



# Review of the 2002 SMP Guidelines

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***WIK workshop – Revising the SMP  
Guidelines***

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# Review Process

- March to June 2017 - **Public Consultation**
- 5 Oct 2017 - Synopsis report of responses and responses published by the Commission
- In 2017 - **Study by external consultants** - will be published by the Commission in due course (at the latest with the publication of the revised Guidelines)
- **BEREC opinion** received on 16 March
- Adoption foreseen for **Q2 2018**

## Scope of the review

- More comprehensive Guidelines (outlining principles) and extensive staff working document (giving examples)
- The Guidelines cover sections on market definition, (single) SMP plus additional focus on joint SMP
- No chapters on remedies and procedures, due to separate and more specific body of EU soft law

# Principles of the review

- Relationship with competition law remains unchanged in the revised Guidelines
- Set out how the concept of SMP, including joint dominance, can be applied in the specific context of telecoms markets which may require regulated access even to parallel networks, for example in a duopoly situation
- Regulation at wholesale level requires NRAs to determine whether the underlying retail markets are effectively competitive under modified greenfield assumptions

## Market Definition

- Same general approach as 2002 → much of previous guidance still remains relevant (demand- and supply-side substitution, chain of substitution and geographic market definition)
- Inter-platform markets: NRAs should group together products or services that are used by consumers for the same purposes (end use)
- Wholesale platforms should be included in a single wholesale market according to SSNIP test
- Analysis should besides the estimated costs of switching also consider (i) potential access seekers not yet providing services and (ii) assume access regime facilitated by regulation, disregarding impediments to switch created by the network operators
- Impact of retail bundles and OTTs

## Single SMP

- Same general approach as 2002 → much of previous guidance still remains relevant
- Main changes to SMP criteria
  - all current criteria remain in the list
  - addition of barriers to entry, conclusion of long-term and sustainable access agreements, engagement in contractual relations with other market players that could lead to market foreclosure, (absolute and relative) size of undertakings and direct and indirect network effects

# Joint SMP – economic assessment

- As stated in *Airtours*, the existence of an agreement or of other links in law is not indispensable to a finding of a collective position of dominance. Such a finding may be based on other connecting factors and would depend on an economic assessment, and in particular an assessment of the structure of the market
- Appropriate market characteristics could lead to a relationship of interdependence between parties, allowing them to anticipate one another's behaviour

## Joint SMP – legal test

To prove existence of a dominant position to the requisite legal standard, the NRA must **cumulatively** establish that:

- There must be sufficient market transparency;
- There must be adequate deterrents to ensure that there is a long-term incentive in not departing from the common policy; and
- It must also be established that the foreseeable reaction of current and future competitors, as well as customers, would not jeopardise the results expected from the common policy

# Joint SMP – market structure conducive to coordination

- Airtours criteria sets out conditions which make tacit coordination more likely to emerge but no mechanical approach of isolated verification of each criterion (Impala II paras 123, 125), market characteristics assessed by reference to mechanism of hypothetical coordination (Impala para 130)
- Joint Dominance can be found were the structure of the market is conducive to coordinated effects
- Arriving at common understanding is easier in less complex, more stable economic environments (fewer players, symmetric market shares, coverage, vertical integration, capacity to replicate bundles)
- homogenous products increase transparency, smaller number of flagship products reduce tariff complexity

## Joint SMP – prospective view

- A prospective analysis must consider market developments over the course of the next review period to ascertain whether tacit collusion is the likely market outcome in the absence of currently applicable SMP-based regulation (modified Greenfield approach)
- Regulators may conclude on joint SMP even though they only observe behaviour of operator subject to (single) SMP regulation

## Joint SMP – integrated approach

- NRAs should analyse links between the relevant wholesale and underlying retail market(s)
- When conducting the analysis in markets that are currently regulated, a focal point can be identified, even if at retail level there is apparent competition, which is the result of existing regulatory intervention
- Focal points can be identified at retail or wholesale level and retaliation can take place at wholesale or retail level
- **Impala II:** tacitly colluding oligopolists *"maximise their joint profits by increasing prices, reducing output, the choice of quality of goods and services, diminishing innovation or otherwise influencing parameters of competition."*

# Joint SMP – specific behavioural indicators

- In the specific circumstances of *ex ante* regulation of electronic communications markets, where barriers to entry for new entrants are typically high, a refusal by network owners to provide wholesale access on reasonable terms may be a potential focal point of a common policy adopted by members of an oligopoly
- NRA need not establish that the *retaliation* would consist of the conclusion of another access agreement by other tacitly colluding operators(s), if the NRA identified a credible retaliatory mechanism (such as short-term wars) on underlying or related retail markets
- Close alignment of prices above competitive level over long period might in the absence of alternative explanation also demonstrate joint SMP



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# Q&A