itself, but part of a process, namely assessing the degree of a firm's market power.

(19) See Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of open network provision (ONP) (OJ L 199, 26.7.1997, p. 32) (the interconnection Directive); Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (OJ L 192, 24.7.1990, p. 1) (the ONP framework Directive); Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines (OJ L 165, 19.6.1992, p. 27) (the leased lines Directive); Directive 95/62/EC of the European Parliament and of the Council of 13 December 1995 on the application of open network provision (ONP) to voice telephony (OJ L 321, 30.12.1995, p. 6), replaced by Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment (OJ L 101, 1.4.1998, p. 24) (the ONP voice telephony Directive).

(20) Joined Cases C-68/94 and C-30/95, *France and Others v Commission* [1998] ECR I-1375. See, also, Notice on market definition, at paragraph 12.

(21) To the extent that the electronic communications sector is technology and innovation-driven, any previous market definition may not necessarily be relevant at a later point in time.

(22) Notice on market definition, paragraph 12.

(23) See, also, Notice on market definition, paragraphs 20-23, Case IV/M.1225 — *Enso/Stora*, (OJ L 254, 29.9.1999), paragraph 40.

(24) See Notice on market definition, paragraph 24. Distinguishing between supply-side substitution and potential competition in electronic communications markets may be more complicated than in other markets given the dynamic character of the former. What matters, however, is that potential entry from other suppliers is taken into consideration at some stage of the relevant market analysis, that is, either at the initial market definition stage or at the subsequent stage of the assessment of market power (SMP).

(25) It is not necessary that all consumers switch to a competing product; it suffices that enough or sufficient switching takes place so that a relative price increase is not profitable. This requirement corresponds to the principle of 'sufficient interchangeability' laid down in the case-law of the Court of Justice; see below, footnote 32.

- (26) See, also, Access notice, paragraph 46, and Case T-83/91, *Tetra Pak v Commission*, [1994] ECR II-755, paragraph 68. This test is also known as 'SSNIP' (small but significant non transitory increase in price). Although the SSNIP test is but one example of methods used for defining the relevant market and notwithstanding its formal econometric nature, or its margins for errors (the so-called 'cellophane fallacy', see below), its importance lies primarily in its use as a conceptual tool for assessing evidence of competition between different products or services.
- (27) See Notice on market definition, paragraphs 17-18.
- (28) In other words, where the cross-price elasticity of demand between two products is high, one may conclude that consumers view these products as close substitutes. Where consumer choice is influenced by considerations other than price increases, the SSNIP test may not be an adequate measurement of product substitutability; see Case T-25/99, *Colin Arthur Roberts and Valerie Ann Roberts v Commission*, [2001] ECR II-1881.
- (29) Within the context of market definition under Article 82 of the EC Treaty, a competition authority or a court would estimate the 'starting price' for applying the SSNIP on the basis of the price charged by the alleged monopolist. Likewise, under the prospective assessment of the effects which a merger may have on competition, the starting price would be based on the prevailing prices of the merging parties. However, where an NRA carries out a market analysis for the purposes of applying Article 14 of the framework Directive the service or product in question may be offered by several firms. In such a case, the starting price should be the industry 'average price'.
- (30) It is worth noting that prices which result from price regulation which does not aim at ensuring that prices are cost-based, but rather at ensuring an affordable offer within the context of the provision of universal services, may not be presumed to be set at a competitive level, nor should they serve as a starting point for applying the SSNIP test.
- (31) Indeed, one of the drawbacks of the application of the SSNIP test is that in some cases, a high-demand cross-price elasticity may mean that a firm has already exercised market power, a situation known in competition law and practice as the 'cellophane fallacy'. In such cases, the prevailing price does not correspond to a competitive price. Determining whether the prevailing price is set above the competitive level is admittedly one of the most difficult aspects of the SSNIP test. NRAs faced with such difficulties could rely on other criteria for assessing demand and supply substitution such as functionality of services, technical characteristics, etc. Clearly, if evidence exist to show that in the past a firm has engaged in anti-competitive behaviour (price-fixing) or has enjoyed market power, then this may serve as an indication that its prices are not under competitive constraint and accordingly are set above the competitive level.
- (32) Case C-333/94 P, *Tetra Pak v Commission* [1996] ECR I-5951, paragraph 13, Case 31/80 *L'Oréal* [1980] ECR 3775, paragraph 25, Case 322/81, *Michelin v Commission* [1983] ECR 3461, paragraph 37, Case C-62/86, *AkzoChemie v Commission* [1991] ECR I-3359, Case T-504/93, *Tiercé Ladbroke v Commission* [1997] ECR II-923, paragraph 81, T-65/96, *Kish Glass v Commission* [2000] ECR II-1885, paragraph 62, Case C-475/99, *Ambulanz Glöckner and Landkreis Südwestpfalz*, [2001] ECR I-0000, paragraph 33. The test of sufficient substitutability or interchangeability was first laid down by the Court of Justice in Case 6/72, *Europemballage and Continental Can v Commission*, [1973] ECR 215, paragraph 32 and Case 85/76, *Hoffmann La-Roche v Commission* [1979] ECR 461, paragraph 23.
- (33) Case C-333/94 P, *Tetra Pak v Commission* [1996] ECR I-5951, paragraph 13, Case 66/86, *Ahmed Saeed* [1989] ECR 803, paragraphs 39 and 40, Case *United Brands v Commission* [1978] ECR 207, paragraphs 22 and 29, and 12; Case T-229/94, *Deutsche Bahn v Commission* [1997] ECR II-1689, paragraph 54. In *Tetra Pak*, the Court confirmed that the fact that demand for aseptic and non-aseptic cartons used for packaging fruit juice was marginal and stable over time relative to the demand for cartons used for packaging milk was evidence of a very little interchangeability between the milk and the non-milk packaging sector, *idem*, paragraphs 13 and 15.
- (34) For example, in the case of a relative price increase, consumers of a lower quality/price service may switch to a higher quality/price service if the cost of doing so (the premium paid) is offset by the price increase. Conversely, consumers of a higher quality product may no longer accept a higher premium and switch to a lower quality service. In such cases, low and high quality products would appear to be effective substitutes.
- (35) Communication from the Commission — Status of voice on the Internet under Community law, and in particular, under Directive 90/388/EEC — Supplement to the Communication by the Commission to the European Parliament and the Council on the status and implementation of Directive 90/388/EEC on competition in the markets for telecommunications services (OJ C 369, 22.12.2000, p. 3). Likewise, it cannot be excluded that in the future, xDSL technology and multipoint video distribution services based on wireless local loops may be used for the transmission of TV materials in direct competition with other existing TV delivery systems based on cable systems, direct-to-home satellite transmission and terrestrial analogue or digital transmission platforms.
- (36) Switching costs which stem from strategic choices by undertakings rather than from exogenous factors should be considered, together with some other form of entry barriers, at the subsequent stage of SMP assessment. Where a market is still growing, total switching costs for already 'captured' consumers may not be significant and may not thus deter demand or supply-side substitution.
- (37) The time frame to be used to assess the likely responses of other suppliers in case of a relative price increase will inevitably depend on the characteristics of each market and should be decided on a case-by-case basis.
- (38) See, also, Case C-333/94, *Tetra Pak v Commission*, *op. cit.*, paragraph 19. As mentioned above, the required investments should also be undertaken within a reasonable time frame.
- (39) See, also, Case COMP/M.2574 — *Pirelli/Edizione/Olivetti/Telecom Italia*, paragraph 58.
- (40) *United Brands*, *op. cit.*, paragraph 44, *Michelin*, *op. cit.*, paragraph 26, Case 247/86 *Alsatel v Novasam* [1988] ECR 5987, paragraph 15; *Tiercé Ladbroke v Commission*, *op. cit.*, paragraph 102.
- (41) *Deutsche Bahn v Commission*, *op. cit.*, paragraph 92. Case T-139/98 *AAMS v Commission*, [2001] ECR 0000-II, paragraph 39.
- (42) See, for instance, Case IV/M.1025 — *Mannesmann/Olivetti/Infostrada*, paragraph 17, and Case COMP/JV.23 — *Telefónica Portugal Telecom/Médi Telecom*.
- (43) In practice, this area will correspond to the limits of the area in which an operator is authorised to operate. In Case COMP/M.1650 — *ACEA/Telefónica*, the Commission pointed out that since the notified joint venture would have a licence limited to the area of Rome, the geographical market could be defined as local; at paragraph 16.

- (44) The fact that mobile operators can provide services only in the areas where they have been authorised to and the fact that a network architecture reflects the geographical dimension of the mobile licences explains why mobile markets are considered to be national in scope. The extra connection and communications costs that consumers face when roaming abroad, coupled with the loss of certain additional service functionalities (i.e. lack of voice mail abroad) further supports this definition; see Case IV/M.1439 — Telia/Telenor, paragraph 124, Case IV/M.1430 — Vodafone/Airtouch, paragraphs 13-17, Case COMP/JV.17 — Mannesmann/Bell Atlantic/Omnitel, paragraph 15.
- (45) Physical interconnection agreements may also be taken into consideration for defining the geographical scope of the market, Case IV/M.570 — TBT/BT/TeleDanmark/Telenor, paragraph 35.
- (46) Case IV/M.856 — British Telecom/MCI (II), paragraph 19s., Case IV/JV.15 — BT/AT & T, paragraph 84 and 92, Case COMP/M.2257 — France Telecom/Equant, paragraph 32. It is highly unlikely that the provision of electronic communications services could be segmented on the basis of national (or local) bilateral routes.
- (47) Reference may be made, for instance, to the market for backhaul capacity in international routes (i.e. cable station serving country A to country E) where a potential for substitution between cable stations serving different countries (i.e., cable stations connecting Country A to B, A to C and A to D) may exist where a supplier of backhaul capacity in relation to the route A to E is or would be constrained by the ability of consumers to switch to any of the other 'routes', also able to deal with traffic from or to country E.
- (48) Where a market is defined on the basis of a bilateral route, its geographical scope could be wider than national if suppliers are present in both ends of the market and can satisfy demand coming from both ends of the relevant route.
- (49) See Notice on market definition, paragraphs 57 and 58. For instance, chain substitutability could occur where an undertaking providing services at national level constraints the prices charged by undertakings providing services in separate geographical markets. This may be the case where the prices charged by undertakings providing cable networks in particular areas are constrained by a dominant undertaking operating nationally; see also, Case COMP/M.1628 — TotalFina/Elf (OJ L 143, 29.5.2001, p. 1), paragraph 188.
- (50) Evidence should show clear price interdependence at the extremes of the chain and the degree of substitutability between the relevant products or geographical areas should be sufficiently strong.
- (51) The Commission has, *inter alia*, made references in its decisions to the existence of the following markets: international voice-telephony services (Case IV/M.856 — British Telecommunications/MCI (II), OJ L 336, 8.12.1997), advanced telecommunications services to corporate users (Case IV/35.337, Atlas, OJ L 239, 19.9.1996, paragraphs 5-7, Case IV/35617, Phoenix/Global/One, OJ L 239, 19.9.1996, paragraph 6, Case IV/34.857, BT-MCI (I), OJ L 223, 27.8.1994), standardised low-level packet-switched data-communications services, resale of international transmission capacity (Case IV/M.975 — Albacom/BT/ENI, paragraph 24) audioconferencing (Albacom/BT/ENI, paragraph 17), satellite services (Case IV/350518 — Iridium, OJ L 16, 18.1.1997), (enhanced) global telecommunications services (Case IV/JV.15 — BT/AT & T, Case COMP/M.1741 — MCI WorldCom/Sprint, paragraph 84, Case COMP/M.2257 — France Telecom/Equant, paragraph 18), directory-assistance services (Case IV/M.2468 — SEAT Pagine Gialle/ENIRO, paragraph 19, Case COMP/M.1957 — VIAG Interkom/Telenor Media, paragraph 8), Internet-access services to end users (Case IV/M.1439 — Telia/Telenor, Case COMP/JV.46 — Blackstone/CDPQ/Kabel Nordrhein/Westfalen, paragraph 26, Case COMP/M.1838 — BT/Esat, paragraph 7), top-level or universal Internet connectivity (Case COMP/M.1741 — MCI WorldCom/Sprint, paragraph 52), seamless pan-European mobile telecommunications services to internationally mobile customers (Case COMP/M.1975 — Vodafone Airtouch/Mannesmann, Case COMP/M.2016 — France Telecom/Orange, paragraph 15), wholesale roaming services (Case COMP/M.1863 — Vodafone/Airtel, paragraph 17), and market for connectivity to the international signalling network (Case COMP/2598 — TDC/CMG/Migway JV, paragraphs 17-18).
- (52) See, also, Joined Cases T-125/97 and T-127/97, *The Coca-Cola Company and Others v Commission* [2000] ECR II-1733, at paragraphs 81 and 82.
- (53) See, also, Article 15 of the framework Directive.
- (54) Access notice, paragraph 45.
- (55) See Case COMP/M.1439 — Telia/Telenor.
- (56) See Telia/Telenor, BT/AT & T, France Télécom/Equant, *op. cit.* See also Commission Decision of 20 May 1999, *Cégétel + 4* (OJ L 218, 18.8.1999), paragraph 22. With regard to the emerging market for 'Global broadband data communications services — GBDS', the Commission has found that such services can be supported by three main network architectures: (i) terrestrial wireline systems; (ii) terrestrial wireless systems; and (iii) satellite-based systems, and that from a demand side, satellite-based GBDS can be considered as a separate market, Case COMP/M.1564 — Astrolink, paragraphs 20-23.
- (57) Directive 96/19/EC, recital 20 (OJ L 74, 22.3.1996, p. 13). See, also, communication from the Commission, 'Unbundled access to the local loop: enabling the competitive provision of a full range of electronic communication services, including broadband multimedia and high speed Internet' (OJ C 272, 23.9.2000, p. 55). Pursuant to point 3.2, 'While categories of services have to be monitored closely, particularly given the speed of technological change, and regularly reassessed on a case-by-case basis, these services are presently normally not substitutable for one another, and would therefore be considered as forming different relevant markets'.
- (58) The Commission has identified separate markets for services to large multinational corporations (MNCs) given the significant differences in the demand (and supply) of services to this group of customers compared to other retail (business) customers, see Case IV/JV.15 — BT/AT & T, Case COMP/M.1741 — MCI WorldCom/Sprint, Case COMP/M.2257 — France Télécom/Equant.
- (59) See communication on 'Unbundled access to the local loop', *op.cit.*, point 3.2. The market for 'high-speed' communications services could possibly be further divided into distinct segments depending on the nature of the services offered (i.e. Internet services, video-on-demand, etc.).
- (60) Case COMP/M.2574 — Pirelli/Edizione/Olivetti/Telecom Italia, paragraph 33. It could also be argued that dial-up access to the Internet via existing 2G mobile telephones is a separate market from dial-up access via the public switched telecommunications network. According to the Commission, accessing the Internet via a mobile phone is unlikely to be a substitute for existing methods of accessing the Internet via a PC due to difference in sizes of the screen and the format of the material that can be obtained through the different platforms; see Case COMP/M.1982 — Telia/Oracle/Druitt, paragraph 15, and Case COMP/JV.48 Vodafone/Vivendi/Canal+.

- (⁶¹) Case COMP/M.2469 — Vodafone/Airtel, paragraph 7, Case IV/M.1430 — Vodafone/Airtouch, Case IV/M.1669, Deutsche Telecom/One2One, paragraph 7. Whether this market can be further segmented into a carrier (network operator) market and a downstream service market should be decided on a case-by-case basis; see Case IV/M.1760 — Mannesmann/Orange, paragraphs 8-10, and Case COMP/M.2053 — Telenor/BellSouth/Sonofon, paragraphs 9-10.
- (⁶²) For instance, in British Interactive Broadcasting/Open, the Commission noted that for the provision of basic voice services to consumers, the relevant infrastructure market included not only the traditional copper network of BT but also the cable networks of the cable operators, which were capable of providing basic telephony services, and possibly wireless fixed networks, Case IV/36.359, (OJ L 312, 6.12.1999, paragraphs 33-38). In Case IV/M.1113 — Nortel/Norweb, the Commission recognised that electricity networks using 'digital power line' technology could provide an alternative to existing traditional local telecommunications access loop, paragraphs 28-29.
- (⁶³) In assessing the conditions of network competition in the Irish market that would ensue following full liberalisation, the Commission also relied on the existence of what, at that period of time, were perceived as potential alternative infrastructure providers, namely, cable TV and electricity networks, Telecom Eireann, cit., paragraph 30. The Commission left open the question whether the provision of transmission capacity by an undersea network infrastructure constitutes a distinct market from terrestrial or satellite transmissions networks, Case COMP/M.1926 — Telefonica/Tyco/JV, at paragraph 8.
- (⁶⁴) Case COMP/M.1439, Telia/Telenor, paragraph 79. For instance, an emerging pan-European market for wholesale access (SMS) to mobile infrastructure has been identified by the Commission in Case COMP/2598 — TDC/CMG/Migway JV, at paragraphs 28-29.
- (⁶⁵) In applying these criteria, the Commission has found that, as far as the fixed infrastructure is concerned, demand for the lease of transmission capacity and the provision of related services to other operators occurs at wholesale level (the market for carrier's carrier services; see Case IV/M.683 — GTS-Hermes Inc./HIT Rail BV, paragraph 14, Case IV/M.1069 — WorldCom/MCI (OJ L 116, 4.5.1999, p. 1), Unisource (OJ L 318, 20.11.1997, p. 1), Phoenix/Global One (OJ L 239, 19.9.1996, p. 57), Case IV/JV.2 — Enel/FT/DT. In Case COMP/M.1439 — Telia/Telenor, the Commission identified distinct patterns of demand for wholesale and retail (subscriber) access to network infrastructure (provision or access to the local loop, and provision or access to long distance and international network infrastructure), paragraphs 75-83.
- (⁶⁶) See footnote 58.
- (⁶⁷) Fibre optics are currently competitive only on upstream transmission markets whereas wireless local loops which are still to be deployed will target mainly professionals and individuals with particular communications needs. With the exception of certain national markets, existing cable TV networks need costly upgrades to support two ways broadband communications, and, compared with xDSL technologies, they do not offer a guaranteed bandwidth since customers share the same cable channel.
- (⁶⁸) See also Case IV/JV.11 — @Home Benelux BV.
- (⁶⁹) For example, if a fixed operator wants to terminate calls to the subscribers of a particular network, in principle, it will have no other choice but to call or interconnect with the network to which the called party has subscribed. For instance, in light of the 'calling party pays' principle, mobile operators have no incentives to compete on prices for terminating traffic to their own network. See also, OECD, 'Competition issues in telecommunications-background note for the secretariat', DAFE/CLP/WP2(2001)3, and Commission's press release IP/02/483.
- (⁷⁰) Case 27/76 *United Brands v Commission* [1978] ECR 207.
- (⁷¹) See, also, recital 25 of the framework Directive.
- (⁷²) See Article 14, paragraph 2, and recital 28 of the framework Directive.
- (⁷³) It should be noted that NRAs do not have to find an abuse of a dominant position in order to designate an undertaking as having SMP.
- (⁷⁴) Case 85/76, *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 39. It should be stressed here that for the purposes of *ex-ante* regulation, if an undertaking has already been imposed regulatory obligations, the fact that competition may have been restored in the relevant market as a result precisely of the obligations thus imposed, this does not mean that that undertaking is no longer in a dominant position and that it should no longer continue being designated as having SMP.
- (⁷⁵) The absence of any substitutable service or product may justify a finding of a situation of economic dependence which is characteristic of the existence of a dominant position. See Commission decisions, *Decca Navigator System* (OJ L 43, 15.2.1987, p. 27) and *Magill TV Guide: ITP, BBC, RTE* (OJ L 78, 21.3.1989, p. 43). See also, Case 22/78 *Hugin v Commission* 1979 [ECR] 1869, Case 226/84, *British Leyland v Commission* 1986 [ECR] p. 3263.
- (⁷⁶) See, also, recital 15 of Council Regulation (EEC) No 4064/89.
- (⁷⁷) *United Brands v Commission*, op. cit. The greater the difference between the market share of the undertaking in question and that of its competitors, the more likely will it be that the said undertaking is in a dominant position. For instance, in Case COMP/M.1741 — MCI WorldCom/Sprint it was found that the merged entity would have in the market for the provision of top-level Internet connectivity an absolute combined market share of more than [35-45] %, several times larger than its closest competitor, enabling it to behave independently of its competitors and customers (see paragraphs 114, 123, 126, 146, 155 and 196).
- (⁷⁸) Case C-62/86, *AKZO v Commission*, [1991] ECR I-3359, paragraph 60; Case T-228/97, *Irish Sugar v Commission*, [1999] ECR II-2969, paragraph 70, Case *Hoffmann-La Roche v Commission*, op. cit, paragraph 41, Case T-139/98, *AAMS and Others v Commission* [2001 ECR II-0000, paragraph 51. However, large market shares can become accurate measurements only on the assumption that competitors are unable to expand their output by sufficient volume to meet the shifting demand resulting from a rival's price increase.

- (79) Case *Hoffmann-La Roche v Commission*, op. cit., paragraph 41, Case C-62/86, *Akzo v Commission* [1991] ECR I-3359, paragraphs 56, 59. 'An undertaking which has a very large market share and holds it for some time, by means of the volume of production and the sale of the supply which it stands for — without holders of much smaller market shares being able to meet rapidly the demand from those who would like to break away from the undertaking which has largest market share — is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which, because of this alone, secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position', Case *AAMS and Others v Commission*, op. cit., paragraph 51.
- (80) Notice on market definition, op. cit., at p. 5.
- (81) See Case COMP/M.1741 — MCI WorldCom/Sprint, paragraph 239-240. In bidding markets, however, it is important not to rely only on market shares as they in themselves may not be representative of the undertakings actual position, for further discussion, see, also, Case COMP/M.2201 — MAN/Aüwarter.
- (82) See, Determination of organisations with significant power (SMP) for the implementation of the ONP Directive, DG XIII, 1 March 1999, at <http://europa.eu.int/ISPO/infosoc/telecompolicy/en/SMPdeter.pdf>, at paragraph 3.2.
- (83) *Idem*, at paragraph 5.2.
- (84) With regard to the interconnection market of fixed and mobile networks, the termination traffic to be measured should include own network traffic and interconnection traffic received from all other fixed and mobile networks, national or international.
- (85) *Hoffmann-La Roche v Commission*, op. cit., at paragraph 48. One of the most important types of entry barriers is sunk costs. Sunk costs are particularly relevant to the electronic communications sector in view of the fact that large investments are necessary to create, for instance, an efficient electronic communications network for the provision of access services and it is likely that little could be recovered if a new entrant decides to exit the market. Entry barriers are exacerbated by further economies of scope and density which generally characterise such networks. Thus, a large network is always likely to have lower costs than a smaller one, with the result that an entrant in order to take a large share of the market and be able to compete would have to price below the incumbent, making it thus difficult to recover sunk costs.
- (86) Joined Cases C-241/91 P and C-242/91 P, *RTE and ITP v Commission*, [1995] ECR I-743, Case C-7/97, *Oscar Bronner* [1998] ECR I-7791, and Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94, *European Night Services and others v Commission* [1998] ECR II-3141.
- (87) Case COMP/M.1741 — MCI WorldCom/Sprint, paragraph 196.
- (88) Case C-333/94 P, *Tetra Pak v Commission* [1996] ECR I-5951.
- (89) See, also, Case COMP/M.2146 — Tetra Laval/Sidel, paragraphs 325-389, *sub judice*, T-5/02.
- (90) See Access notice, paragraph 65.
- (91) In the case of horizontal markets, the market analysis should focus on establishing the existence of close associative links which will enable an undertaking dominant in one market to behave independently of its competitors in a neighbouring market. Such links may be found to exist by reference to the type of conduct of suppliers and users in the markets under consideration (same customers and/or suppliers in both markets, i.e. customers buying both retail voice calls and retail Internet access) or the fact that the input product or service is essentially the same (i.e. provision by a fixed operator of network infrastructure to ISPs for wholesale call origination and wholesale call termination); see, also, Case T-83/91, *Tetra Pak v Commission*, op. cit., paragraph 120 and Case COMP/M.2416 — *Tetra Laval/Sidel*.
- (92) Article 14(3) of the framework Directive is not intended to apply in relation to market power leveraged from a 'regulated' market into an emerging, 'non-regulated' market. In such cases, any abusive conduct in the 'emerging' market would normally be dealt with under Article 82 of the EC Treaty.
- (93) See Access notice, paragraph 79.
- (94) Joined cases C-395/96 P and C-396/96 P, *Compagnie maritime belge and others v Commission* [2000] ECR I-1365.
- (95) *Idem*, at paragraph 39.
- (96) Case T102/96, *Gencor v Commission* [1999] ECR II-753.
- (97) See Joined Cases T-68/89, T-77/89 and T-78/89, *SIV and Others v Commission* [1992] ECR II-1403, paragraph 358, Case C-393/92 *Almelo* [1994] ECR I-1477, paragraph 43, Case C-96/94, *Centro Servizi Spediporto* [1995] ECR I-2883, paragraph 33, Joined Cases C-140/94, 141/94, and C-142/94, *DIP*, [1995] ECR I-3257, paragraph 62, Case C-70/95, *Sodemare* [1997] ECR I-3395, paragraph 46, and Joined Cases C-68/94 and C-30/95 *France and Others v Commission* [1998] ECR I-1375, paragraph 221.
- (98) Case IV/M.619 — *Gencor Lonhro* (OJ L 11, 14.1.1997, p. 30).
- (99) *Gencor v Commission*, op. cit., at paragraph 276.
- (100) *Idem*, at paragraph 277.
- (101) *Compagnie maritime belge transports and Others*, op. cit., at paragraph 39, see, also, Case T-342/99 *Airtours/Commission* [2002] ECR II-0000, paragraph 76.
- (102) See, in particular, *France and Others v Commission*, op. cit., paragraph 221.
- (103) *Compagnie maritime belge*, at paragraph 39.
- (104) *Idem* at paragraph 44.
- (105) *Idem* at paragraph 45.
- (106) The use here of the term 'coordinated effects' is no different from the term 'parallel anticompetitive behaviour' also used in Commission's decisions applying the concept of collective (oligopolistic) dominance.

- (107) See in particular, Cases COMP/M.2498 — UPM-Kymmene/Haindl, and COMP/M.2499 — Norske Skog/Parenco/Walsum, Case COMP/M.2201 — MAN/Auwärter, Case COMP/M.2097 — SCA/Metsä Tissue, Case COMP/M.1882 — Pirelli/BICC, Case COMP/M.1741 — MCI WorldCom/Sprint, *sub judice*, T-310/00 Case IV/M.1524 — Airtours/First Choice (OJ L 93, 13.4.2000, p. 1), *sub judice* T-342/99, Case IV/M.1383 — Exxon/Mobil, Case IV/M.1313 — Danish Crown/Vestjyske Slagterier (OJ L 20, 25.1.2000, p. 1), Case IV/M.1225 — Enso/Stora (OJ L 254, 29.9.1999, p. 9), Case IV/M.1016 — Price Waterhouse/Coopers & Lybrand (OJ L 50, 26.2.1999, p. 27), Case IV/M.619 — Gencor/Lonrho, *cit.*, Case IV/M.308, Kali + Salz/MdK/Treuhand (OJ L 186, 21.7.1994, p. 38) and Case IV/M.190 — Nestlé/Perrier (OJ L 356, 5.12.1992, p. 1).
- (108) This is in essence the type of analysis carried out by the Commission in past decisions related to collective dominance, see, for instance, Case IV/M.190 — Nestlé/Perrier, (OJ L 356, 5.12.1992, p. 1), Gencor/Lonrho, *cit.*, Case IV/M.1383 — Exxon/Mobil, paragraph 259, Case IV/M.1524 — Airtours/First Choice (OJ L 93, 13.4.2000, p. 1), and Case COMP/M.2499 — Norske Skog/Parenco/Walsum, paragraph 76; see, also, *Airtours v Commission*, *op. cit.*, paragraph 62.
- (109) See, also, recital 26 of the framework Directive: 'two or more undertakings can be found to enjoy a joint dominant position not only where there exist structural or other links between them but also where the structure of the relevant market is conducive to coordinated effects, that is, it encourages parallel or aligned anticompetitive behaviour on the market'.
- (110) See Case COMP/M.2498 — UPM-Kymmene/Haindl, and Case COMP/M.2499 — Norske Skog/Parenco/Walsum, at paragraph 77.
- (111) See, for instance, Case COMP/M.2097 — SCA/Metsä Tissue.
- (112) For instance, in Case COMP/M.2201 — MAN/Auwärter, despite the fact that two of the parties present in the German city-bus market in Germany, MAN/Auwärter and EvoBus, would each supply just under half of that market, the Commission concluded that there was no risk of joint dominance. In particular, the Commission found that any tacit division of the market between EvoBus and MAN/Auwärter was not likely as there would be no viable coordination mechanism. Secondly, significant disparities between EvoBus and MAN/Auwärter, such as different cost structures, would make it likely that the companies would compete rather than collude. Likewise, in the Alcoa/British Aluminium case, the Commission found that despite the fact that two of the parties present in the relevant market accounted for almost 80 % of the sales, the market could not be said to be conducive to oligopolistic dominance since (i) market shares were volatile and unstable; and (ii) demand was quite irregular making it difficult for the parties to be able to respond to each other's action in order to tacitly coordinate their behaviour. Furthermore, the market was not transparent in relation to prices and purchasers had significant countervailing power. The Commission's conclusions were further reinforced by the absence of any credible retaliation mechanism likely to sustain any tacit coordination and the fact that competition in the market was not only based on prices but depended to a large extent on technological innovation and after-sales follow-up, Case COMP/M.2111 — Alcoa/British Aluminium.
- (113) Likewise, in Case COMP/M.2348 — Outokumpu/Norzink, the Commission found that even if the zinc market was composed of few players, entry barriers were high and demand growth perspectives low, the likelihood of the emergence of a market structure conducive to coordinated outcome was unlikely if it could be shown that (i) parties could not manipulate the formation of prices; (ii) producers had asymmetric cost structures and there was no credible retaliation mechanism in place.
- (114) See Case COMP/M.1741 — MCI WorldCom/Sprint, paragraph 263.
- (115) *Idem*, paragraphs 257-302.
- (116) Case COMP/M.1838 — BT/Esat.
- (117) *Idem*, paragraphs 10 to 14.
- (118) Case IV/M.1430 — Vodafone/Airtouch.
- (119) *Idem*, at paragraph 28. The likely emergence of a duopolistic market concerned only the three largest mobile operators, that is D2 and E-Plus, on the one hand, and T-Mobil on the other hand, given that VIAG Interkom's market share was below 5 %. The Commission's concerns were finally removed after the parties proposed to divest Vodafone's entire stake in E-Plus.
- (120) Case COMP/M.2016 — France Telecom/Orange, at paragraph 26.
- (121) *Idem*, at paragraphs 39-40. In its working document 'On the initial findings of the sector inquiry into mobile roaming charges', the Commission made reference to (i) the likely existence of a number of economic links between mobile operators, namely through their interconnection agreements, their membership of the GSM Association, the WAP and the UMTS forum, the fact that terms and conditions of roaming agreements were almost standardised; and (ii) the likely existence of high barriers to entry. In its preliminary assessment the Commission also stressed that the fact that the mobile market is, in general, technology driven, did not seem to have affected the conditions of competition prevailing on the wholesale international roaming market, see: http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/roaming/, at pages. 24 and 25.
- (122) GATS commitments taken by EC on telecommunications: <http://gats-info.eu.int/gats-info/swtosvc.pl?&SECCODE=02.C>.
- (123) The Communications Committee in Article 22 of the framework Directive also aims at ensuring effective cooperation between the Commission and the Member States.
- (124) The specific Articles covered are as follows: Articles 15 and 16 of the framework Directive (the latter of which refers to Articles 16-19 of the universal service Directive and Articles 7 and 8 of the access Directive), Articles 5 and 8 of the access Directive (the latter of which refers to the obligations provided for in Articles 9-13 of the access Directive) and Article 16 of the universal service Directive (which refers to Articles 17-19 of universal service Directive). In addition, Article 6 of the access Directive, although not explicitly referenced in Article 7 of the framework Directive, itself contains cross-reference to Article 7 of the framework Directive and is therefore covered by the procedures therein.
- (125) Recital 38 of the framework Directive.
- (126) As provided for in Article 3 of Council Decision 1999/468/EC laying the procedure for the exercising of implementing powers conferred on the Commission, the Commission shall take the utmost account of the opinion delivered by the Committee, but shall not be bound by the opinion.