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European Commission: Guidelines on Significant Market Power

On 26 April 2018, the European Commission adopted new Guidelines on market analysis and the assessment of “significant market power” (“SMP”) under the EU regulatory framework for electronic communications networks and services (“the SMP Guidelines”). This follows a public consultation conducted in 2017 by the Commission on the review of the 2002 SMP Guidelines (see IRIS 2017-5/5 and IRIS 2002-9/10), and the publication of draft revised Guidelines in February 2018, along with an opinion from the Body of European Regulators for Electronic Communications (BEREC) (see IRIS 2018-4/11).

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

The revised Guidelines reflect the latest developments in case-law and address issues which have become more prominent in recent years. Those issues have been identified by the Commission as including the competitive impact of online service providers that have entered the market and started to offer Internet-based services, and the transition from monopolistic to oligopolistic market structures in some countries.

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 “chain of substitution”; (c) geographic market definition, and (d) assessing SMP - including “single SMP” and “joint SMP”. Notably, in relation to “over-the-top” (OTT) services, the final version of the SMP Guidelines took into account suggestions by BEREC on the draft revised Guidelines. In particular, BEREC invited the Commission to distinguish the potential impact of OTT services depending on the market being considered. The Guidelines now state that OTT services or other Internet-related communications paths have emerged as a “potential” competing force to established retail communications services. As a result, NRAs should assess whether such services may, on a forward-looking basis, constitute partial or full substitutes for traditional telecommunications services.

Furthermore, the Guidelines provide that NRAs should also consider whether the market power of an incumbent operator can be constrained (in terms of price) by products or services from outside the relevant market and underlying retail market(s), such as OTT players operating on the basis of providing online communications services. Thus, even where an NRA has considered that constraints coming from these products and services at retail level are not sufficiently strong for the retail market to be effectively competitive or are not sufficiently strong to act as indirect constraint on the provision of wholesale services (for the purpose of the wholesale market definition), potential constraints should still be assessed at the SMP assessment stage. Given that, currently, OTT providers do not provide access services themselves, they do not generally exercise competitive pressure on access markets.

- European Commission, Significant Market Power guidelines updated to safeguard competition in the telecoms market, 27 April 2018

<http://merlin.obs.coe.int/redirect.php?id=19160>

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- European Commission, Communication from the Commission: Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services (2018/C 159/01), 7 May 2018

<http://merlin.obs.coe.int/redirect.php?id=19161>

DE EN FR CS DA EL ES ET FI HU IT LT LV MT NL PL PT SK SL SV HR

- Body of European Regulators for Electronic Communications, BEREC Opinion on draft SMP Guidelines, 16 March 2018

<http://merlin.obs.coe.int/redirect.php?id=19164>

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