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THE ASSESSMENT OF SINGLE SMP: LESSONS LEARNED FROM THE FIRST ROUND MARKET REVIEW

LIYANG HOU*

Abstract

The concept of significant market power (SMP) is enshrined by the European regulatory framework for electronic communications networks and services to the extent to which national regulatory authorities (NRAs) in most circumstances can only regulate undertakings with SMP. According to this regulatory framework, both the definition and the methods for the assessment of SMP are equivalent to those of dominance under Article 82 EC Treaty. Although theories already suggest that the assessment of SMP should be different from dominance to some extent, empirical research has not been fully explored. This paper aims to shed some light on the empirical differences between the assessment of single SMP and single dominance based on the decisions of the European Commission under Article 7 of Framework Directive in the first round of market review. After examining these decisions, this paper first finds that when using a very high/low market share as evidence of market power the regulatory regime takes a higher threshold than the antitrust regime. Subsequently, on a closer level it looks at the appraisal of other criteria for the assessment of SMP by NRAs and furthermore categorizes them into three groups due to their different values: direct criteria, collaborating criteria and not very important criteria.

Keywords: Significant Market Power; Dominance; Electronic Communications Regulation

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1. INTRODUCTION

Within the current regulatory framework in the electronic communications sector (the 2002 Regulatory Framework) in the European Union (EU) the term of significant market power (SMP) becomes important to this sector-specific regulation to the extent to which regulatory remedies in that sector can only be imposed on undertakings with SMP¹ (the SMP regime), except otherwise provided.² The 2002 Regulatory Framework does not take the initiative to bring forward the concept of SMP, which has already been done by the last generation of regulatory framework.³ However, it is the first time that the 2002 Regulatory Framework aims to articulate that the concept of SMP is equivalent to dominance under Article 82 of the EC Treaty.⁴ Based on this principle the guidelines on market analysis and the assessment of significant market power for electronic communications regulation⁵ (the SMP Guidelines) issued by the European Commission (the Commission) is nothing more than a distillation of the practices related to the assessment of dominance under Article 82 of the EC Treaty. The SMP Guidelines works so well that it remains the only document that was not subjected to any amendment within the Commission's proposals for amending the 2002 Regulatory Framework⁶ (the 2007 proposals).

According to the SMP Guidelines SMP is equivalent to dominance both in terms of definition and in terms of method for assessment. Within the SMP Guidelines the Commission is dedicated to drawing up the equivalent link between SMP and dominance. Even more the SMP Guidelines leaves an impression that SMP is not so much

¹ See, Directive 2002/21/EC of the European Parliament and of the Council of March 7, 2002 on a common regulatory framework for electronic communications networks and services, [2002] O.J. L108/33 (Framework Directive).

² Under the 2002 Regulatory Framework some obligations can be imposed regardless of market power. See, Article 5 of Directive 2002/19/EC of the European Parliament and of the Council of March 7, 2002 on access to, and interconnection of, electronic communications networks and services, [2002] O.J. L108/7 (Access Directive), and universal service obligations in Directive 2002/22/EC of the European Parliament and of the Council of March 7, 2002 on universal service and users' rights relating to electronic communications networks and services, [2002] O.J. L108/51 (Universal Service Directive).

³ Within the 1998 regulatory framework the assessment of SMP was not equivalent to dominance under Article 82 of the EC Treaty. See, Article 2(3) of Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997 amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications, OJ L 295, 29.10.1997, pp. 23–34.

⁴ See, Article 14 of Framework Directive, *supra* note 1.

⁵ See, the Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (the SMP guidelines), 2002/C 165/03, 11.7.2002, C 165/6.

⁶ See, the Commission's proposals for the review of the electronic communications regulatory framework, published on 13 November 2007, available at: http://ec.europa.eu/information_society/policy/ecommm/tomorrow/reform/index_en.htm.

different from dominance. However, the assessment of SMP must be different from that of dominance to some extent. Reasons are mainly two fold. First, the objectives of regulation⁷ are different from EU competition law, which in theory does not guarantee an identical application, even if the two terms operate on the same set of methodologies. Second, the assessment of SMP should be based on “a prospective, forward looking approach”⁸ while the assessment of dominance under Article 82 of the EC Treaty is based on a backward looking approach. The different emphasises in terms of approach also foresee different applications in practice.

However, the problem remains what the differences would be in practice. The Commission does not elaborate on the possible differences within its SMP Guidelines. Neither do the 2007 proposals provide any useful hints. This paper assumes that such differences in theory must be embodied in practices. Therefore, it turns to the Commission decisions under Article 7 of Framework Directive (the Commission decisions) for answers. According to Article 7 of Framework Directive NRAs should notify the Commission of each obligation they want to impose on market players; then the Commission adopts one decision to each notification for confirmation or veto under certain conditions; and finally NRAs take the final step of implementation. Within the Commission decisions the analysis of SMP is an essential component. Until now the first round of market review in the electronic communications sector has been almost closed for the 25 “old” Member States.^{9, 10}

This paper is purported to shed some light on the empirical differences between single SMP and single dominance through the examination of the Commission decisions.¹¹ With regard to the research methodologies this paper first collects all the Commission decisions in the first round of market review¹² excluding two types of decisions: (1) decisions concerning markets of broadcasting transmission services (Market 18) and (2) decisions related to markets beyond the Commission recommendation¹³; then it compares the representative practices with regard to the assessment of SMP with the SMP Guidelines; and finally identifies the differences between the application of SMP and dominance.

⁷ See, Article 8 of Framework Directive, *supra* note 1.

⁸ See, e.g. Para 30 of the SMP guidelines, *supra* note 5.

⁹ Until the time of drafting the two “new” Member States, Bulgaria and Romania, have not made any notification.

¹⁰ There are 25 markets that have not been notified or not been re-notified after withdrawal at the time of drafting.

¹¹ Collective SMP, or joint SMP, is a much more complicated subject. It is not the ambition of this paper to cover the assessment of joint SMP.

¹² See all the Commission decisions at: <http://circa.europa.eu/Public/irc/infso/ecctf/library?l=/commissionsdecisions&vm=detailed&sb=Title>.

¹³ The main reason to take out those decisions is that the market circumstances within those decisions are so different among Member States that it is quite difficult for a comparative study.

In the following, the second part, after examining the appraisal of market shares, finds that when using very large or small market shares as evidence of (non-)existence of market power, the SMP regime always takes higher thresholds than the dominance regime. In the third part, other criteria used in the Commission decisions are observed and then categorised into three groups due to their respective values as to the assessment of SMP which are in order direct criteria, collaborating criteria and not very important criteria. The subsequent part delivers a brief discussion on the issue of leverage of market power and its removal proposed by the 2007 proposals. The last part concludes the different applications between the assessment of SMP and dominance.

2. MARKET SHARES

Although economic theory holds that in the absence of barriers to entry high market shares are not themselves indicative of dominance (e.g., VICKERS, 2006), market share is still the most practical instrument for the assessment of SMP/dominance. In practice every notification starts its assessment of SMP from analysing market shares.

2.1. THE SMP GUIDELINES

According to the SMP Guidelines, the role of market shares as an indicator of SMP can be summarised as Table 1.¹⁴ Rules concerning the indicative value of market shares are rather simple. First, important critical thresholds are two, above 50% and below 25%. Once an undertaking has a market share of more than 50%, it has SMP save in exceptional circumstances while it can hardly enjoy SMP when it has less than 25% market share. Second, in between or close to critical thresholds market shares are themselves less indicative of existence of SMP and the analysis of other criteria is particularly necessary. Last but not the least, single SMP concerns normally arise in the case of undertakings with market shares of over 40%, although in some cases SMP concerns may even be raised with lower market shares.

Table 1. Market shares as to assessing single SMP de jure

	Market shares (MS)	Indication of single SMP
1	MS > 50%	Evidence of single SMP, save in exceptional circumstances
2	MS > 40%	Likely single SMP and assessing other criteria
3	40% < MS > 25%	Less likely single SMP and assessing other criteria
4	MS < 25%	Unlikely single SMP

¹⁴ See, the SMP guidelines, Para 75, *supra* note 5.

2.2. THE COMMISSION DECISIONS

However, the practices contained in the Commission decisions show differences from the SMP Guidelines concerning the appraisal of market shares.

2.2.1. *In excess of 50%*

The Commission declares that market shares of in excess of 50% are evidence of single SMP, save in exceptional circumstances. Although it is not clear what those exceptional circumstances refer to, it is assumed that there must be only a small number of cases where undertakings with more than 50% market shares are actually not designated as having SMP. Otherwise it cannot be termed as “exceptional”.

Based on a presumption of such this paper begins to collect the data of market shares of the undertakings that are suspected to have SMP on the relevant markets within all the Commission decisions. Almost all of the suspected undertakings are the former incumbents before liberalisation in each Member State. There are in principle three rules on the data collection. First, in case where NRAs divide the recommended markets into several sub-markets, each sub-market is counted as one case. Second, when NRAs provide data about market shares of the suspected undertakings from different perspectives, e.g. market shares in terms of revenues or market shares in terms of capacities, this paper always chooses the largest one. Three, veto decisions and withdrawn notifications are not counted. After that it fills those data into 7 categories organised by different ranges of market shares, which are respectively (1) 90–100%, (2) 80–90%, (3) 70–80%, (4) 60–70%, (5) 50–60%, (6) 40–50% and (7) less than 40%. Consequently it draws the following Table 2.

Table 2. The number of cases in different ranges in terms of market shares¹⁵

	1	2	3	4	5	6	7
	90–100%	80–90%	70–80%	60–70%	50–60%	40–50%	< 40%
No single SMP	0	2	1	2	17	17	16
Single SMP	200	42	29	30	14	6	0

¹⁵ Excluding the Commission Decisions concerning Market 18, new markets beyond the Commission recommendation and veto or withdrawn notifications, 432 markets have been notified and reviewed by the Commission. Nevertheless, in 53 markets the information about market shares is not accessible to the public. In addition, there are 3 cases where analyses of SMP were not conducted because of their fulfilments of the 3 criteria test. The 3 cases are Austrian Market 10, Lithuanian Market 13 and Luxembourg Market 10. Therefore, the total number of cases to be researched here is only 376.

As Table 2 implies, in the first four columns, or in other words under the situations where the suspected undertakings have more than 60% market shares, the very high market shares themselves are indeed evidence of SMP. It is highly exceptional to negate the conclusion of such very high market shares, as observed that only in a very small number of cases, literally 5 out of 306, the suspected undertakings are not designated as having SMP. In particular, in the first column where the suspected undertakings have more than 90% of market shares, the conclusion of existence of SMP is always reached. It suggests that the existence of SMP should be established when the undertakings concerned have more than 90% market shares.

However, in the fifth column, i.e. 50–60% market shares, there are almost equal numbers of SMP negative and SMP positive cases, 17 vs. 14. Under this situation it cannot be immediately concluded that market shares within this range can be evidence of SMP, save in exceptional circumstances. The value of very high market shares as an indicator of SMP thereby turns ambiguous. Because of the limited value of high market shares as evidence of existence of SMP in those cases analysis of other criteria is not only important but also necessary. For example, in three¹⁶ out of the five Commission veto decisions the market shares of the suspected undertakings were within or close to this range.¹⁷ In those veto decisions the Commission paid extra attention to the analysis of the other criteria of the NRAs concerned and asked them to look at those criteria.

2.2.2. *Between 40% and 50%*

In the sixth column of Table 2, i.e. 40–50% market shares, there are much less cases with the finding of SMP than cases without the finding of SMP, 6 vs. 17. It may imply that when the suspected undertakings have 40–50% market shares, market shares of this size shows more limited indication of existence of SMP. Moreover, there is a tangible tendency that those markets are competitive rather than the contrary. Therefore, in those cases NRAs should not depend on the preliminary conclusion of market shares but take a further look at the other criteria in order to have a thorough and overall overview of the market concerned.

¹⁶ These three veto decisions are Cases FI/2003/0024 and FI/2003/0027: publicly available international telephone services provided at a fixed location for residential and non-residential customers; and CASE FI/2004/0082: Access and call origination on public mobile telephone networks in Finland.

¹⁷ The other two veto decisions are Case DE/2005/0144: Call termination on individual public telephone networks provided at a fixed location, Brussels, 17 May 2005, C(2005)1442 final and Case AT/2004/0090: transit services in the fixed public telephone network in Austria, Brussels, 20 October 2004, C(2004)4070 final. These two veto decisions concern market definition, rather than the assessment of SMP.

2.2.3. *Less than 40%*

While very high market shares can be evidence of existence of SMP, very small market shares can do exactly the opposite. Within the SMP Guidelines the Commission takes below 25% as the threshold for non-existence of SMP. Nevertheless, as implied by Table 2 in practice no undertakings with market shares of less than 40% are designated as having SMP. Consequently, it implies that an undertaking cannot be designated as having SMP when it has less than 40% market share.

2.2.4. *Conclusions*

Based on the above research the practices of using market shares as an indicator of SMP can be summarised as follows:

Table 3. Market shares as to assessing single SMP de facto

	The range of Market shares (MS)	Indication of single SMP
1	MS > 90%	Evidence of single SMP
2	90% < MS > 60%	Evidence of single SMP, save in exceptional circumstances
3	60% < MS > 40%	Likely single SMP and further analysis of the other criteria
4	MS < 40%	Unlikely single SMP

3. THE OTHER CRITERIA FOR SMP ASSESSMENT

3.1. AN OVERVIEW OF THE OTHER CRITERIA

The (non-)existence of SMP cannot be established on the sole basis of very low/high market shares. In order to get a thorough and overall analysis of the economic structures of the relevant markets NRAs should also look at other criteria. Based on the conclusions of the second part, the importance of analysis of other criteria has two dimensions. First and foremost, when the incumbents have 40–60% market shares, it is necessary to examine the other criteria because the value of market shares as an indicator of existence of SMP are shrinking. Second, when the suspected undertakings have 60–90% market shares, it is also necessary to see whether the other criteria can negate the preliminary conclusion of very high market shares since in exceptional circumstances even very high market shares cannot be evidence of existence of SMP.

Within the SMP Guidelines the Commission lists 12 other criteria to contribute to the assessment of SMP. These 12 other criteria are overall size of the undertaking, control of infrastructure not easily duplicated, technological advantages or superiority, absence of or low countervailing buying power, easy or privileged access to capital markets/financial resources, product/services diversification (e.g. bundled products or services), economies of scale, economies of scope, vertical integration, a highly developed distribution and sales network, absence of potential competition and barriers to expansion.¹⁸

However, several legal uncertainties remain with the 12 criteria. First the Commission does not further specify how to appraise those 12 criteria. Second, these 12 criteria are neither cumulative nor necessary. NRAs enjoy a wide margin of discretion on what to choose and how to evaluate, as provided by the SMP Guidelines that “[a] dominant position can derive from a combination of the above criteria, which taken separately may not necessarily be determinative.”¹⁹ Third, in practice NRAs use new criteria other than the 12 criteria in their notifications. Therefore, the list of other criteria cannot really serve itself as guidelines for the SMP assessment as it is supposed to be, which may dissatisfy NRAs that were not equipped with competition law knowledge.

This part on the one hand investigates how the other criteria and new criteria that are used by NRAs and nevertheless not within the SMP Guidelines are evaluated from an empirical point of view, and on the other hand tries to hierarchise them. Due to the different value of every criterion as to the assessment of SMP, Those criteria are categorised into three groups: (1) direct criteria, (2) collaborating criteria and (3) not very important criteria.

3.2. DIRECT CRITERIA

Direct criteria can directly counteract the conclusion of very high market shares or have strong indication of (non-)existence of SMP when the value of market shares is limited. They can not only indicate difference from what very high/low market shares suggest, but also in extreme cases can negate the preliminary conclusions of very high/low market shares. The extreme cases refer to (i) cases where suspected undertakings have more than 60% market shares and nevertheless are not designated as having SMP, and (ii) cases where suspected undertakings have less than 50% market shares and however are designated as having SMP. After examining those extreme cases, in conjunction with other Commission decisions, two direct criteria are found, which are countervailing buying power and sufficiency of wholesale remedies. The

¹⁸ See, Para 78 of the SMP guideline, *supra* note 5.

¹⁹ *Ibid*, Para 79.

first relates more to wholesale markets while the second is only related to retail markets.²⁰

3.2.1. *Countervailing buying power*

3.2.1.1. An overview

The assessment of countervailing buyer power focuses on whether customers enjoy a strong negotiating position that can be exercised to produce a significant impact on competition, by restricting the ability of providers to act independently of their customers. “The extent of countervailing buyer power largely depends on whether customers can credibly threaten to switch to other suppliers, to self-provide the service, to significantly reduce consumption or to cease to use the service at all in case of a price increase.”²¹

In practice only large customers’ countervailing buying powers are taken into account. Neither the Commission nor NRAs believes that small customers can exert effective countervailing buying power. Besides, as a matter of fact in all the retail markets, whether finding existence of SMP or not, no effective countervailing buying power is observed, although in some retail markets NRAs declared there were some degree of countervailing buying power. Consequently, being a direct criterion for the assessment of SMP countervailing buying power is in most cases only relevant to the review of wholesale markets.

Countervailing buyer power can only exist where large customers have the ability to resort to credible alternatives at acceptable costs in response to a price increase or threatened price increase. Accordingly the assessment of countervailing buying power in principle has two dimensions: switching possibility and switching costs.²² The first concerns the sufficiency of alternative infrastructure competition while the second is related to whether switching costs are preventive or not.

3.2.1.2. Sufficient alternative infrastructure competition

Without existence of alternative infrastructures it is impossible for customers to exercise countervailing buying power. Therefore, the evaluation of sufficient alternative infrastructure competition in practice focuses on examining whether infrastructures controlled by suspected undertakings are easily replicable or not. The very task of the

²⁰ For an overview of the Commission recommended retail and wholesale markets in the first round of market review, please look at “the list of relevant markets in the first round of market review” in the Appendix.

²¹ See, Revised ERG Working paper on the SMP concept for the new regulatory framework, September 2005, ERG (03) 09rev3, p. 5.

²² See, e.g. Case AT/2007/0590: Transit services in the fixed public telephone network in Austria, Brussels, 06/03/2007.

liberalisation in the electronic communication sector is to tackle the “bottleneck” case, i.e. the non-replicable legacy infrastructure of the incumbents. Those legacy infrastructures give first-mover advantages to the incumbents and make them already achieving economies of scale prior to the entry of alternative competitors. Since the non-replicable legacy infrastructures are the very hardcore obstacle for alternative competitors, the electronic communications markets will not turn into effectively competitive until the coming up of sufficient alternative infrastructures. Non-replicable infrastructures leave customers no choice but the incumbents, thereby not being capable of exercising their countervailing buying power. Consequently, the existence of sufficient alternative infrastructure competitors is significant to the assessment of SMP.

After examining all the extreme cases, it is found that, first, in all the 6 cases where the suspected undertakings have only 40–50% market shares while designated as having SMP, lack of fully duplicated alternative infrastructure was always a decisive factor for the existence of SMP. In those cases the suspected undertakings were the only operators with ubiquitous networks which on the one hand had not been replicated by alternative operators and on the other hand would not be replicated in the forthcoming two or three years. Second, there are only 3 Commission decisions²³ relating to wholesale markets where the suspected undertakings had over 60% market shares and were not designated as having SMP. In all of the 3 decisions the existence of sufficient infrastructure competition was considered as a strong indication of effective competition.

Furthermore, the evaluation of sufficient alternative infrastructures can be clearly shown by a comparison between two cases, Swedish Market 14²⁴ and Irish Market 10.²⁵ In the Swedish market the market share of the suspected undertaking was 60–75% while in the Irish market the market share of the suspected undertaking was 73%. The market shares of the suspected undertakings showed almost equal value as to the assessment of SMP. Besides, in both markets there were certain degrees of alternative competition. However, it is interesting that in the Swedish market the suspected undertaking was not designated as having SMP whereas the Irish suspected undertaking was. The very difference of the two cases depends on their distinct degrees of alternative infrastructure competition. In the Swedish case at least two of alternative operators were considered to have fully duplicated infrastructure of the suspected undertaking and therefore the suspected undertaking was not considered to have SMP. By contrast, in the Irish market there were two alternative operators who built out only

²³ See, Joint Case DE/2005/0143 and Case DE/2005/0145: Call origination on the public telephone network provided at a fixed location and transit services in the fixed public telephone network in Germany, 14 March 2005 (Market 10); Case SE/2006/0341: Wholesale Trunk Segments of Leased Lines in Sweden, 7 March 2006 (Market 14) and Case DK/2007/0725: Wholesale trunk segments of leased lines in Denmark, 30 November 2007 (Market 14).

²⁴ *Ibid*, Swedish Market 14.

²⁵ See, Case IE/2007/0673: Transit services in the fixed public telephone network in Ireland, 31 August 2007.

more than half of the suspected undertaking's infrastructure. There was no fully duplicated alternative infrastructure in the Irish market at that time. Such market circumstance did not sufficiently allow customers to exercise countervailing buying power and accordingly the Irish suspected undertaking was designated to have SMP. The difference between the two cases indicates that sufficient alternative infrastructure competition exists only where there is fully duplicated alternative infrastructure.

Last but not the least, although it cannot itself lead to a conclusion of non-existence of SMP, the emergence of alternative infrastructure, even having not developed to the extent of full replication of the suspected undertakings' infrastructures, can imply some degree of effective competition. For example, in the aforementioned Irish decision the Commission, seeing the emergence of alternative infrastructure, asked the Irish NRA to closely monitor the development of the alternative competition and to withdraw regulation on that market once there is indeed sufficient alternative infrastructure.

To conclude, the criterion of sufficient alternative competition is crucial for the assessment of SMP. It can indicate existence of SMP regardless of very large market shares. This criterion is however interpreted in a very strict way that the existence of sufficient alternative infrastructures can be found only where there is at least one fully replicated alternative infrastructure other than the suspected undertakings'.

3.2.1.3. Switching costs

The existence of fully replicated alternative infrastructure may not allow customers to exert countervailing buying power if switching costs to alternative operators are preventive. Therefore, the issue of switching costs should also be assessed even if there is sufficient alternative infrastructure competition on the relevant market.

The costs to switch operators are affected by a lot of objective and subjective matters. The most relevant is whether the customers can easily switch to alternative operators or self-provision. First, in order to test the possibility of switching to alternative operators NRAs in practice investigate two issues: customer awareness of switching, and actual and prospective customers switching on the relevant markets.²⁶ Second, concerning switching to self-provision, it is value-added to make a hypothetical monopoly test, i.e. small but significant and non-transitory increase in price, to see whether those customers can easily change to self-provision.²⁷

²⁶ See, e.g. Case DK/2005/0208: Publicly available local and/or national telephone services provided at a fixed location for non-residential customers, Brussels, 12 August 2005. In this case the Danish NRA provided data about low switching costs as such that "2/3 of the total number of customers consider that there are many suppliers available and 3/4 of customers regularly examine whether it would be advantageous to switch despite switching costs. In fact, 29% of customers have changed operator within the last three years and 53% would be prepared to switch if there was a hypothetical increase in price of 10%".

²⁷ See, e.g. Germany Market 10, *supra* note 23.

3.2.2. Sufficiency of wholesale remedies

According to the 2002 Regulatory Framework “[r]egulatory controls on retail services can only be imposed where relevant wholesale or related measures would fail to achieve the objective of ensuring effective competition.”²⁸ Accordingly when NRAs consider that remedies imposed on related wholesale markets²⁹ are sufficient to ensure effective competition on the relevant retail markets, the suspected undertakings on the retail markets should not be designated as undertakings having SMP, even if the assessment of market shares may suggest otherwise. Sufficiency of wholesale remedies is thus also a criterion that can directly counteract the preliminary conclusion of very high market shares. The definition of this criterion suggests that it is only related to the review of retail markets.

The most important notifications concerning sufficiency of wholesale remedies are the Commission decisions about the Estonian Markets 3 and 5.³⁰ The market shares of the suspected undertakings, namely more than 80% for both markets, show strong tendency of existence of SMP. However, the Estonian NRA believed that the wholesale remedies it had proposed or already imposed on the Market 8, Market 9 and Market 11, as well as Market 1 and 2, were sufficient to ensure effective competition on the relevant markets. Therefore, it did not designate any undertaking as having SMP in the relevant markets.³¹ Moreover, the criterion of sufficiency of wholesale remedies was also used frequently by other NRAs within the market analysis of Market 3–6.³²

²⁸ See, Revised ERG Common Position on the approach to Appropriate remedies in the ECNS regulatory framework, ERG (06) 33, p. 11.

²⁹ The wholesale markets herein also include the retail markets of fixed telephony access because those markets are considered as upstream markets of markets for retail fixed telephony call.

³⁰ See, Case EE/2007/0635: Publicly available local and/or national telephone services provided at a fixed location for residential customers in Estonia (Market 3), Brussels, 14 June 2007; Case EE/2007/0636: Publicly available local and/or national telephone services provided at a fixed location for non-residential customers in Estonia (Market 5), Brussels, 14 June 2007.

³¹ The Estonian NRA arrived at the conclusion of the absence of SMP on the basis of decreasing market shares of the suspected undertaking and the growing market shares of alternative operators as well. Nevertheless, the market shares of the suspected undertaking decreased averagely only around 1% per year in the last 7 years, which cannot show strong indication of absence of SMP. Therefore, it is considered that the most pertinent reason for the absence of SMP is sufficiency of wholesale remedies.

³² See, e.g. Case EE/2007/0615: Publicly available international telephone services provided at a fixed location for residential customers (Market 4), Brussels, 23 April 2007; Case EE/2007/0616: Publicly available international telephone services provided at a fixed location for non-residential customers (Market 6), Brussels, 23 April 2007; Case EE/2007/0642: Minimum set of leased lines (Market 7), Brussels, 22 June 2007; Case SE/2005/0195: Publicly available local and/or national telephone services provided at a fixed location for residential customers (Market 3), Case SE/2005/0196: Publicly available international telephone services, provided at a fixed location for residential customers (Market 4), Case SE/2005/0197: Publicly available local and/or national telephone services provided at a fixed location for non-residential customers (Market 5), Case SE/2005/0198: Publicly available international telephone services provided at a fixed location for non-residential customers (Market 6), Brussels, 24 June 2005; Cases FI/2003/0023 and FI/2003/0026: publicly available national tele-

This criterion is not clearly listed within the SMP Guidelines. The Commission nevertheless does acknowledge the significance of this criterion as to the assessment of SMP within its second edition of Commission recommendation on relevant product and service markets within the electronic communications sector.³³ Within this new version of market recommendation the Commission reckons that wholesale remedies, if imposed appropriately, can significantly reduce the barriers to entering retail markets and therefore should be sufficient to ensure that there is competitive supply at the retail level.³⁴ Therefore, all the retail markets but retail markets of access to fixed public telephone network at a fixed location are removed from the Commission recommended list.

3.3. CORROBORATING CRITERIA

Collaborating criteria refers to criteria that cannot alone negate the preliminary conclusions of market shares. Nevertheless, the assessment of these criterion has added value to support the conclusions of very high market shares or direct criteria. These criterion include dynamic competition and overall size of the undertaking.

3.3.1. *Dynamic competition*

Dynamic competition refers to a situation where “even when a market is characterised by high barriers to entry, other structural factors or market characteristics and developments may mean that the market tends towards effective competition.”³⁵ Three examples of dynamic competition provided by the Commission are

- (i) “the case where in markets with a limited, but sufficient, number of undertakings behind the entry barrier having diverging cost structures and facing price-

phone services provided at a fixed location for residential and nonresidential customers (Market 3 and 5), Brussels, 17 December 2003; Cases FI/2005/0201 and FI/2005/0202: Publicly available international telephone services provided at a fixed location for residential and nonresidential customers in Finland (Market 4 and 6), Brussels, 14 July 2005; Case DK/2005/0208: Publicly available local and/or national telephone services provided at a fixed location for non-residential customers (Market 5), Brussels, 12 August 2005; and Case DK/2005/0194: Publicly available international telephone services provided at a fixed location for non-residential customers (Market 6), Brussels, 27 June 2005.

³³ See, COMMISSION RECOMMENDATION of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, 28 December 2007, L 344/65.

³⁴ See, COMMISSION STAFF WORKING DOCUMENT EXPLANATORY NOTE Accompanying document to the Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, Brussels, xxx, SEC (2007) 1483 final, pp. 28 and 39.

³⁵ *Ibid*, p. 9.

elastic market demand. In such markets, market shares may change over time and/or falling prices may be observed”;

- (ii) “[t]here may also be excess capacity in a market that would allow rival firms to expand output very rapidly in response to any price increase, provided that there are no barriers to expansion behind the barriers to entry”; and
- (iii) “[m]arket dynamics may also be changed by technological developments or by the convergence of products and markets”.³⁶

Only the first example of dynamic competition, i.e. changing market shares and falling prices, will be analysed in this section. The second and third example will be not be examined here because the second concerns the availability of alternative infrastructures, which has been discussed in the previous section, “countervailing buying power”; and the third involves technological advantages that will be subsequently analysed.

Dynamic competition is so enshrined by the 2002 Regulatory Framework that it is even one of the three criteria to assess whether a relevant market should be subject to *ex ante* regulation.³⁷ However, the causal link between effective competition and dynamic competition is contingent and indirect, as alleged by the Commission that “[t]he simple fact that market shares have begun to decrease in recent years ... are in themselves insufficient to find that the market tends towards effective competition.”³⁸ Therefore, the criterion of dynamic competition is not categorised as direct criteria but collaborating criteria.

3.3.1.1. Changing market shares

Changing market shares refers to on the one hand decreasing market shares of the suspected undertakings and on the other increasing market shares of the alternative operators. It is rather comprehensible that sharp decreases of market shares of the suspected undertakings in the past or in the future can show the existence of dynamic competition. However, the problems remain (i) what burden of proof NRAs should bear, and, (ii) to what extent decrease of market shares of the suspected undertakings is sufficient to prove existence of dynamic competition.

First, with regard to the burden of proof NRAs should collect data of the development of market shares in the past years, and based on the past data further predict the prospective development. The Commission imposes a very high standard of evidence upon NRAs concerning changing market shares by requiring the latter to collect accurate and specific data. According to the Commission requirements, NRAs have to collect data regarding the development of market shares in each of the past years. It is not sufficient to provide data of such that in the past several years the market shares of the suspected

³⁶ *Ibid*, pp. 9–10.

³⁷ *Ibid*, p. 8.

³⁸ *Ibid*, p. 10.

undertakings decreased by X% in total and therefore the competition is dynamic.³⁹ If the data of decreasing market shares are not provided on a yearly basis, the notification concerned is under the risk of veto by the Commission, among with other things.

Second, there is no clear trend of generalising the threshold of changing market shares in the Commission decisions. Nevertheless, a possible threshold is implied by some Commission decisions that the decrease must be capable of driving the suspected undertakings' market shares below 50% within the time period of the current round of market review. An example of this possible threshold can be found in the Dutch notification of Market 1–6⁴⁰ where the Dutch NRA drafted the following table. In Table 4 only in the international fixed calls market was the suspected undertaking's market share expected to be reduced below 50%. Therefore, the Dutch NRA did not designate that undertaking as having SMP on the international fixed calls market. By contrast, on all the other markets the suspected undertaking was considered to have SMP.

Table 4. The development of market shares in Dutch market 1–6

	Present market share of KPN	Market share forecast at the end of the review period for KPN
Low capacity access	95–99%	55–75%
High capacity access	80–90%	65–85%
Local/national calls	70–80%	55–70%
International calls	50–60%	40–50%
Fixed to mobile calls	60–70%	50–60%
Narrowband data communications	90–95%	75–85%
Communication to information numbers	90–95%	70–80%
Communication via operator-assisted calls	90–95%	70–80%

³⁹ See, e.g. Cases FI/2003/0024 and FI/2003/0027: publicly available international telephone services provided at a fixed location for residential and non-residential customers, Brussels, 20 February 2004 C(2004)527 final.

⁴⁰ See, Case NL/2005/0287 to NL/2005/0292: Retail fixed narrowband and access markets, Case NL/2005/0293 fixed to mobile calls; Case NL/2005/0294 narrowband data services; Case NL/2005/0295 calls to information numbers; Case NL/2005/0296 calls to personal assistant numbers, Brussels, 2 December 2005.

Nevertheless, it is also observed that an indication of a steep decrease of market shares of the suspected undertakings cannot directly lead to non-existence of SMP. For example, in Belgian Market 3, the suspected undertaking lost 23% market share, in particular from 90% to 67%, in less than two years.⁴¹ However, the Belgian NRA still designated the suspected undertaking as having SMP on that market. Hence the criterion of decreasing market shares of the suspected undertakings cannot be considered as a direct criterion but as a collaborating criterion.

3.3.1.2. Falling prices

Falling prices is another aspect of dynamic competition. The examination of falling prices in practice has two dimensions, price evolution and low price level. In principle, a stably decreasing price and a lower price than other Member States can among with other things indicate non-existence of SMP.

In a majority of Commission decisions where the existence of SMP was not found the price evolution was used as an indicator of dynamic competition. In general, the collection of data regarding price evolution is similar as decreasing market shares in the above. NRAs should collect data of price evolution on the relevant markets in the past years. Nevertheless, the burden of proof of collecting data of price evolution is not as intensive as collecting data of changing market shares in that it is not necessary to collect data in each of the past years. It is sufficient to show that the price was indeed reduced continually in the past several years.

In the cases where falling prices are not found on the relevant markets or prices do not fall to a certain extent, a low price level can also prove helpful. Normally a lower level of price refers to a comparison of prices with other Member States. The benchmark used by the NRAs is usually “the EU average”.⁴² If the prices are below the EU average, the price level can be considered as low.⁴³

Nevertheless, the value of falling price as to the assessment of SMP is not as high as direct criteria. For example, in all the Commission decisions concerning wholesale markets for international roaming on public mobile networks (Market 17) the non-existence of SMP was always found, despite the prices on those markets were still high and stable. The prices in the international roaming market were so high that the EU initiated roaming regulation in June 2007.⁴⁴

⁴¹ See, Case BE/2006/0435: Publicly available local and/or national telephone services provided at a fixed location for residential customers; Case BE/2006/0436: Publicly available international telephone services provided at a fixed location for residential customers.

⁴² See, for example, Case CZ/2006/0447: Minimum set of leased lines, Brussels, 11 August 2006.

⁴³ See, for example, Case SE/2006/0496: The wholesale national market for international roaming on public mobile networks, Brussels, 3 October 2006; Case FI/2005/0304: the wholesale national market for international roaming on public mobile networks, Brussels, 16 December 2005.

⁴⁴ See, REGULATION (EC) No 717/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC, 29 June 2007, OJ L 171/32.

3.3.2. Overall size of the undertaking

The assessment of this criterion is to compare the market shares of the suspected undertakings with other market players.⁴⁵ Other market players with significantly lower market shares cannot exert sufficient competition pressure on the suspected undertakings and the suspected undertakings therefore can act independently even there are already a number of alternative operators present on the relevant markets.

However, since this criterion is refined based on EU competition law practices, it does not apply to the electronic communications sector in most instances. The electronic communications markets are still highly concentrated even after almost two-decades of liberalisation. As showed by Table 1, in around 90% notified markets the European incumbents still occupied more than 50% market shares. In those cases it is obvious that the sizes of the incumbents were at least equal to the sizes of all their competitors together. Consequently, it is not necessary to repeat the large size of the incumbents by analysing this criterion.

This criterion is relevant only when the suspected undertakings have smaller market shares, e.g. less than 50%. In these cases the size of alternative competitors should be taken into consideration with other factors. This criterion is especially beneficial in supporting existence of SMP when market shares of alternative competitors are much lower than suspected undertakings. In 4 out of the 6 Commission decisions⁴⁶ where the suspected undertakings had less than 50% market shares and however were designated as having SMP, the NRAs concerned used this criterion as evidence of existence of SMP.

However, it should be noted that the value of this criterion is still limited even in the abovementioned situations for two reasons. First, when the market shares of the suspected undertakings have been decreasing as low as less than 50%, it is very likely those markets are, at least, on their way to effective competition. This trend may already witness the existence of countervailing buying power or dynamic competition. Second, according to a report of the Competition Commission in the UK, “once an MNO (mobile network operators) has captured 20–25% of the market volume, there are only very limited remaining economies of scale”.⁴⁷ In other words, the relatively large size of suspected undertakings can only deliver limited competition advantages, when an alternative competitor achieves a market size of 20–25% on the mobile network markets. This criterion is accordingly only a collaborating criterion.

⁴⁵ See, Revised ERG Working paper on the SMP concept, p. 5, *supra* note 21.

⁴⁶ Those notified markets concern Spanish Market 10, Latvian Market 12, Polish Market 13 and German Market 13.

⁴⁷ See, CASE ES/2005/0330: Access and Call Origination on Public Mobile Telephone Networks in Spain, Brussels, 30 January 2006, p. 5.

3.4. NOT VERY IMPORTANT CRITERIA

The not very important criteria refers to criterion which do not have much importance as to the assessment of SMP, or criterion the application of which is uncertain. The reason for this phenomenon is possibly that the list of criteria for the assessment of SMP is drafted based on the practices of industry-wide competition law, which does not take into consideration the specific characteristics of the electronic communications sector. Therefore, not all of the listed criteria are particularly relevant for the assessment of SMP.

3.4.1. *Vertical integration*

Vertical integration can promote market power in two ways (1) by making new market entry harder due to control of upstream or downstream markets; (2) through the potential ability to lever market power into upstream or downstream markets, thereby adversely affecting competition.⁴⁸ However, vertical integration is the common feature of the electronic communications industry. The advantage of vertical integration enjoyed by suspected undertakings was pointed out in almost all the Commission decisions. Nevertheless, the existence of SMP or not was always found despite the existence of vertical integration. Therefore, this criterion is less meaningful because conclusion of non-existence of SMP can always be reached by analysis of other criteria. Since the indicative value of this criterion is very limited in practice, it is categorised as not very important criteria.

3.4.2. *Potential competition*

Potential competition refers to the competition constraints exerted by the entry of new-comers. However, considering the short time period of a market review, less than 3 years, it is very difficult for new comers to immediately exert “genuine” competition constraints on the existing market players.⁴⁹ In practice, considerable potential competition can only be offered by self-provided operators that currently do not provide wholesale services on merchant markets.⁵⁰ Nevertheless, this paper considers this

⁴⁸ See, Oftel’s market review guidelines: criteria for the assessment of significant market power, 5 August 2002, p. 9, available at: http://www.ofcom.org.uk/static/archive/Oftel/publications/about_oftel/2002/smpg0802.pdf.

⁴⁹ In a number of notifications, the NRAs concerned had a look at the potential new entry. However, all of them concluded that the new entries would not immediately change the current market structure.

⁵⁰ Merchant sales refer to the sales provided by wholesale operators and purchased by retail undertakings who want to provide retail products/services. In some wholesale markets only the incumbents are present and consequently the incumbents have 100% market shares. However, it does not necessarily mean that the incumbents have SMP. It might be the case where alternative operators, though

type of potential competition as an element for the assessment of countervailing buying power which is already discussed above. Therefore, it is not necessary to assess the criterion of potential competition separately.

3.4.3. *Technological advantages or superiority*

Technological advantages or superiority may represent a barrier to entry as well as an advantage over existing competitors.⁵¹ However, in almost all the notified markets the suspected undertakings, almost synonymous to the incumbents, were not found to enjoy technological advantages or superiority. The suspected undertakings normally use the “old” or mature technologies. It is rather the alternative operators that launch new technologies. Nevertheless, new technologies themselves should not be a concern for the assessment of SMP, but a successful taking up of such new technologies is. A successful taking up of a new technology should be embodied by the increase of market shares of those operators who launch new technologies. Consequently, the assessment of technological advantages or superiority is not different from assessing changing market shares.

3.4.4. *Easy or privileged access to capital markets/financial resources*

Easy or privileged access to capital markets/financial resources can also operate as a barrier to entry. However, no Commission decisions clearly stated that the suspected undertakings had extreme advantages to access capital markets or financial resources over others and therefore should be designated as having SMP on the relevant markets. Considering the high sunk cost feature of the electronic communications sector, without good connection to capital market or financial resources is it in practice rather difficult, if not impossible, for an entry at the service level, even not to mention investment at the infrastructure level.

3.4.5. *Three uncertain criteria*

It is uncertain how the NRAs appraise the following three criteria: economies of scope, product/services diversification (e.g. bundled products or services) and a highly developed distribution and sales network. First, the assessment of the three criteria was not often raised. Second, even if those criteria were mentioned to be used, there

not present on merchant markets, provide similar wholesale inputs to their own retail arms only. The internal flows of wholesale inputs of undertakings who are not present on merchant markets are called captive sales. If alternative competitors have excess capacity, they could exert competition constraints on the incumbents by entering merchant markets when the incumbents increase prices. Effective potential competition thus takes place.

⁵¹ See, Revised ERG Working paper on the SMP concept, p. 5, *supra* note 21.

were always no explanations within the Commission decisions on how the NRAs assessed the three criteria. In addition, the Commission never made comments on how to apply those three criteria. Therefore, it is difficult to probe the importance of these three criteria as to the assessment of SMP.

4. LEVERAGE OF MARKET POWER

According to Article 14(3) of the Framework Directive, “where an undertaking has significant market power on a specific market, it may also be deemed to have significant market power on a closely related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the undertaking”.⁵² Thereby is the debatable concept of leverage of market power in EU competition law (e.g., TAYLOR 2001) transposed into the electronic communications regulation.

However, as a matter of fact there is so far no Commission decision within which the existence of SMP was found solely based on leverage of market power. There are indeed a number of Commission decisions where NRAs expressed concerns about the ability of the suspected undertakings to leverage their market power. However, in no cases was the finding of the possibility of leverage of SMP a decisive factor for the existence of SMP. Consequently, it may raise a doubt on the usefulness of leverage of market power as a type of SMP in the 2002 Regulatory Framework.

The Commission did notice this problem recently. Within its 2007 proposals the Commission admits that “[e]xperience in the implementation of the regulatory framework indicates that the market into which significant market power is being leveraged is not the source of the problem but rather the object of its effect. Therefore, the significant market power enjoyed on one market should be addressed by national regulatory authorities at source and not on adjacent markets where its effects are felt.”⁵³ Therefore, the Commission proposes to delete the provision of leverage of market power in the next generation of Framework Directive.⁵⁴

⁵² See, Article 14(3) of Framework Directive, *supra* note 1.

⁵³ See, Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and services, and 2002/20/EC on the authorisation of electronic communications networks and services, Brussels, 13 November 2007, COM (2007) 697 final, 2007/0247 (COD), p. 20.

⁵⁴ *Ibid*, p. 37.

5. CONCLUSIONS

The SMP regime of the 2002 Regulatory Framework brings the concept of SMP much closer to that of dominance under Article 82 of the EC Treaty than the last generation of regulatory framework in so far as NRAs must apply competition law methodologies to assess SMP. The practices within the Commission decisions suggest that NRAs in general follow competition law methodologies when assessing SMP. Nevertheless, both the different objectives between this sector-specific regulation and EU competition law, and the different approaches between them, i.e. forward-looking vs. backward-looking, in theory call for different application of SMP from dominance. [This paper first examined the application of the assessment of SMP in the first round of market review and secondly two major differences between the application of SMP and that of dominance were detected.]

5.1. DIFFERENT APPRAISAL OF MARKET SHARES

The difference with regard to the appraisal of market shares between the SMP regime and the dominance regime can be summarised as Table 5. It is found that when using market shares as evidence of (non-)existence of market power, the SMP regime takes higher thresholds than the dominance regime.

Table 5. Different thresholds concerning market shares (MS) between the SMP regime and the dominance regime

The SMP regime	The Dominance regime	Indication of single SMP/dominance
MS > 60%	MS > 50%	Evidence of SMP/dominance, save in exceptional circumstances
60% > MS > 40%	50% > MS > 25%	Likely SMP/dominance
MS < 40%	MS < 25%	Unlikely SMP/dominance

Justifications for this tendency are possibly two-fold. First, when NRAs start analysing a relevant market they cannot rely only on the existing market circumstances, but should predict market development in the following two or three years as well. In other words, a relevant market, though not effectively competitive at present, may not be subject to *ex ante* regulation if it will by itself develop into effective competition in the near future. On the other hand, liberalisation that aims to boost new market entries necessarily results into the decrease of market shares of the incumbents. According to the Commission decisions the incumbents' market shares in general continue decreasing throughout the EU. If NRAs choose the same threshold as that of

dominance, i.e. exceeding 50%, excessive regulation would come out soon if market shares of the incumbents will certainly decrease to a much lower level in the foreseeable future. The deeper the development of liberalisation is, the more tangible this situation will be. Therefore, it is reasonable to choose a higher threshold for the SMP regime in order to avoid excessive regulation.

Second, the 2002 Regulatory Framework provides that regulatory obligations should be imposed “where there is not effective competition ... and where national and Community competition law remedies are not sufficient to address the problem”.⁵⁵ In essence it requires that regulatory remedies can only be imposed where necessary. It does not mean that in order to apply the SMP regime competition law authorities transfer part of their competence to regulatory authorities. Maintaining the same threshold for sector-specific competition and competition law would possibly lead to duplicated procedures between regulatory authorities and competition authorities (e.g., HOU 2008). Furthermore, it is not the objective of the 2002 Regulatory Framework to regulate all the undertakings whose market shares are more than 50%. It is nonetheless the purpose of the 2002 Regulatory Framework to only focus on the bottleneck of liberalisation and leave others to competition law. The bottleneck of liberalisation is not to reduce the market power of the incumbents, but to create effective alternative competitors.⁵⁶ Were it true that “once an MNO (mobile network operators) has captured 20–25% of the market volume, there are only very limited remaining economies of scale”⁵⁷, the market share of an effective alternative MNO should be at least around 20–25%. It is beyond the discussion of this paper how many competitors created by liberalisation can ultimately make a relevant market effectively competitive. Supposing two alternative competitors are enough, the market share of the incumbent on that market should be decreased to around 50–60%. In this case such very high market shares are rather evidence of effective competition than existence of SMP. This paper assumes this logic also applies to other relevant markets. Consequently, the Commission and NRAs “subconsciously” choose high thresholds for the SMP regime.

5.2. DIFFERENT APPLICATIONS OF OTHER CRITERIA

Since the (non-)existence of SMP cannot be established on the sole basis of market shares; the Commission provides a list of 12 other criteria for NRAs to undertake a thorough and overall market analysis. Nevertheless, the above analysis shows that since those 12 criteria are compiled from competition law practices not all of them are

⁵⁵ See, Recital 27 of Framework Directive, *supra* note 1.

⁵⁶ See, EGR Common Position on Remedies, p. 13, *supra* note 28.

⁵⁷ *Supra* note 47.

particularly relevant to electronic communications regulation. It leads to the following two consequences.

First, the fact that industry-wide competition law should take all possibilities under consideration makes it impossible to hierarchize the criteria for the assessment of dominance. However, this is not the case for the sector-specific regulation in the electronic communications sector. It provides the possibility to hierarchize those criteria that the electronic communications regulation should concentrate on creating effective alternative competitors. According to different values as to the assessment of SMP, this paper separates the other criteria into three categories: direct criteria, collaborating criteria and not very important criteria.

Second, since the 12 other criteria are not organised closely on the conditions of the characteristics of the electronic communications sector, some new criteria which are more relevant were introduced by NRAs or the Commission. The most important two are sufficiency of wholesale remedies and dynamic competition.

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APPENDIX

Table 6. The numbers of cases with finding SMP in the different ranges of market shares⁵⁸

	90-100%	80-90%	70-80%	60-70%	50-60%	40-50%
AT	7	0	0	3	1	1
BE	10	0	1	3	0	0
CY	16	0	0	0	0	0
CZ	7	1	1	3	0	0
DE	2	0	1	4	0	1
DK	6	3	0	1	1	0
EE	5	0	1	0	0	0
ES	6	1	4	3	0	1
FI	8	1	1	0	1	0
FR	7	1	1	4	2	0
EL	13	0	2	0	0	0
HU	8	1	0	0	0	0
IRL	5	7	2	3	1	0
IT	7	3	3	3	1	0
LT	9	3	2	1	0	0
LU	9	4	3	0	0	0
LV	10	1	0	0	0	1
MT	12	2	0	0	1	0
NL	12	2	2	0	2	1
PL	5	2	1	2	2	1
PT	5	3	1	0	0	0
SE	6	2	2	0	0	0
SI	13	1	1	0	0	0
SK	10	3	0	0	1	0
UK	2	1	0	0	1	0
subtotal	200	42	29	30	14	6

⁵⁸ There are 32 markets where the data of market shares are not disclosed.

Table 7. The numbers of cases without finding SMP in the different ranges of market shares⁵⁹

	80-90%	70-80%	60-70%	50-60%	40-50%	< 40%
AT	0	0	0	0	3	1
BE	0	0	0	1	1	2
CY	0	0	0	0	0	0
CZ	0	0	0	0	3	2
DE	0	1	0	0	0	0
DK	0	0	1	1	0	0
EE	2	0	0	0	2	0
ES	0	0	0	1	1	0
FI	0	0	0	1	1	4
FR	0	0	0	0	0	0
EL	0	0	0	0	1	2
HU	0	0	0	1	0	0
IRL	0	0	0	0	1	0
IT	0	0	0	1	1	0
LT	0	0	0	1	0	0
LU	0	0	0	1	0	0
LV	0	0	0	0	0	0
MT	0	0	0	0	0	0
NL	0	0	0	3	1	1
PL	0	0	0	0	1	1
PT	0	0	0	0	0	1
SE	0	0	1	4	0	2
SI	0	0	0	1	1	0
SK	0	0	0	1	0	0
UK	0	0	0	0	0	0
subtotal	2	1	2	17	17	16

⁵⁹ There are 21 markets where the data of market shares are not disclosed.

The list of relevant markets in the first round of market review⁶⁰

Retail level

- Market 1 Access to the public telephone network at a fixed location for residential customers.
- Market 2 Access to the public telephone network at a fixed location for non-residential customers
- Market 3 Publicly available local and/or national telephone services provided at a fixed location for residential customers.
- Market 4 Publicly available international telephone services provided at a fixed location for residential customers.
- Market 5 Publicly available local and/or national telephone services provided at a fixed location for non-residential customers
- Market 6 Publicly available international telephone services provided at a fixed location for non-residential customers.
- Market 7 The minimum set of leased lines (which comprises the specified types of leased lines up to and including 2Mb/sec as referenced in Article 18 and Annex VII of the Universal Service Directive).

Wholesale level

- Market 8 Call origination on the public telephone network provided at a fixed location.
- Market 9 Call termination on individual public telephone networks provided at a fixed location.
- Market 10 Transit services in the fixed public telephone network
- Market 11 Wholesale unbundled access (including shared access) to metallic loops and subloops for the purpose of providing broadband and voice services.
- Market 12 Wholesale broadband access
- Market 13 Wholesale terminating segments of leased lines.
- Market 14 Wholesale trunk segments of leased lines
- Market 15 Access and call origination on public mobile telephone networks
- Market 16 Voice call termination on individual mobile networks.
- Market 17 The wholesale national market for international roaming on public mobile networks.
- Market 18 Broadcasting transmission services, to deliver broadcast content to end users.

⁶⁰ Market 3–7, Market 10, Market 14, Market 15, Market 17 and Market 18 have been removed out of the list of markets which are recommended to be regulated at the European level since the end of 2007. In addition, Market 1 and Market 2 are combined into one market. Consequently, at present there are only 7 markets recommended by the Commission for *ex ante* regulation. However, NRAs can still use three-criterion test to further add/remove markets susceptible to regulation. See, the Commission 2007 recommendation of relevant product and service markets, *supra* note 33.