



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 28.3.2001
COM (2001) 175 final

COMMISSION WORKING DOCUMENT

On

**Proposed New Regulatory Framework for
Electronic Communications Networks and Services**

**Draft Guidelines on market analysis
and the calculation of significant market power**

**under Article 14 of the proposed Directive
on a common regulatory framework for
electronic communications networks and services**

CONTENTS

1.	Introduction.....	3
1.1.	Scope and purpose of the Guidelines.....	3
1.2.	Principles and policy objectives of sector specific measures.....	5
1.3.	Relationship to Competition law	6
2.	Market definition.....	7
2.1.	Introduction	7
2.2.	Main criteria for defining the relevant market	9
2.2.1.	The relevant product/service market	10
2.2.1.1.	Demand-side substitution.....	11
2.2.1.2.	Supply-side substitution.....	12
2.2.2.	Geographic Market	12
2.2.3.	Other issues of market definition	14
2.2.3.1.	The Commission’s own practice	14
3.	Calculating significant market power (dominance)	18
3.1.	Criteria for assessing SMP.....	18
3.1.1.	Leverage of market power	21
3.1.2.	Collective dominance	21
3.1.2.1.	The Commission’s decision-making practice	24
3.1.2.2.	Collective dominance and the Telecommunications sector.....	26
4.	Imposition, amendment or withdrawal of obligations under Article 14 of the Framework directive.....	27
4.1.	Designation of Significant Market Power	27
4.2.	Regulatory obligations.....	28
4.3.	Trans-national markets: joint analysis by NRAs.....	28
4.4.	Regulatory obligations and WTO commitments.....	29
5.	Powers of investigation and Procedures for Co-operation	29
5.1.	Overview of Procedures by NRAs	29
5.2.	Market analysis and power of investigation.....	30
5.3.	Co-operation Procedures.....	31
6.	Procedures for Public Consultation and Publication of Proposed NRA decisions	31
6.1.	Consultation mechanism.....	31
6.2.	Adoption of the final decision.....	33
	ANNEX OF RELEVANT PROVISIONS.....	

Draft Guidelines on market analysis and the calculation of significant market power under Article 14 of the proposed Framework Directive on a common regulatory framework for electronic communications networks and services¹

Note. This document is based on the text of the Directive as proposed by the Commission. It will be updated as necessary to reflect any changes to the Commission proposal agreed by the EP and the Council.

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 effective competition under Article 14 of the proposed Directive [...] on a common regulatory framework for electronic communications networks and services. These Guidelines are for NRAs to use when determining whether an undertaking or undertakings enjoy significant market power as defined in Article 13 of that directive. Undertakings designated as having significant market power may be subject to obligations under other Directives in the regulatory package.²

2. These guidelines address the following subjects: (a) market definition (b) assessment of Significant Market Power (c) SMP designation and (d) procedural issues.

3. These Guidelines will be applied by NRAs in the markets identified in the Commission Decision adopted under Article 14 of Directive [framework] that lays down the relevant product and service markets susceptible of ex ante regulation under the directives and in the markets identified by NRAs with the approval of the Commission under Art 14.(1) of Directive [framework].

4. The major objective of these Guidelines is to ensure consistency of approach by NRAs in applying certain provisions of the Directives, as reproduced in Annex, and especially when they designate undertakings with significant market power in application of the provisions of the Directives.

5. The Guidelines have been designed for NRAs to use as follows:

- To identify the geographical dimension of those product and service markets identified in the Commission Decision under Article 14 of Directive [framework]. NRAs will not

¹ Commission proposal for a Directive on a common regulatory framework for electronic communications networks and services COM(2000) 393 (OJ C 365 E, 19.12.2000, p.198).

² Proposal for a Directive of the European Parliament and of the Council on access to, and interconnection of, electronic communications networks and associated facilities COM(200) 384, OJ C365E, 19.12.2000, p.215

Proposal for a Directive of the European Parliament and of the Council on universal service and users' rights relating to electronic communications networks and services COM(2000)392, OJ C365E, 19.12.2000, p.238

define the geographic scope of trans-national markets, as the Commission Decision under Article 14(1) will identify the geographic dimension of trans-national markets.

- To identify relevant product and service markets other than those identified in the Commission’s Decision, and this, in agreement with the Commission.
- To analyse the characteristics of competition in both the markets identified in the Commission Decision and in markets that NRAs identify themselves using the methodology set out in Section 2 of the Guidelines,
- To identify undertakings in a relevant market with significant market power and to impose ex ante measures consistently with the terms of Directives [Framework, Access and Interconnection and Universal Service and Users Rights] as set out in Sections 3 and 4 of the Guidelines.
- To assist Member States and NRAs in enforcing Article 11.1(f) of Directive [] on the Authorisation of electronic communications networks and services³, and Article 5(1) of Directive [framework], by ensuring that companies comply with the obligation to provide information necessary for NRAs to determine relevant markets and significant market power thereon.
- To assist NRAs when dealing with confidential information, which is likely to be provided by:
 - undertakings under Article 11.1(f) of the Authorisation Directive
 - National Competition Authorities (NCAs) as part of the co-operation foreseen in Article 3.5 of the Framework Directive and in these Guidelines and
 - the Commission as part of the co-operation foreseen in Article 5.2 of the Framework Directive and these Guidelines
 - To recommend co-operation procedures for NRAs to use in their dealings with NCAs, with other NRAs and with the Commission.

6. The Guidelines are structured in the following way:

Section 2 describes the methodology for market definitions. **Section 3** describes the criteria for assessing SMP in a relevant market. **Section 4** outlines the possible outcomes that NRAs may reach in their assessments of markets and sets out the possible actions in respect of each possible outcome. **Section 5** describes the powers of investigations of NRAs, suggests procedures for co-ordination between NRAs, between NRAs and NCAs, and describes co-ordination and co-operation procedures between NRAs and the Commission. **Section 6** describes procedures for public consultation and publication of NRAs’ proposed decisions.

7. By issuing these Guidelines, the Commission also intends to explain to interested parties and companies operating in the electronic communications sector how NRAs will make their assessments of SMP under Directive [framework]. By publishing these Guidelines, the Commission intends to maximise the transparency and legal certainty in the

³ Proposal for a Directive of the European Parliament and of the Council on the authorisation of electronic communications networks and services, COM(2000)386, OJ C365E, 19.12.2000, p.230

application of the sector specific legislation to which they are complementary. The Commission will amend the Guidelines, whenever appropriate, in the light of NRAs' experience and related developments, for example, in response to future judgements of the Court of First Instance and the Court of Justice in competition law cases.

8. Under the terms of Article 14.2 of Directive [framework], NRAs should follow the Guidelines in their market analyses and SMP designations. This will be an important factor in any assessment by the Commission of proposed decisions by NRAs, pursuant to Article 6 of Directive [framework]. These Guidelines do not in any way restrict the rights conferred by Community law on individuals or undertakings and are without prejudice to the application by the Commission of the competition rules of the Treaty and to any interpretation of the competition rules that may be given by the European Court of Justice and the Court of First Instance of the EC.

1.2. Principles and policy objectives of sector specific measures

9. In the absence of effective competition in the relevant markets identified in the Commission Decision, or in respect of electronic communications markets identified by NRAs using the methodology described in section 2 of the Guidelines, NRAs will designate undertakings as having SMP and impose specific obligations as appropriate. NRAs must decide which of the specific obligations should be imposed as a measure to substitute for effective competition (Article 14.5 of the Framework Directive).

10. When evaluating whether specific ex ante measures would be appropriate to impose upon one or more undertakings designated as having SMP, NRAs must seek to achieve the policy objectives identified in Article 7 (2), (3) and (4) of Directive [framework]. These are:

- to promote an open and competitive market for electronic communications networks, services and associated facilities
- to develop the internal market and
- to promote the interests of European citizens.

11. In the absence of effective competition, NRAs therefore have a threefold mandate. NRAs must consider what effect the measures imposed will have on the competitive environment, on the development of the internal market and on the interests of European citizens.

12. Where NRAs take decisions using the Guidelines, they will necessarily affect the development of the internal market. These decisions cannot be allowed to jeopardise the functioning of the internal market. Therefore, NRAs must ensure there is consistency of approach as between themselves in the application of the rules to which these Guidelines apply. Such consistency can only be achieved by close co-ordination and co-operation with other NRAs, with national competition authorities (NCAs) and with the Commission, as provided in Directive [framework] and suggested in Section 5.3 of the Guidelines. .

13. NRAs are directed to apply ex ante rules only in the absence of effective competition except where specific public policy objectives apply. In carrying out a market analysis under the terms of Article 14.1 of Directive [framework], NRAs will conduct a forward-looking, structural, evaluation of the relevant market(s).

14. The shortest meaningful period that should be used for such an assessment is twelve months. Therefore, NRAs' assessments should take into account expected or reasonably foreseeable market developments, over a period of up to 12 months, with longer periods used, if appropriate, depending on the specificities of the relevant market.

15. NRAs will make determinations as to whether there is effective competition in any of the markets identified in the Commission Decision, will designate SMP operators in those markets and will impose appropriate sector specific obligations on such undertakings. Co-ordination procedures for NRAs to use with NCAs for these purposes are described in Section 5.

16. If NRAs determine that there is no effective competition in a market other than a market identified in the Commission's Decision, and competition law remedies do not suffice to address the problems identified, NRAs must seek the prior agreement of the Commission, in accordance with the provisions of Article 14.1 of Directive [framework] before designating undertakings as having SMP and imposing specific obligations on such SMP operators.

17. The purpose of imposing obligations on undertakings designated as having SMP is to guarantee that the undertaking's market power could not be used to restrict or distort competition on the relevant market nor could such market power be leveraged onto adjacent markets. NRAs will impose one or more obligations, as set out in the Specific Directives, and as described further in Section 4, and may impose obligations, for access and interconnection, that go beyond the measures foreseen in Directive [access] only with the prior agreement of the Commission in accordance with the provisions of Article 8 of the Access Directive.

1.3. Relationship to Competition law

18. To ensure consistency of approaches, these Guidelines are based on (1) existing jurisprudence of the Court of First Instance and the Court of Justice concerning market definition and the notion of dominant position within the meaning of Article 82 of the EC Treaty, (2) the "Guidelines on the application of EEC competition rules in the telecommunications sector"⁴, the "Commission Notice on the definition of relevant market for the purposes of Community competition law"⁵, and the "Notice on the application of competition rules to access agreements in the telecommunications sector"⁶.

19. Markets defined by the Commission and NCAs in competition cases may, nevertheless, vary from those identified in the Commission Decision and from market definitions identified by NRAs under Section 2. The market definitions used by NRAs are without prejudice to those used by NCAs and by the Commission in the exercise of their respective powers.

20. In practice, parallel procedures under ex ante regulation and competition law

⁴ *Guidelines on the application of EEC Competition rules in the Telecommunications sector*, OJ C 233, 6.9.1991, p.2.

⁵ *Commission Notice on the definition of relevant market for the purposes of Community Competition law*, OJ 1997 C 372, p. 5, (hereafter *Notice on market definition*)

⁶ *Notice on the application of the competition rules to access agreements in the telecommunications sector*, OJ C 265, 22.8.1998, p. 2 (hereafter, *Access notice*).

may arise with respect to different kinds of problems in relevant markets. NCAs may therefore investigate a market and market behaviour 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. The principle previously set out above, i.e., autonomy of regulatory action in the exercise of their respective regulatory powers, would apply.

21. NRAs will exercise their powers under Article 14 of Directive [framework] to determine whether to designate undertakings in the market as having SMP. In so doing, NRAs enjoy considerable discretion in the exercise of their powers, with respect to the complexity of inter-related factors that must be assessed concerning the economic, factual and legal elements of identified markets, subject to the consultation and transparency procedure foreseen in Article 6 of the Framework Directive (see below, Section 6).

22. These Guidelines are meant to facilitate the work of NRAs, assisting them in reaching coherent and consistent results in each Member State and between Member States. Because each NRA has wide range of discretionary powers, it is extremely important for a balanced system to have mechanisms and facilitate co-operation between authorities that can ensure overall consistency and coherence (specific cooperation procedures are described below, in Section 5.3).

23. The new Directives cover electronic communications networks and services in general, and not just traditional telecommunications. However, ex-ante regulation is limited to those markets where competition is not effective, namely markets identified in the Commission's Decision or by NRAs in accordance with Article 14 of the Directive [framework]

2. MARKET DEFINITION

2.1. Introduction

24. In the Competition Guidelines issued in 1991⁷, 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 telecommunications sector, but focus only on issues related to (i) market definition and (ii) the calculation of significant market power within the meaning of Article 13 of the Framework Directive (hereafter, "SMP").

25. 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" (Article 13, paragraph 2 of the Framework Directive), the definition of the relevant market is of fundamental

⁷ *Guidelines on the application of EEC Competition rules in the Telecommunications sector*, OJ C 233, 6.9.1991, p.2.

importance since effective competition can only be assessed by reference to the market thus defined⁸. 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 previous 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 analysis⁹.

26. 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 analysis¹⁰. In this respect, any experience gained by NRAs or NCAs through the application of competition rules to the telecommunication sector clearly will be of particular relevance in applying Article 13 of the Framework directive. Thus, any information gathered, any findings made and any studies or reports commissioned or relied upon by NRAs 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 13 of the Framework Directive¹¹.

27. The main product and service markets which are likely to justify the imposition of *ex ante* regulatory obligations will be identified in the “*Decision on Relevant Product and service markets*” which the Commission is required to adopt pursuant to Article 14 of the Framework directive¹². Normally, the task of NRAs will be to define only the geographical scope of the relevant market, although NRAs will have the possibility under the Framework Directive to define markets other than those listed in the above mentioned

⁸ Case C-209/98, *Entreprenørforeningens Affalds* [2000] ECR I-3743, par. 57, and Case C-242/95 *GT-Link* [1997] ECR I-4449, par. 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.

⁹ 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 1997 L199/32 (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 1990 L192/1 (the “*ONP Framework Directive*”); Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines, OJ 1992 L165/27 (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 1995 L321/6, 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 1998 L101/24 (the “*ONP Voice Telephony Directive*”).

¹⁰ 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 par.12..

¹¹ 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.

¹² Article 14, paragraph 1 of the Framework Directive.

Decision, with the agreement of the Commission.

28. 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 behaviour¹³, nonetheless NRAs should seek to preserve, where possible, consistency between, on the one hand, market definition developed for the purposes of *ex-ante* regulation, and on the other hand, market definition developed for the purposes of *ex post* application of the competition rules.

2.2. Main criteria for defining the relevant market

29. 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. However, the existence of potential competition may more usefully be examined for the purposes of assessing whether a market is effectively competitive within the meaning of the Framework Directive, that is, whether there exist undertakings with significant market power¹⁴.

30. 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, whereas supply-side substitutability indicates whether suppliers other than those offering the product or services in question would switch their line of production or offer the relevant products or services without incurring significant additional costs.

31. One way of assessing the existence of any demand and supply-side substitution is to apply the so-called "hypothetical monopolist test"¹⁵. 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 the effects of a price increase of between 5 to 10%. The likely responses by consumers will aid in determining whether substitutable products do exist and if so, where the boundaries of the relevant product market should be delineated¹⁶.

32. 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.

¹³ *Notice on market definition*, p.5.

¹⁴ See *Notice on market definition*, par.20.

¹⁵ See also, *Access Notice*, par 46. This test is also known as "SSNIP" (small but significant non transitory increase in price).

¹⁶ In other words, where the cross-elasticity of demand between two products is high, one may conclude that consumers view these products as close substitutes.

33. 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”. 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.

34. The hypothetical monopolist test should be applied 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*

35. 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, but also in terms of the conditions of competition and/or the structure of supply and demand on the market in question¹⁷. Products or services which are only to a small, or relative degree interchangeable with each other do not form part of the same market¹⁸. 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).

36. 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.

37. 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

¹⁷ Case 31/80 *L'Oréal* [1980] ECR 3775, par. 25, Case 322/81 *Michelin v Commission* [1983] ECR 3461, par. 37, Case C-62/86 *AkzoChemie v Commission* [1991] ECR I-3359, Case T-504/93 *Tiercé Ladbroke v Commission* [1997] ECR II-923, par. 81, T-65/96, *Kish Glass v Commission* [2000] ECR II-0000, par.62.

¹⁸ Case 66/86, *Ahmed Saeed* [1989] ECR 803, paras 39 and 40, Case *United Brands v Commission* [1978] ECR 207, paras 22 and 29 and 12; Case T-229/94, *Deutsche Bahn v Commission* [1997] ECR II-1689, par. 54.

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).

38. 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 services¹⁹.

39. 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

40. 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. 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.

41. 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.

42. 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.

¹⁹ 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.

2.2.1.2. Supply-side substitution

43. 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 frame²⁰, 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. 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.

44. 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 collocation agreements, negotiating any other form of network access, or obtaining rights of ways for network expansion, may render unlikely in the short term the provision of new services and the deployment of new networks by potential competitors.

45. 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

46. 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.

47. 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 different²¹. 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

²⁰ 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. Given the constant technological developments of the telecommunications markets, NRA's should, in principle, evaluate the likely responses of suppliers in a period which is less than one year.

²¹ *United Brands*, cit., par 44, *Michelin*, cit., par 26, Case 247/86 *Alsattel v Novasam* [1988] ECR 5987, para.15; *Tiercé Ladbroke v Commission*, cit., par 102.

competition are “heterogeneous” may not be considered to constitute a uniform market²².

48. 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.

49. 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.

50. In the telecommunications sector, the geographical scope of the relevant market has traditionally been determined by reference to two main criteria²³:

- (a) the area covered by a network²⁴, and
- (b) the existence of legal and other regulatory instruments²⁵.

51. On the basis of these two main criteria²⁶, markets can be considered to be local, regional, national or covering territories of two or more countries (pan-European, EEA-wide or global markets).

52. In certain cases, the geographic market may be defined on a route-by-route basis. In particular, when considering the geographical 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. Clearly, from the demand side, the delivery of a call to one country is not a substitute for the delivery of the same to a 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

²² *Deutsche Bahn v Commission*, cit., par 92.

²³ See for instance, Case No IV/ML.1025, *Mannesmann/Olivetti/Infostrada*, par. 17, Case No COMP/JV.23 – *Telefonica Portugal Telecom/Médi Telecom*.

²⁴ In practice, this area will correspond to the limits of the area in which an operator is authorised to operate. In Case No COMP/M.1650 – *ACEA/Telefonica*, 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 par.16.

²⁵ 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 licenses, 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 No IV/M.1430 – *Vodafone/Airtouch*, paras. 13-17, Case No COMP/JV.17 – *Mannesmann/Bell Atlantic/Omnitel*, para.15..

²⁶ Physical interconnection agreements may also be taken into consideration for defining the geographical scope of the market, Case No IV/M.570 – *TBT/BT/TeleDanmark/Telenor*, par. 35.

specificities of the market and should be decided on a case-by-case basis²⁷.

2.2.3. Other issues of market definition

53. 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”²⁸. 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 substantiated²⁹.

2.2.3.1. The Commission’s own practice

54. The Commission has adopted a number of decisions under Regulation N° 17 and Regulation N° 4064/89³⁰ relating to the telecommunications sector. In these decisions the Commission has identified a number of relevant markets which may be of particular relevance for NRAs when applying Article 13 of the Framework Directive. 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 future³¹.

55. As stated in the *Access Notice*, there are in the telecommunications 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)³². Within these two broad market definitions further market distinctions may be made depending on demand and supply side patterns.

56. As regards the fixed services market, the Commission has defined the relevant market as being the market for domestic and international voice and data communications services, with further segmentation between the voice market (in which both private

²⁷ 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.

²⁸ See *Notice on market definition*, paras. 57 and 58.

²⁹ 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.

³⁰ Regulation (EEC) no 4064/89 on the control of concentrations between undertakings, OJ L 395, 30.12.1989, p.1, as last amended by Council Regulation (EC) no 1310/97 of 30 June 1997, OJ L 180, 09.7.1997, p. 1 (hereafter, the “Merger Control Regulation”).

³¹ See also, Joined Cases T-125/97 and T-127/97 *The Coca-Cola Company and Others v Commission* [2000] ECR II-0000, at paras 81 and 82.

³² *Access Notice*, par. 45.

households and business customers participate) and the data market (primarily used by business)³³. In the market for fixed telephony retail services, the Commission has distinguished various services: the initial connection, the monthly rental, local calls and long distance calls³⁴. These services are offered to two distinct classes of consumers, namely, residential and business users, the latter possibly being broken down further into two sub-markets, one for professional, small firms customers and another for large businesses. With regard to the fixed telephony retail services offered to residential users, demand patterns seems to indicate that two main 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.³⁵

57. As regards mobile telecommunications, the Commission has found that, from a demand-side point of view, mobile services and fixed telephony services constitute separate markets³⁶. Within the mobile market, evidence gathered from the Commission has indicated that the market for mobile telecommunications services encompasses both GSM 900 and GSM 1800 and possibly analogue platforms³⁷.

58. Specifically, the Commission has made references in its decisions to the existence of the following main markets:

- international voice-telephony services³⁸

³³ See Commission decision of 20 May 1999, *Cégétel + 4* (OJ L 218, 18.8.1999), par. 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 No COMP/M.1564 – *Astrolink*, paras. 20-23.

³⁴ 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”.

³⁵ *Id.* at point 3.2

³⁶ 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 No COMP/M.1982 – *Telia/Oracle/Drutt*, para.15, and Case No COMP/JV.48 *Vodafone/Vivendi/Canal+*.

³⁷ Case No IV/M.1430 – *Vodafone/Airtouch*, Case No IV/M.1669, *Deutsche Telecom/One2One*, par 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 No IN/1760, *Mannesmann/Orange*, paras.8–10, and Case No COMP/M.2053 – *Telenor/BellSouth/Sonofon*, paras 9-10.

³⁸ Case No IV/M.856 - *BT/MCI (II)*, OJ L 8.12.1997. These services are provided on the basis of existing international transmission facilities existing between the countries concerned or through the use of international private leased circuits hired from facilities based operators. In that decision, the

- advanced telecommunications services to corporate users³⁹
- standardised low-level packet-switched data-communications services
- resale of international transmission capacity⁴⁰
- audioconferencing⁴¹
- satellite services⁴²
- enhanced global telecommunications services⁴³
- directory-assistance services⁴⁴
- Internet-access services to end users⁴⁵
- Seamless pan-European mobile telecommunications services to internationally mobile customers⁴⁶

59. The Commission has decided that with regard to the “access” market, the latter comprises all types of infrastructure that can be used for the provision of a given service⁴⁷.

Commission considered that cable and satellite networks are not substitutable for the provision of international voice services at the required standard, para.13.

³⁹Case No IV/35.337, *Atlas* (OJ L 239, 19.9.1996) paras. 5-7, Case No IV/35617, *Phoenix/Global/One* (OJ L239, 19.9.1996), par. 6, Case IV/34.857, *BT-MCI* (OJ L 223, 27.8.1994), Case No IV/M.802 - *Telecom Eireann*, par. 22.

⁴⁰ Case No IV/M.975 - *Albacom/BT/ENI*, par 24.

⁴¹ *Idem*, par 17; From the point of view of end users, audioconferencing was considered a separate market, given that demand substitutes such as videoconferencing were significantly more expensive and it was unlikely that consumers would switch to such services in response to a small but significant permanent price increase (the “hypothetical monopolist test”).

⁴² Case IV/350518 – *Iridium*, OJ L 16, 18.1.1997.

⁴³ Case No IV/M.570 – *TBT/BT/TeleDanmark/Telenor*, Case No IV/M.900 – *BT/TELE DK/SBB/Migros/UBS*, par. 25.

⁴⁴ Case No COMP/M.1957 – *VIAG Interkom/Telenor Media*, par 8.

⁴⁵ From a demand point of view access to the Internet can be provided at a variety of bandwidths, with low bandwidth service (dial-up service) offered, generally, to residential customers and high-bandwidth service (i.e., dedicated, high speed connections) to business customers, Case no IV/M.1439 – *Telia/Telenor*, Case No COMP/JV.46 – *Blackstone/CDPQ/Kabel Nordrhein/Westfalen*, par. 26, Case No COMP/M.1838 – *BT/Esat*, par 7. In the latter case, the Commission left open the question whether the dial-up market could also be segmented into a residential and a business market (SME) given that business dial-up was being provided on the basis of more sophisticated dial-up mechanisms.

⁴⁶ Case No COMP/M.1975 – *Vodafone Airtouch/Mannesmann*, Case No COMP/M.2016 – *France Telecom/Orange*, para.15.

⁴⁷ 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 see Case No IV/36.359, OJ L 312, 6.12.1999, paras.33-38. In Case No 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, par. 28-29.

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 and should be decided on a case-by-case basis⁴⁸. 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). At the retail level, a further segmentation may take place between business and residential customers⁴⁹.

60. 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 loop⁵⁰, 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 infrastructure⁵¹. Future innovative and technological changes may, however, justify different conclusions⁵².

61. From a demand-side point of view, 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 a case-by-case basis⁵³.

⁴⁸ 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., para.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 No COMP/M.1926 - *Telefonica/Tyco/JV*, at par. 8.

⁴⁹ 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 No IV/M.683 - *GTS-HERMES Inc./HIT Rail BV*, par 14, M.1069 - *WorldCom/MCI*, OJ L 116, 4.5.1999, p. 1, *Unisource*, OJ L 318, 1997, p. 1, *Phoenix/Global One*, OJ L 239, 1996, p. 57, *JV.2, Enel/FT/DT*

⁵⁰ See footnote 25.

⁵¹ Fiber 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 xDLS technologies, they do not offer a guaranteed bandwidth since customers share the same cable channel.

⁵² See also Case No IV/JV.11 - *@Home Benelux B.V.*

⁵³ If an undertaking 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. In that regard, it is worth mentioning that one NRA has already defined an indirect access market for call origination on individual mobile networks.

3. CALCULATING SIGNIFICANT MARKET POWER (DOMINANCE)

62. According to Article 13 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 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 Treaty⁵⁴. The legislator has decided to align the definition of SMP to the Court’s definition of dominance within the meaning of Article 82 of the Treaty⁵⁵. Consequently, in applying the new definition of SMP, NRAs will have to ensure that their decisions are in line with the Commission’s practice and in conformity with the relevant jurisprudence of the Court of Justice and the Court of First Instance on dominance. 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*. Often, the lack of evidence or of records of past behaviour or conduct will mean that the market analysis will have to be based on a purely 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.

63. The fact that an NRA’s initial market predictions do not finally materialise in a given case does not necessarily mean that its decision was inconsistent with the Directive. In applying *ex-ante* the concept of dominance, NRAs must be accorded wide discretionary powers correlative 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, typically once a year. 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

64. 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 detriment⁵⁶.

65. 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..

66. The market power of an undertaking can be constrained by the existence of

⁵⁴ Case 27/76 *United Brands v. Commission*, [1978] ECR 207.

⁵⁵ See also recital 20 of the Framework directive.

⁵⁶ Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, par. 39.

potential competitors⁵⁷. 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.

67. Other criteria could also be relied upon to measure market power. Market shares are often used as a proxy for market power. Undertakings with market shares of no more than 25% are not liable to enjoy a dominant position on the market concerned⁵⁸. In the Commission's decision-making practice, dominance concerns normally arise only in the case of undertakings with market shares of over 40%⁵⁹. According to established case-law, extremely large market shares - in excess of 50% - are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position⁶⁰. An undertaking with a large market share may be presumed to have SMP, that is, to be in a dominant position, only if its market share has remained stable over time⁶¹. 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.

68. As regards the methods used for measuring market size and market shares, both volume sales and value sales provide useful information for market measurement⁶². 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.

69. 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

⁵⁷ 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 65, 1987, and *Magill TV Guide:ITP, BBC, RTE*, OJ L 78, 1989, p. 43. See also, Case 22/78 *Hugin v Commission* 1979 [ECR] 1869, Case 226/84, *British Leyland v Commission* 1986 [ECR] 3263.

⁵⁸ See also recital 15 of Regulation No 4064/89

⁵⁹ *United Brands v Commission*, 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.

⁶⁰ Case C-62/86 *AKZO v Commission*, [1991] ECR I-3359, par. 60; Case T-228/97, *Irish Sugar v Commission*, [1999] ECR II-2969, par. 70. 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.

⁶¹ Case *Hoffmann-La Roche v Commission*, cit., par. 41, Case C-62/86, *Akzo v Commission* 1991 [ECR] I-3359, paras. 56, 59. In dynamics markets characterised by technological changes, any period less than three years might be considered too short a period to assess the existence of a dominant position. See also Case No IV/M.1027 – *Deutsche Telekom/BetaResearch*, OJ L 53, 27.2.1999, paras. 28 s.

⁶² *Notice on market definition*, cit., at p. 5

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, 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 markets⁶³. 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 coverage⁶⁴. 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 operators⁶⁵.

70. Although market shares have been a prime surrogate for market power, other criteria can also be used to measure market power. These criteria include

- overall size of the undertaking
- control of infrastructure not easily duplicated
- technological advantages or superiority
- absence of 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

71. A dominant position can derive from a combination of the above criteria, which taken separately may not necessarily be determinative.

⁶³ See, *Determination of Organizations 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 par. 3.2..

⁶⁴ *Idem*, at par. 5.2

⁶⁵ 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.

72. A finding of dominance also 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 telecommunications 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 profitable⁶⁶.

73. As regards the notion of "essential facilities", there is for the moment no jurisprudence in relation to the electronic communications sector. In other contexts, this notion is only relevant with regard to the existence of an abuse of a dominant position under Article 82 of the EC Treaty and has no bearing on the ex ante assessment of SMP within the meaning of Article 13 of the Framework directive.

3.1.1. *Leverage of market power*

74. According to Article 13, paragraph three, 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*".

75. This provision is intended to address a market situation comparable to the one that gave rise to the Court's judgement in *Tetra Pak II*⁶⁷. 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. Close associative links, within the meaning of the Court's case-law, will most often be found in vertically integrated markets.

76. 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 market⁶⁸. Under such circumstances, an NRA may consider it appropriate to find that such operator has SMP on both markets taken together⁶⁹.

3.1.2. *Collective dominance*

77. Under Article 82 of the EC Treaty, a dominant position can be held by one or more undertakings ("collective dominance"). Article 13, paragraph two, of the Framework directive also provides that an undertaking may enjoy significant market power, that is, it may

⁶⁶ *Hoffmann-La Roche v Commission*, cit., at para. 48.

⁶⁷ Case C-333/94 P, *Tetra Pak v Commission* [1996] ECR I-5951.

⁶⁸ See *Access Notice*, par 65.

⁶⁹ For instance, vertical integration is particularly prevalent in digital pay TV markets where content providers usually also control the digital platform.

be in a dominant position, either individually or jointly with others.

78. 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 dominance⁷⁰.

79. 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 17 and under Regulation 4064/89. In addition, both the Court of First Instance and the Court of Justice have given judgements which have contributed to further clarifying the exact scope of this concept.

3.1.3. *The jurisprudence of the CFI/ECJ*

80. 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 other⁷¹.

81. Until the ruling of the Court of Justice in *Compagnie Maritime Belge*⁷² and the ruling of the Court of First instance in *Gencor*⁷³ (see below), it might have been argued that a finding of collective dominance was based on the existence of economic links or other factors which could give rise to a connection between the undertakings concerned⁷⁴. 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 Regulation 4064/89 prohibiting the notified transaction on the grounds that it would lead to the creation of a duopoly market conducive to a situation of oligopolistic dominance⁷⁵. 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.

82. The CFI dismissed the application by stating, inter alia, that there was no legal

⁷⁰ *Access Notice*, par. 79.

⁷¹ Joined cases C-395/96 P and C-396/96 P, *Compagnie maritime Belge and others v Commission* [2000] ECR I-1365.

⁷² *Idem*, at para.39.

⁷³ Case T102/96, *Gencor v Commission* [1996] ECR II-753.

⁷⁴ See Joined Cases T-68/89, T-77/89 and T-78/89, *SIV and Others v Commission* [1992] ECR II-1403, par 358, Case C-393/92 *Almelo* [1994] ECR I-1477, par. 43, Case C-96/94, *Centro Servizi Spediporto* [1995] ECR I-2883, par. 33, Joined Cases C-140/94, 141/94, and C-142/94, *DIP*, [1995] ECR I-3257, par. 62, Case C-70/95, *Sodemare* [1997] ECR I-3395, par. 46, and Joined Cases C-68/94 and C-30/95 *France and Others v Commission* [1998] ECR I-1375, par. 221.

⁷⁵ Case No IV/M.619, - *Gencor Lonhro* (OJ 1997, L 11, p.30).

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*”⁷⁶. 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*”⁷⁷.

83. The CFI’s ruling in *Gencor* was later endorsed by the ECJ in *Compagnie Maritime Belge*, where the Court of Justice 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 market⁷⁸. 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 market⁷⁹. Only when that question is answered in the affirmative, is it appropriate to consider whether the collective entity actually holds a dominant position⁸⁰. 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 consumers⁸¹.

84. 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,*

⁷⁶ *Gencor v Commission*, cit., at par 276.

⁷⁷ *Idem*, at par. 277

⁷⁸ *Compagnie Maritime Belge transports and Others*, cit., at par 39.

⁷⁹ See in particular, *France and Others v Commission*, cit., par 221.

⁸⁰ *Compagnie Maritime Belge*, at par 39.

⁸¹ *Idem* at par. 44.

on an assessment of the structure of the market in question”⁸².

85. It follows from *Gencor* and *Compagnie Maritime Belge* judgements 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 is conducive to co-ordinated effects on the relevant market⁸³.

3.1.3.1. The Commission’s decision-making practice

86. The Commission has applied the concept of collective dominance in relation to oligopolistic markets the structure of which was considered conducive to co-ordinated effects on the relevant market, in a number of decisions adopted under the Merger Control Regulation⁸⁴. In doing so, the Commission has relied upon a certain number of criteria which can be summarised as follows:

- few market players⁸⁵
- mature market
- stagnant or moderate growth on the demand side⁸⁶
- low elasticity of demand
- homogeneous product
- similar cost structures⁸⁷

⁸² *Idem* at par. 45.

⁸³ The use here of the term “co-ordinated effects” is no different from the term “parallel anticompetitive behavior” also used in Commission’s decisions applying the concept of collective (oligopolistic) dominance.

⁸⁴ See in particular, Case No COMP/M. 1882 – *Pirelli/BICC*, Case No IV/M.1527 – *OTTO Versand/Freemans*, Case No IV/M1225 – *Enso/Stora* (OJ L 254, 29.9.1999, p. 9), Case No IV/M.1524 – *Airtours/First Choice* (OJ L 93, 13.4.2000, p. 1), Case No IV/M.1517, *Rhodia/Donau Chemie/Albright & Wilson*, Case No IV/M1016 – *Price Waterhouse/Coopers & Lybrand* (OJ L 50, 26.2.1999, p. 27), Case No IV/M.619 – *Gencor/Lonrho*, *cit.*, Case No IV/M.308, *Kali + Salz/MdK/Treuhand* (OJ L 186, 21.7.1994, p. 38) and Case No IV/M.190 – *Nestlé/Perrier* (OJ, L 356, 5.12.1992, p. 1).

⁸⁵ As the Commission noted in *Price Waterhouse/Coopers & Lybrand*, “collective dominance involving more than three or four suppliers is too complex and unstable to persist over time, *cit.*, at paras 103 and 113. In that decision the Commission dismissed the possibility that the so-called Big Six accounting firms be considered collectively dominant. However, such an assessment will depend on each market’s particular characteristics and indeed markets with more than three players may under certain circumstances be considered as being conducive to oligopolistic dominance.

⁸⁶ *Enso/Stora*, *cit.*, at par.67.

⁸⁷ *Idem*.

- similar market shares⁸⁸
- transparent market conditions⁸⁹
- lack of technical innovation, mature technology
- absence of excess capacity⁹⁰
- high barriers to entry⁹¹
- lack of countervailing buying power⁹²
- lack of potential competition⁹³
- various kind of informal or other links between the undertakings concerned⁹⁴
- retaliatory mechanisms
- lack or reduced scope for price competition⁹⁵

87. The above is not an exhaustive list, nor are the criteria cumulative. Rather, the

⁸⁸ See in particular, *France and Others v Commission*, cit., at par. 226. Large imbalances of market share between the undertakings concerned may render the existence or creation of a collective dominant position highly unlikely, *Rhodia/Donau Chemie/Albright & Wilson*, at para.73. See also, *OTTO Versand/Freemans*, cit., para.31, and *Pirelli/BICC*, cit., para.83. However, imbalances in market share among the members of an oligopoly have not been an obstacle to a finding of collective dominance in a number of cases; Case No IV/M.1313 – *Danish Crown/Vestjyske Slagterier*, OJ L 20, 25.1.2000, p. 1.

⁸⁹ See also Case No IV/M.942 – *VEBA/Degussa*, OJ L 201, 17.7.1998, p. 102, at par. 44 (market conditions were not found to be transparent). In *Enso/Stora* the Commission also took into consideration the absence of market transparency regarding such key parameters as supplies and prices together with the existence of secret discounts, cit., at para.68. See also, *Pirelli/BICC*, cit., “the results of market investigation indicate that price transparency for LVMV products is rather low due to absence of meaningful list prices and varying customer-defined specifications. Collusive strategies are thus further complicated”, par. 91.

⁹⁰ A finding of collective dominance may be negated if it can be established that there exist overcapacities distributed among the undertakings concerned “in a way that would allow for breaking up of parallel anticompetitive behavior”, see in particular, *Rhodia/Donau Chemie/Albright & Wilson*, at para.71.

⁹¹ See for instance, *Enso/Stora*, cit., at paras. 75-77.

⁹² See Case No IV/M.1313 – *Danish Crown/Vestjyske Slagterier*, OJ L 20, 25.1.2000, p. 1, paras. 171 to 174..

⁹³ *Idem*, at par.174

⁹⁴ In *Price Waterhouse/Coopers & Lybrand*, the Commission also took into account the fact that the undertakings concerned (accounting firms) were represented in various industry organizations and institutions responsible for matters of self-regulation and that their representatives met on a regular basis to discuss issues crucial to their profession.

⁹⁵ *Danish Crown/Vestjyske Slagterier*, cit., par.176.

list is intended to illustrate the sorts of evidence that could be used to support assertions concerning the existence of a collective (oligopolistic) dominance. Indeed, as stated above, 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 above mentioned criteria, why in a given oligopolistic market co-ordinated effects are likely to arise.

88. In an oligopolistic market where most, if not all, of the above mentioned criteria are met, what does need to be established is that market operators have a strong incentive to converge to a co-ordinated market outcome and refrain from reliance on competitive conduct. This will be the case where the long-term benefits of an anti-competitive conduct far outweigh any short-term gains resulting from a resort to a competitive behaviour. Therefore, in tight oligopolistic markets, the so-called “retaliation” condition corresponds to an undertaking’s consciousness of the long-term negative consequences that can result from departing from a co-ordinated outcome⁹⁶.

3.1.3.2. Collective dominance and the Telecommunications sector

89. In applying the notion of collective dominance, NRAs may also take into consideration decisions adopted under Regulation 4064/89 in the telecommunications sector, in which the Commission has examined whether any of the notified transactions could give rise to a finding of collective or oligopolistic dominance.

90. In *BT/Esat*⁹⁷, 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 market⁹⁸.

91. In *Vodafone/Airtouch*⁹⁹, 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 co-ordinated effects¹⁰⁰.

⁹⁶ In other words, while in a “cartel”-type situation, compliance with an agreed conduct may well be enforced by means of a retaliatory mechanism, in a situation of oligopolistic dominance retaliation may for instance consist of reverting to the pre-price increase market equilibrium.

⁹⁷ Case No COMP/M.1838 – *BT/Esat*.

⁹⁸ *Idem*, paras 10 to 14.

⁹⁹ Case No IV/M.1430 – *Vodafone/Airtouch*.

¹⁰⁰ *Idem*, at par 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.

92. 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 trends¹⁰¹. 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 price¹⁰².

93. Finally, the possibility that in certain Member States mobile operators may enjoy a collective dominance in the market for the provision of wholesale roaming to foreign mobile operators, has been examined by the Commission in relation to the recent "Roaming Sector inquiry"¹⁰³.

4. IMPOSITION, AMENDMENT OR WITHDRAWAL OF OBLIGATIONS UNDER ARTICLE 14 OF THE FRAMEWORK DIRECTIVE

94. Section 3 of the Guidelines deals with the analysis of effective competition that NRAs must carry out under Article 14.2 and 14.3 of the Framework directive. This Section aims to provide guidance for NRAs on the action to take following on from that analysis; in practice, this will mean the imposition, maintenance, amendment or withdrawal of specific regulatory obligations.

95. This section deals first with the designation by NRAs of operators with Significant Market Power. It then describes the process by which NRAs should decide whether to impose, maintain, amend or withdraw sector-specific obligations.

4.1. Designation of undertakings with Significant Market Power

96. Article 14 of Directive [framework] sets out the procedure that must be followed by NRAs in relation to a series of specific regulatory obligations. These obligations relate to: transparency, non-discrimination, accounting separation, obligations for access to and use of specific network facilities, price control and cost accounting (Articles 9-13 of the Access directive); retail tariff regulation, carrier selection and pre-selection and availability of leased lines (Articles 16, 25 and 27 of the Universal Service and Users' Rights directive).

¹⁰¹ Case No COMP/M.2016 – France Telecom/Orange, at par. 26.

¹⁰² *Idem*, at paras 39-40.

¹⁰³ In its Working Document "*On the initial findings of the sector inquiry into mobile roaming charges*", the Commission made reference to (i) the existence of a number of economic links that existed 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 standardized, and (ii) the existence of high barriers to entry. In its 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.

97. NRAs may impose obligations only on operators with Significant Market Power under Article 8 of the Access directive and Articles 16, 25 and 27 of the Universal Service and Users Rights directive. The only exception to this requirement is Article 8(2) of the Access directive, which provides for obligations to be imposed on non-SMP operators in order to comply with the Community's international commitments. This exception is dealt with in paragraph 103 of this section.

98. Article 14.4 and 14.5 of Directive [framework] require that NRAs only maintain or impose obligations on operators in markets that are not subject to effective competition. A finding that a market is effectively competitive is, in effect, a finding of an absence of single or collective dominance on that market.

4.2. Regulatory obligations

99. If an NRA finds that a product market defined in the Article 14.1 Decision is subject to effective competition in a specific geographical area within its territory, it will not designate any undertaking as having significant market power. If there are existing regulatory obligations¹⁰⁴ on an undertaking in that territory, the NRA must withdraw such obligations and may not impose any new obligation on that undertaking. Where the NRA proposes to remove regulatory obligations, it must give parties affected a reasonable period of notice. What is reasonable will depend on the obligation in question, but normally the period should not be less than two months and may be considerably more.

100. If an NRA finds that a product market defined in the Article 14.1 Decision is not subject to effective competition in a specific geographical area within its territory, it would normally designate one or more undertakings as having SMP and impose appropriate regulatory obligations on the undertaking(s) concerned. If such undertaking is subject to pre-existing obligations under the previous regulatory framework, the NRA must consider whether these obligations continue to be appropriate under the new regulatory framework. The NRA may maintain, amend or remove certain obligations if it sees fit. The NRA may decide to impose new or additional obligations on that undertaking. NRAs must impose at least one regulatory obligation on an undertaking that has been designated as having SMP. An NRA must have already designated an undertaking as having SMP as a pre-requisite to imposing obligations. Conversely, NRAs should not designate undertakings as having SMP without associated obligations being imposed.

4.3. Trans-national markets: joint analysis by NRAs

101. Article 14.1 of Directive [framework] also makes provision for the Commission's Decision on relevant product and service markets to identify product markets that are transnational, covering the whole of the Community or a substantial part thereof. Under the terms of Article 14.1 of Directive [framework], NRAs must conduct the market analysis jointly. Any joint analysis of such markets will therefore involve most if not all NRAs. In practice, this joint analysis would take place within the High Level Communications Group¹⁰⁵. In other respects, such analysis would be conducted as by a single NRA.

¹⁰⁴ Obligations of a nature to substitute temporarily for the absence of competition in a relevant market.

¹⁰⁵ See article 21 of the Framework Directive.

4.4. Relationship to WTO commitments

102. The EC has given commitments in the WTO in relation to undertakings that are ‘major suppliers’ of basic telecommunications services¹⁰⁶. Where undertakings have SMP for the provision of such services in the European Community, such undertakings would also fulfil the definition of ‘major supplier’ within the meaning of the Community’s commitments in the WTO. Such undertakings must therefore be subject to all of the obligations set out in the EC commitments in the WTO for basic telecommunications services. NRAs would apply all obligations to such an undertaking in accordance with the EU commitments in the WTO.

103. In all other regulatory respects, NRAs are obliged by Article 7 of the directive and by general Community law to ensure that the measures adopted under Article 14 are effective, justified and proportionate. Proportionality will be a key criterion used by the Commission to assess measures proposed by NRAs under the procedure of Article 6 of Directive [framework]. Proportionality is a well-established legal principle of examining the legitimacy of regulatory actions under Community law. Where a reasonable relationship exists between the regulatory action and the aims sought to be achieved, in the sense that the measure applied does not go beyond what is necessary to achieve the end result, the specific regulatory measure will be deemed to be proportionate.

104. The Commission will also check that any measure taken by the NRAs is in conformity with the regulatory framework as a whole, and will also assess the impact of the said measure on the single market.

5. MARKET ANALYSIS, POWERS OF INVESTIGATION AND CO-OPERATION PROCEDURES

5.1. Overview

105. NRAs will analyse effective competition and impose sector specific obligations in three steps: firstly, NRAs will analyse the market, draw conclusions in relation to the existence of effective competition and whether the market contains undertakings that enjoy significant market power, and then propose to designate any such undertakings as having SMP together with ex ante obligations (either newly imposed, maintained or modified)., secondly, NRAs will conduct a public consultation; and finally, NRAs will adopt a final decision.

106. This section of the Guidelines covers procedures in respect of an NRA’s powers to obtain the information necessary to conduct a market analysis. In that regard, it should be recalled that Article 5.1 of the FW Directive 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. Furthermore, Article 11 of Directive [Authorisation] provides that undertakings can be 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 14.2.

107. These provisions thus enable NRAs to require undertakings that provide electronic communications networks and services to supply all the information including confidential information, as described in paragraph 108, necessary for NRAs to assess

¹⁰⁶ GATS commitments taken by EC on telecommunications: <http://gats-info.eu.int>

competition and impose appropriate ex ante obligations and thus to ensure compliance with the Framework and Specific Directives.

108. This section of the Guidelines also includes measures to ensure effective co-operation between various national authorities, as between NRAs and NCAs and with the Commission. Under the terms of Article 3.5, NRAs and NCAs have the right to exchange information; moreover, they are subject to the same rights and duties of confidentiality in respect of exchange of information as a ‘competent authority’ for the purposes of Regulation 17/62. To facilitate the co-operation foreseen in Article 3.5, this section of the Guidelines suggests procedures for sharing information between authorities.

109. 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 undermine the development of the relevant market, as well as affect the incentives for investment and the interests of consumers.

5.2. Market analysis and power of investigation

110. Under Article 14.2 of the FW Directive, NRAs must carry out an analysis of the markets identified in the Commission’s Decision within two months of the date of adoption or revision by the Commission. The Directive therefore ensures that NRAs will begin a substantive analysis of the relevant markets identified in the Decision without delay but does not mandate that such analyses be completed within the two month period, although NRAs should do their utmost to reach the final result by this time. Each market analysis of the relevant markets and proposed regulatory action must be published and subjected to a consultation procedure as described in Section 6.

111. Article 14.2 also requires NRAs to conduct their analyses in accordance with the provisions of the Guidelines and associate NCAs to such analyses. NCAs will share any relevant information they have, including confidential information. NRAs should invite NCAs to advise as they consider useful. 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.

112. In preparing to carry out a market analysis, NRAs will collect all the necessary information from the widest possible range of sources. From those undertakings that have obtained a general authorisation under Article 3.2 of the Authorisations Directive, NRAs can request any information that is objectively justified and proportionate, provided this requirement has been included in the conditions attached to the general authorisation in that Member State.

113. When NRAs request information from an undertaking under the terms of Article 11.1 (f) of the Authorisations Directive, they shall state the reasons justifying the request, and the time limit within which the information is to be provided. NRAs are subject to the same obligations of professional secrecy in respect of confidential information as NCAs (see Article 3.5 of Directive [framework]).

114. In accordance with Article 5.3 of Directive [framework], NRAs shall publish all information that would contribute to an open and competitive market, subject to the rules on commercial confidentiality. Pursuant to Article 5.4 of that Directive, NRAs should also

publish the terms of public access to information, including the procedure for obtaining such access. Any decision to refuse access to information should be reasoned and made available to interested parties. NRAs should ensure that up-to-date information is made publicly available with regard to SMP operators in accordance with paragraph 131.

115. NRAs may not disclose information received in the exercise of their functions, unless such information was in the public domain, or unless the public interest justifies such disclosure. More particularly, NRAs may not disclose confidential information, notably covering business secrets, as well as business relations and cost components. When information has been received in confidence from another public authority, NRAs must maintain this confidentiality (see Article 5.2 of Directive [framework]).

5.3. Co-operation Procedures

Between NRAs and NCAs

116. NRAs should normally have access to all the information held by the NCAs, obtained using the investigatory and enforcement powers of the NCAs, including confidential information, as the NRAs are also subject to Community and national rules on professional secrecy (Article 3.5 of Directive [framework]).

Between Commission and NRAs

117. In accordance with Article 5.3 of Directive [framework], 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 covers information that the Commission might require, for example, in considering compliance with WTO commitments. The Commission's requests for information must also respect the principle of proportionality .

118. The Commission also acts as the mechanism for exchange of information between NRAs. Directive [framework] does not foresee direct exchange of information among NRAs (see Article 5.2 of Directive [framework]). Nonetheless, where one NRA requests access to information held by an NRA in another Member State, the Commission will supply that information, where it considers such exchange appropriate.

119. The Commission and NRAs must maintain the confidentiality of information received.

6. PROCEDURES FOR PUBLIC CONSULTATION AND PUBLICATION OF PROPOSED NRA DECISIONS

1.1. Consultation mechanism

120. Upon completion of their market analysis in accordance with Sections 2 and 3, NRAs will publish their findings along with the regulatory measures they propose to adopt. In particular, NRAs shall render public their findings concerning:

- market definition used and reasons therefor
- the assessment of competition on the relevant market

- evidence relating to the existence of undertakings with significant market power
- identification of any undertakings proposed to be designated as having SMP
- sector specific obligations that the NRA proposes to impose, maintain, modify or withdraw on the above mentioned undertakings
- public policy objectives justifying the imposition of such obligations on the identified undertakings and
- why the measures are proportionate to those objectives.

121. At the same time, in accordance with Article 6 of Directive [framework], the NRA will communicate these measures, together with their reasoning, to the NRAs in other Member States and to the Commission. During the consultation period, the NRA will give interested parties, other NRAs and the Commission the chance to comment on the NRA's proposed conclusions and proposals, before adopting any final decision. NRAs shall take full account of the comments they receive from all parties concerned and of the comments made by NRAs from other Member States

122. 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 undertaking with significant market power, the Commission considers that a period of no more than two months would be reasonable for the public consultation. After the public consultation period is over, the NRA will, if appropriate, adapt the proposed measures and communicate, without delay, the resulting draft measure to the Commission.

123. Under the terms of Article 6.4 of the Framework Directive, the measure will take effect one month after the date of communication to the Commission, unless the Commission notified the national regulatory authority that it has serious doubts as to the compatibility of the measure with the Framework and Specific Directives, and in particular with the policy objectives identified in Article 7 of Directive [framework].

124. Where the Commission so indicates, NRAs must observe a further two month period before taking a final decision. If the Commission does indicate that it has serious doubts in this regard, it can request additional information, including confidential information, from the NRA concerned, provided the information requested is necessary and proportionate to a determination of the compatibility of the proposed decision with the Framework and Specific Directives.

125. During the further two month period of review, the Commission will adopt a final decision on the compatibility of the decision with the Framework and Specific Directives. The Commission's final decision can require the NRA to amend or withdraw the draft measure. If the Commission does not take a decision within that period, the draft measure may be adopted by the NRA.

126. In exceptional circumstances, Article 6.5 of Directive [framework] allows NRAs to act urgently in order to safeguard competition and protect the interest of users. An NRA may exceptionally therefore adopt decisions and impose specific obligations on designated undertakings without consulting either the 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 7 of Directive [framework]. If the Commission determines that the NRA's decision and the obligations imposed on specific undertakings cannot be considered compatible with the Framework and Specific Directives, the Commission will require the NRA to amend its decision. The Commission may require the NRA to remove or modify the obligations the NRA has imposed on specific undertakings.

6.1. Adoption of the final decision

127. 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 32 of the Universal Service and Users Directive and Article 16 of the Access and Interconnection Directive. The Commission will thereafter make this information available in a readily accessible form, and will transmit the information to the Communications Committee and the High Level Communications Group as appropriate.

128. 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.

ANNEX OF RELEVANT PROVISIONS

The specific provisions of Directives [Framework, Access and Interconnection and Universal Service and Users Rights] of which these Guidelines are intended to provide interpretative guidance are the following:

Article 3 of Directive [...] on a common regulatory framework for electronic communications networks and services

National Regulatory Authorities

1. *Member States shall ensure that each of the tasks assigned to national regulatory authorities in this Directive and the Specific Measures is undertaken by a competent body.*
2. *Member States shall guarantee the independence of national regulatory authorities by ensuring that national regulatory authorities are legally distinct from and functionally independent of all organisations providing electronic communications networks, equipment or services. Member States that retain ownership or control of undertakings providing electronic communications networks and/or services shall ensure full and effective structural separation of the regulatory function from activities associated with ownership or control.*
3. *Member States shall ensure that national regulatory authorities exercise their powers impartially and transparently.*
4. *Member States shall publish the tasks to be undertaken by national regulatory authorities in an easily accessible manner, in particular where those tasks are assigned to more than one body. Member States shall in addition publish the procedures for consultation and co-operation between those authorities, and between those authorities and national authorities entrusted with the implementation of competition law and national authorities entrusted with the implementation of consumer law, on matters of common interest. Member States shall ensure that there is no overlap between the tasks of those authorities.*
5. *National regulatory authorities and national competition authorities shall have the right to exchange information. In order to facilitate co-operation and the mutual exchange of information, national regulatory authorities shall have the same rights and duties of confidentiality in respect of exchange of information as a 'competent authority' as defined in Regulation No.17.*
6. *Member States shall notify to the Commission all national regulatory authorities assigned tasks under this Directive and the Specific Measures, and their respective responsibilities.*

Article 5 of Directive [...] on a common regulatory framework for electronic communications networks and services

Exchange and provision of information to national regulatory authorities and the Commission

1. *Member States shall ensure that undertakings providing electronic communications networks and services provide all the information necessary for national regulatory authorities to ensure conformity with Community law. The information requested by the national regulatory authority shall be proportionate to the performance of that task. The national regulatory authority shall give the reasons justifying its request for information.*
2. *Member States shall ensure that national regulatory authorities provide the Commission on request with the information necessary for it to carry out its tasks under the Treaty. The information requested by the Commission shall be proportionate to the performance of those tasks. Where appropriate, the Commission shall make information submitted to one national regulatory authority available to another such authority in the same or another Member State. Where information has been submitted in confidence, the Commission and the national regulatory authorities concerned shall maintain the confidentiality of the information provided.*
3. *Member States shall ensure that, acting in accordance with national rules on public access to information and subject to Community and national rules on commercial confidentiality, national regulatory authorities publish such information as would contribute to an open and competitive market.*
4. *National regulatory authorities shall publish the terms of public access to information as referred to in paragraph 3, including detailed guidelines and procedures for obtaining such access. Any decision to refuse access to information shall give reasons and shall be made public.*

Article 6 of Directive [...] on a common regulatory framework for electronic communications networks and services

Consultation and transparency mechanism

1. *Except where provided for in paragraph 5, Member States shall ensure that where national regulatory authorities intend to take measures in accordance with this Directive or the Specific Measures, they give interested parties the chance to comment within a reasonable period. National regulatory authorities shall publish their national consultation procedures.*
2. *Where a national regulatory authority intends to take measures under Article 8 or Article 14(4) and (5) of this Directive or Article 8(2) of Directive [on access to and interconnection of electronic communications networks and associated facilities], it shall communicate the draft measure to the Commission and the national regulatory authorities in other Member States, together with the reasoning on which the measure is based. National regulatory authorities may make comments to the national regulatory authority concerned within the period for consultation determined in accordance with paragraph 1.*

3. *The national regulatory authority concerned shall take the utmost account of comments of other national regulatory authorities, and shall communicate the resulting draft measure to the Commission without delay.*
4. *The measure shall take effect one month after the date of the communication in paragraph 3 unless the Commission notifies the national regulatory authority concerned that it has serious doubts as to the compatibility of the measure with Community law and in particular the provisions of Article 7. In such cases, the measure shall not take effect for a further two months. Within that period the Commission shall take a final decision, and if necessary, require the national regulatory authority concerned to amend or withdraw the draft measure. If the Commission does not take a decision within this period, the draft measure may be adopted by the national regulatory authority.*
5. *In exceptional circumstances, where a national regulatory authority considers that there is an urgent need to act, by way of derogation from the procedure set out in paragraphs 1, 2, 3 and 4, in order to safeguard competition and protect the interests of users, it may adopt measures immediately. It shall, without delay, communicate those measures, with full reasons, to the Commission and the other national regulatory authorities. The Commission shall verify the compatibility of those measures with Community law and in particular the provisions of Article 7. If necessary, the Commission shall require the national regulatory authority to amend or abolish those measures.*
6. *Omission on the part of the Commission to take action under paragraphs 4 and 5 shall not prejudice or limit in any way its rights to act under Article 226 of the Treaty in relation to any decision or measure of a national regulatory authority.*

Article 13 of Directive [...] on a common regulatory framework for electronic communications networks and services

Undertakings with significant market power

1. *Where the Specific Measures require national regulatory authorities to determine whether operators have significant market power, paragraphs 2 and 3 shall apply.*
2. *An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.*
3. *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.*

Article 14 of Directive [...] on a common regulatory framework for electronic communications networks and services

Market analysis procedure

1. *After consultation with national regulatory authorities through the High Level Communications Group, the Commission shall issue a Decision on Relevant Product and Service Markets (hereinafter ‘the Decision’), addressed to Member States. The Decision shall identify those product and service markets within the electronic communications sector, the characteristics of which may be such as to justify the imposition of regulatory obligations set out in the Specific Measures, without prejudice to markets that may be defined in specific cases under competition law. The Commission shall also publish Guidelines on market analysis and the calculation of significant market power (hereinafter ‘the Guidelines’).*

The Commission may indicate in the Decision those markets which are trans-national. In such markets, the national regulatory authorities concerned shall jointly conduct the market analysis and decide on any imposition of regulatory obligations in paragraphs 2, 4 and 5 in a concerted fashion.

National regulatory authorities shall seek and receive the prior agreement of the Commission before using market definitions that are different from those identified in the Decision or before imposing sector-specific regulatory obligations on markets other than those identified in the Decision.

The Commission shall regularly review the Decision.

2. *Within two months of the date of adoption of the Decision or any updating thereof, national regulatory authorities shall carry out an analysis of the product and service markets identified in the Decision, in accordance with the Guidelines. Member States shall ensure that national competition authorities are fully associated with that analysis. The national regulatory authority’s analysis of each market shall be published.*
3. *Where national regulatory authorities are required under Articles 16, 25 or 27 of Directive [on universal service and users rights relating to electronic communications networks and services], or Articles 7 or 8 of Directive [access to and interconnection of electronic communications networks and associated facilities] to determine whether to impose, maintain or withdraw obligations on undertakings, it shall determine on the basis of its market analysis referred to in paragraph 2 whether a market identified in the Decision is effectively competitive in a specific geographic area in accordance with the Guidelines.*
4. *Where a national regulatory authority concludes that the market is effectively competitive, it shall not impose or maintain sector specific regulatory obligations set out in the Specific Measures. In cases where sector specific regulatory obligations already exist, it shall withdraw such obligations placed on undertakings in that specific market. An appropriate period of notice shall be given to parties affected by such a withdrawal of obligations.*
5. *Where a national regulatory authority determines that a market identified in the Decision is not effectively competitive in a specific geographic area in accordance with the Guidelines, it shall impose sector-specific regulatory obligations set out in the Specific Measures, or maintain such obligations where they already exist.*
6. *Measures taken according to the provisions of paragraphs 4 and 5 shall be subject to the procedure set out in Articles 6(2) to 6(5).*

Article 8 of Directive [...] on access to, and interconnection of electronic communications networks and associated facilities

Imposition, amendment or withdrawal of obligations

1. *Where an operator is deemed to have significant market power on a specific market as a result of a market analysis carried out in accordance with Article 14 of Directive [on a common regulatory framework for electronic communications networks and services], national regulatory authorities shall impose one or more of the obligations set out in Articles 9 to 13 of this Directive as appropriate, in order to avoid distortions of competition. The specific obligation(s) imposed shall be based on the nature of problem identified.*
2. *National regulatory authorities may, without prejudice to the provisions of Article 6, impose on operators, including operators other than those with significant market power, the obligations set out in Article 9 to 13 in relation to interconnection, in order to comply with international commitments.*

Exceptionally, with the prior agreement of the Commission, national regulatory authorities may impose on operators with significant market power obligations for access or interconnection that go beyond those set out in Articles 9 to 13 of this Directive, provided that all such obligations are justified in the light of the objectives laid down in Article 1 of this Directive and in Article 7 of Directive [on a common regulatory framework for electronic communications networks and services], and are proportionate to the aim pursued.

3. *In relation to the first subparagraph of paragraph 2, national regulatory authorities shall notify decisions to impose, modify or withdraw obligations on market players to the Commission, in accordance with the procedures in Article 6(2), (3) and (4) of Directive on [a common regulatory framework for electronic communications networks and services].*

Article 9 of Directive [...] on access to, and interconnection of electronic communications networks and associated facilities

Obligation of transparency

1. *National regulatory authorities may, in accordance with the provisions of Article 8, impose obligations for transparency in relation to interconnection and/or network access, requiring operators to make publicly available specified information, such as technical specifications, network characteristics, terms and conditions for supply and use, and prices.*
2. *In particular where an operator has obligations of non-discrimination, national regulatory authorities may require that operator to publish a reference offer, sufficiently unbundled, giving a description of the relevant offerings broken down into components according to market needs, and the associated terms and conditions including prices.*
3. *National regulatory authorities may specify the precise information to be made available, the level of detail required and the manner of publication.*

Article 10 of Directive [...] on access to, and interconnection of electronic communications networks and associated facilities

Obligation of non-discrimination

1. *A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations of non-discrimination, in relation to interconnection and/or network access.*
2. *Obligations of non-discrimination shall ensure, in particular, that the operator applies similar conditions in similar circumstances to other undertakings providing similar services, and provides services and information to others under the same conditions and of the same quality as they provide for their own services, or those of their subsidiaries or partners.*

Article 11 of Directive [...] on access to, and interconnection of electronic communications networks and associated facilities

Obligation of accounting separation

1. *A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations for accounting separation in relation to specified activities related to interconnection and/or network access.*

In particular, a national regulatory authority may require a vertically integrated company to make transparent its wholesale prices and its internal transfer prices, in situations where a market analysis indicates that the operator concerned provides input facilities that are essential to other service providers, while competing itself on the same downstream market.

2. *To facilitate the verification of compliance with obligations of transparency, national regulatory authorities shall have the power to require that accounting records, including data on revenues received from third parties, are provided on request. National regulatory authorities may publish such information as would contribute to an open and competitive market, while respecting national and Community rules on commercial confidentiality.*

Article 12 of Directive [...] on access to, and interconnection of electronic communications networks and associated facilities

Obligations of access to, and use of, specific network facilities

1. *A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations on operators to grant access to, and use of, specific facilities and/or associated services, inter alia in situations where the national regulatory authority considers that denial of access would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest.*

Operators may be required inter alia:

- (a) *to give third parties access to specified network elements and/or facilities;*
- (b) *not to withdraw access to facilities already granted;*
- (c) *to provide resale of specified services;*
- (d) *to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services;*
- (e) *to provide collocation or other forms of facility sharing, including duct, building or mast sharing;*
- (f) *to provide specified services needed to ensure interoperability of end-to-end services to users, including facilities for intelligent network services or roaming on mobile networks;*
- (g) *to provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services;*
- (h) *to interconnect networks or network facilities.*

National regulatory authorities may attach to those obligations conditions covering fairness, reasonableness, timeliness, transparency and/or non discrimination.

2. *When imposing the obligations referred in paragraph 1, national regulatory authorities shall take account in particular of:*
 - (a) *the technical and economic viability of using or installing competing facilities, in the light of the rate of market development;*
 - (b) *the feasibility of providing the access proposed, in relation to the capacity available;*

- (c) *the initial investment by the facility owner, bearing in mind the risks involved in making the investment;*
- (d) *the need to safeguard competition in the long term;*
- (e) *where appropriate, any relevant intellectual property rights.*

Article 13 of Directive [...] on access to, and interconnection of electronic communications networks and associated facilities

Price control and cost accounting obligations

1. *A national regulatory authority may, in accordance with the provisions of Article 8, impose price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of interconnection and/or network access, in situations where a market analysis indicates that a potential lack of effective competition means that the operator concerned might be capable of sustaining prices at an excessively high level, or applying a price squeeze, to the detriment of end users. National regulatory authorities shall take into account the investment made by the operator and the risks involved.*
2. *National regulatory authorities shall ensure that any pricing methodology that is mandated serves to promote efficiency and sustainable competition and maximise consumer benefits.*
3. *Where an operator has an obligation regarding the cost orientation of its prices, the burden of proof that charges are derived from costs including a reasonable rate of return on investment shall lie with the operator concerned. National regulatory authorities may require an operator to provide full justification for its prices, and may, where appropriate, require prices to be adjusted.*
4. *National regulatory authorities shall ensure that, where implementation of a cost accounting system is mandated in order to support price controls, a description of the cost accounting system is made publicly available, showing at least the main categories under which costs are grouped and the rules used for the allocation of costs. Compliance with the cost accounting system shall be verified by a qualified independent body. A statement concerning compliance shall be published annually.*

Article 16 of Directive [...] on universal service and users rights relating to electronic communications networks and services

Retail Tariff Regulation

1. *access to and use of the public telephone network at fixed locations that were in Member States shall maintain all obligations on retail tariffs for the provision of force prior to the date of entry into force of this Directive under Article 17 of Directive 98/10/EC, until a review has been carried out and a determination made in accordance with paragraph 2 of this Article.*

2. Member States shall ensure that, on the entry into force of this Directive, and periodically thereafter, national regulatory authorities undertake a market analysis, in accordance with the procedure set out in Article 14(3) of Directive [on a common regulatory framework for electronic communications networks and services] to determine whether to maintain, amend or withdraw the obligations referred to in paragraph 1 of this Article. Measures taken shall be subject to the procedure set out in Article 6(2) to (5) of Directive [on a common regulatory framework for electronic communications networks and services].
3. *Where as a result of a market analysis carried out in accordance with Article 14(3) of the Directive [on a common regulatory framework for electronic communications networks and services], national regulatory authorities determine that a market is not effectively competitive, they shall ensure that undertakings with significant market power in that market orient their tariffs towards costs, so as not to charge excessive prices or inhibit market entry, or restrict competition by setting predatory prices, showing undue preference to specific users or unreasonably bundling services. National regulatory authorities may apply appropriate retail price cap measures to such undertakings in order to protect user and consumer interests whilst promoting effective competition.*
4. *National regulatory authorities shall notify to the Commission the names of undertakings subject to retail tariff controls and, on request, submit information concerning the retail tariff controls applied and the cost accounting systems used by the undertakings concerned.*
5. *Member States shall ensure that, where an undertaking is subject to retail tariff regulation, the necessary and appropriate cost accounting systems are implemented and that the suitability of such systems is verified by a competent body which is independent of the organisation. National regulatory authorities shall ensure that a statement concerning compliance is published annually.*
6. Without prejudice to Article 9(1) on special affordable tariff options and Article 10 on specific provisions to help users control expenditure, national regulatory authorities shall not apply retail tariff control mechanisms under paragraph 1 of this Article to geographical or user markets where they are satisfied that there is effective competition.

Article 25 of Directive [...] on universal service and users rights relating to electronic communications networks and services

Number portability, carrier selection and carrier pre-selection

1. *Member States shall ensure that all subscribers of publicly available telephone services, including mobile services, who so request can retain their number(s) independently of the undertaking providing the service:*
 - (a) *in the case of geographic numbers, at a specific location, and*
 - (b) *in the case of numbers other than geographic numbers, at any location.*

2. *National regulatory authorities shall require undertakings notified as having significant market power for the provision of connection to and use of the public telephone network at fixed locations to enable their subscribers to access the services of any interconnected provider of publicly available telephone services,:*

(a) on a call-by-call basis by dialling a short prefix, and

(b) by means of pre-selection, with a facility to override any pre-selected choice on a call-by-call basis by dialling a short prefix.

User requirements for these facilities to be implemented on other networks or in other ways shall be assessed in accordance with the market analysis procedure laid down in Article 14 of Directive [on a common regulatory framework for electronic communications networks and services].

3. *National regulatory authorities shall ensure that pricing for interconnection related to the provision of number portability under paragraph 1, and the use of the facility in paragraph 2, are cost oriented.*

4. *National regulatory authorities shall not impose tariffs for the porting of numbers in a manner that would distort competition, such as by imposing a common tariff across all undertakings.*

Article 27 of Directive [...] on universal service and users rights relating to electronic communications networks and services

Availability of leased lines

1. *Member States shall maintain all obligations on undertakings that were in force prior to the date of entry into force of this Directive under Articles 3, 4, 6, 7, 8 and 10 of Directive 92/44/EEC as amended by Directive 97/51/EC, until a review has been carried out and a determination made in accordance with paragraph 2 of this Article.*

2. *Within one year after the entry into force of this Directive, and every two years thereafter, national regulatory authorities shall conduct a market analysis, in accordance with the procedure set out in Article 14(3) of Directive [on a common regulatory framework for electronic communications networks and services] , to determine whether the provision of part or all of the minimum set of leased lines services in their territory is subject to effective competition and to determine whether to maintain, amend or withdraw obligations referred to in paragraph 1 of this Article. Measures taken shall be subject to the procedure set out in Article 6(2) to (5) of Directive [on a common regulatory framework for electronic communications networks and services].*

3. *Technical standards for the minimum set of leased lines with harmonised characteristics shall be published in the Official Journal of the European Communities, as part of the List of Standards referred to in Article 15 of Directive [on a common regulatory framework for electronic communications networks and services]. The Commission may adopt amendments necessary to adapt the minimum set of leased lines to new technical developments and to changes in market demand,*

including the possible deletion of certain types of leased line from the minimum set, acting in accordance with the procedure referred to in Article 33 of this Directive.