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European Union. European Commission: Draft Guidelines on Significant Market Power

Ó Fathaigh, R.

Publication date

2018

Document Version

Final published version

Published in

IRIS

[Link to publication](#)

Citation for published version (APA):

Ó Fathaigh, R. (2018). European Union. European Commission: Draft Guidelines on Significant Market Power. *IRIS*, 2018(4), 11-12. Article 11.
<http://merlin.obs.coe.int/iris/2018/4/article11.en.html>

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IRIS 2018-4/11

European Commission: Draft Guidelines on Significant Market Power

On 14 February 2018, the European Commission published its draft Guidelines on market analysis and the assessment of significant market power (the SMP Guidelines) under the EU regulatory framework for electronic communications networks and services. This follows a public consultation conducted from March to June 2017 by the Commission on the review of the 2002 SMP Guidelines (see IRIS 2017-5/5 and IRIS 2002-9/10). The Commission also published a 50-page Explanatory Note accompanying the new Guidelines.

Article 15(2) of the Framework Directive 2002/21/EC requires that the Commission publish the SMP Guidelines, which shall be in accordance with the principles of competition law. The SMP Guidelines set out the principles to be applied by national regulatory authorities (NRAs) when defining relevant markets and assigning telecommunications operators with significant market power. This is aimed at imposing on operators appropriate regulatory obligations to redress competition problems.

The revised SMP Guidelines reflect developments in case-law and address issues which have become more prominent in recent years, such as the transition from monopolistic to oligopolistic market structures in some countries. While oligopolistic markets are often characterised by strong competition, they are perceived as difficult to tackle when this is not the case. The revised SMP Guidelines will give practical guidance to regulators on how to identify market failures (such as coordinated anti-competitive strategies by network operators) in a legally secure manner, and will therefore enhance predictability for all market participants.

The SMP Guidelines provide guidance on (a) the main criteria for defining the relevant market, (b) product market definition - including demand-side substitution, supply-side substitution, and whether a “chain substitutability” or “chain of substitution” exist; (c) geographic market definition, and (d) assessing SMP - including single SMP and joint SMP. Notably, “over-the-top” (OTT) services are discussed under product market definition. The Guidelines note that the relevant product market comprises all products or services that are sufficiently interchangeable or substitutable, not only in terms of their objective characteristics, their prices or their intended use, but also in terms of the conditions of competition and/or the structure of supply and demand in the market in question. In particular, the Guidelines state that OTT services or other Internet-bound communication channels have emerged as a competing force to established retail communications services. As a result, NRAs should assess whether such services may, on a forward-looking basis, provide partial or full substitutes to traditional telecommunications services. Moreover, where no sufficient substitutability patterns can be established to warrant including such OTT-based services in the relevant product market, NRAs should, nevertheless, consider the potential competitive constraints exercised by these services at the stage of the SMP assessment.

Following publication of the draft revised Guidelines, the Commission has now asked the Body of Regulators for Electronic Communications (BEREC) (see IRIS 2010-3/4) to provide an opinion on drafts of the revised SMP Guidelines and its accompanying Explanatory Note. The Commission “will take this opinion into account” before the adoption of the final revised Guidelines and Explanatory Note.

- European Commission, Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services, 14 February 2018

<http://merlin.obs.coe.int/redirect.php?id=18974>

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- European Commission, Staff working document - Explanatory Note, Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services, 14 February 2018

<http://merlin.obs.coe.int/redirect.php?id=18975>

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Ronan Ó Fathaigh

Institute for Information Law (IViR), University of Amsterdam

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