IRG Input Document
to the European Commission's

Working Document

On

Proposed New Regulatory Framework for Electronic Communications Networks and Services

Draft Guidelines on market analysis and the calculation of SMP

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

(21.06.2001)

Introduction and Executive Summary

IRG welcomes the European Commission´s Draft Guidelines on market analysis and the calculation of significant market power.[1] In IRG´s view the Guidelines will help to ensure consistency in the approach taken by NRAs in applying certain provisions of the Directives, especially those concerning market definition and designation of SMP. As the proposed document is of central importance to the future work of NRAs, it is a matter of course for IRG to follow Mr. Verrues kind invitation to comment on it and to provide the Commission as an input, an explanation of NRAs understanding of the principles behind SMP.

IRG has carefully read the Guidelines, mainly from the perspective of its day-to-day experience of efficient decision-making and its obligation to comply with the rules laid down in national and EC legislation. IRG has also taken into account some of the judgements by ECJ and ECI as well as EC notices and opinions on competition.

The IRG is aware, that the Commissions Draft SMP-Guidelines are based upon the original text of the proposed Framework Directive, and that the Guidelines - consequently - will have to be revised in accordance with the final text of the Directive. IRG believes that the following remarks, if taken into consideration by the Commission could increase the value of the Guidelines and strengthen the objective of the Guidelines as laid down in paragraph 4 thereof.

For IRG, the most important issues on which greater clarification is required with respect to the current draft SMP-guidelines, are the following:

Important issues of the Draft SMP-guidelines (requiring further clarification)

Ex-ante vs. ex-post analysis

IRG has certain concerns regarding the practical applicability of concepts developed in an *ex-post* framework as instruments for *ex-ante* determinations with a view to imposing sector-specific obligations. While some aspects of competition law do focus on ex-ante issues (as in merger regulation), in the view of the IRG, NRAs have a more specific duty to regulate in all cases of market failure. Consequently, all of their activity is inherently ex ante because any regulatory investigation of market failure is implicitly ex ante. Although there is reference to this issue in several paragraphs of the SMP Guidelines, IRG believes that the difference between the approaches, that were developed in an *ex-post* context and their transposition into *ex-ante* regulation, is not adequately addressed.

Practicality of the approach to market definition

While IRG admits that the definition of relevant markets should be based on the principles of competition law - as outlined in the draft guidelines - we nevertheless have certain concerns about the practicality of the methods developed therein.

[1] Hereinafter: SMP-guidelines or Draft guidelines

First, in IRG's view the SSNIP test is a hypothetical experiment for which, in many cases, NRAs will not have sufficient information/data for it to be used at a sophisticated level (eg, using price elasticities). IRG appreciates the usefulness of data where available e.g. from past price shocks, but the availability of such data should not be seen as a *conditio sine qua non* of the test (and of market definition). What the SSNIP test should contribute to, in IRG's view, is to the development of a logical argument/line of thinking for which other available evidence can be used (functionality of services, technical characteristics, demand and supply substitutability etc.), without being strictly binding.

Second, because leveraging of market power is a frequently used strategy by (dominant) operators, the IRG believes that the Commission's Decision/Recommendation with respect to relevant markets should cover the whole electronic communications industry. If market definition only focuses on markets where competition clearly does not exist, NRAs may have to define further markets onto which market power can be leveraged.

Third, IRG believes that switching costs should only be considered in the market definition process, when there is incontrovertible evidence that they are due to the incompatibility of equipment needed, in order to use the product/service based on technological characteristics, which are not linked to any strategic decision by the firm. IRG believes that if this is not the case and is not clarified as such, the process of calculating SMP could be pre-empted at the market definition stage as a consequence of there being (too) many narrowly defined markets.

Distinction between effective competition and SMP

In IRGs view, the explanations given in the draft SMP-guidelines and those given by the Commission at the NRA/NCA consultation meeting on 29th of March do not overcome the basic problem presented by an "equation"[2] that appears to equate effective competition to the absence of SMP (and vice-versa). There are several paragraphs throughout the draft guidelines which suggest that there are two different kinds of analysis NRAs have to perform: One, on the effectiveness of competition in a certain market and another, on the existence of SMP operators.

This ambiguity appears not only to exist in the Guidelines but is also apparent in the slide that was handed out to NRAs/NCAs at the consultation meeting in Brussels. Here again, it is stated that NRAs should perform an analysis of effective competition and in the event that it is found not to exist, NRAs are obliged to identify operators with SMP. Although these two types of analysis are of course closely interrelated, there are in IRG's opinion, methodological differences that should be considered.

On the one hand, analysis of effective competition looks at the market as a whole[3] and does not necessarily take into account a detailed analysis of the degree of market power/leveraging with respect to one or more companies. It may conclude with a hypothesis about which firms have market power. On the other hand, an SMP-investigation is more concentrated on the behaviour of one or more companies.

[2] This equation is done implicitly for example in paragraph 94 of the draft SMP-guidelines, that states: "Section 3 of the Guidelines deals with the analysis of effective competition", while the header of section three is "Calculating SMP (Dominance)".

[3] For a methodological outline on an effective competition analysis see for example IRG's document: Principles of Implementation and Best Practice on Effective Competition (for the existing framework).

If this ambiguity between the two approaches is not addressed properly in the guidelines, NRAs might be confronted by operators requesting separate types of analysis. Consequently, if this issue is not addressed properly, operators may be encouraged to appeal against any decision on procedural grounds. Therefore, IRG would request that the Commission provide for greater clarification on this issue in the final SMP-guidelines.

Joint Dominance and the criteria used

IRG has serious concerns about the applicability of the Joint Dominance (JD) approach to the communications industry. Several points contribute to these concerns:

Firstly, Joint Dominance, may not be appropriate to assess market structures in the Electronic Communications Industries. In some segments tight oligopolies may exist for several years to come due to technical, economic or historic reasons.

Secondly, existing decisions of the CFI/ECJ on Joint Dominance have been reached within the context of merger regulation. Although this is ex-ante oriented, IRG has doubts whether the criteria developed in this area is adequate for the purposes of sector-specific ex-ante regulation where a higher standard of proof of a dominant position may be required. In this context IRG are of the opinion that the criteria developed, to date, on Joint Dominance are clearly related to the market and not to operators. By considering these criteria NRAs might be able to identify markets in which there is Joint Dominance, but not which operators have an SMP position in this market. This seems to be due to the fact that the criteria have been developed in the context of merger regulation where describing the market is the overriding concern, because the merging companies are obviously known. For identifying SMP operators on the other hand, such analysis looks insufficient. Therefore the IRG would like to ask the Commission to provide criteria in the final guidelines, which not only allow NRAs to identify markets in which Joint Dominance could exist, but which also assist in the identification of operators which are jointly dominant.

Thirdly, IRG believes that Joint Dominance will be extremely difficult to prove. NRAs need to establish that operators have a strong incentive to converge to a co-ordinated outcome. A review of the relevant criteria by NRAs may coincide with lengthy processes and discussions involving the relevant parties and consequently, NRAs may encounter difficulties in acquiring the required information within an acceptable timeframe.

Fourthly, if the Commission links the designation of SMP in oligopolistic markets to general competition law and the concept of JD developed therein, legal certainty (in non-merger cases) can only be provided by the European Courts and consequently, NRAs and the industry will need a certain period of time before the concept will be clarified through the European judicial process.

Although the Commission considers JD a well developed concept in competition law, IRG has its doubts as to how well developed it is in the context of regulating the electronic communications industries.

A recent decision by the Irish High Court has only served to fuel these doubts[4]. IRG's concerns in relation to this is exacerbated by the fact that the Commission provides two different sets of criteria to analyse single and joint dominance, although the scope of the analysis is by and large the same. In addition, it is not clear whether these lists are exhaustive, whether criteria should be applied cumulatively, etc. While some of these issues are clarified by the Council's agreement on Art.13 (including the Annex) this is not sufficiently addressed in the draft guidelines. In addition IRG would like to ask the Commission to advise as to the weight/importance that should be attached to different criteria in a Joint Dominance investigation. IRG also thinks it would be extremely useful if the Commission could explain the criteria by some means other than references to merger case law, e.g. by giving typical examples which demonstrate a standard in the communications sector. The Commission might also give a general explanation as to the relevance of the different criteria by making use of economic theories or national experiences.

Access Notice

In IRG's opinion the draft guidelines under discussion in some parts (ex-ante vs. ex-post, Joint Dominance etc.) could be more closely related to the requirements and experiences of electronic communication markets. As an example as to how this might be done, the IRG would refer to the Commission's Notice on the application of the competition rules to access agreements in the telecommunications sector (C 265, 22/08/1998).

In the following IRG provides comments on the whole of the Draft Guidelines on market analysis and the calculation of significant market power. Many of the subsequent more detailed comments are to be read as examples of what has been identified as main issues above.

[4] In a Judgement delivered by the Irish High Court on October 4th, 2000, in a market in which there were only 2 operators, the judge found that there was no "prima facie evidence of joint dominance as required in the legal sense". In the judges view "the concept of "conscious paralellism", seems to be fundamentally different to the concept of acting as a unit or as one in the market place, which is a requirement of joint dominance". – Meridian Communications Limited and Cellular Three Telecommunications Limited v Eircell Limited.

Annex: Detailed Comments on the Draft SMP-Guidelines

In order to facilitate reading, the subsequent detailed comments follow the structure of the European Commission's Draft-SMP-Guideline.

2 Market definition

2.1 General comment

As stated in paragraph 25, any assessment of effective competition or SMP requires as a precondition an appropriate definition of the relevant market in terms of its product- and its geographic dimension.
Concerning this process of market definition the IRG has submitted to the European Commission two Working Documents.[5] The Working paper on market definition outlines IRGs position on the methodologies and order considered important by IRG in defining relevant markets, whereas the Working paper on candidate markets goes one step further and provides – on the basis of the criteria which have been developed for market definition – an analytical list of candidate markets as an input to the Commissions Decision/Recommendation on relevant markets. Concerning this "Decision/Recommendation on Relevant Product and Service Markets" (paragraph 27), IRG wishes to make two suggestions:

- First, the relevant product and service markets should be defined according to the principles of competition law with consideration to economic criteria and the methodology as developed in the IRG's definition of relevant markets.
- Second, IRG is convinced that NRAs should be able to define markets with due consideration to their own national circumstances. While IRG recognises the need for harmonisation, it is convinced that, in defining markets, there needs to be flexibility for NRAs (and this also concerns the consultation procedure of Art. 6 of the Draft Framework Directive) to achieve the regulatory targets outlined in Art. 7 of this Draft Directive.

The procedure outlined in chapter two of these draft guidelines on market analysis corresponds by and large to the procedure developed by IRG as laid out in its working document on market definition. Nevertheless, there is a methodological uncertainty about the proposed order of the market definition test: IRG believe that the markets proposed by the Commission must first hold up against specific national experiences, objective product characteristics, studies by NRAs etc. In some cases this exercise may reveal market definitions which are different from those in the Commissions Decision/Recommendation. Once we have acquired a comprehensive list of working definitions, NRAs can then apply – where appropriate and necessary – the SSNIP test, which is a hypothetical experiment, that should be supported if feasible by analytical evidence (such as price and demand developments, shock-events etc.). While this process seems to be proposed through paragraph 39, the structure of the chapter might lead one to a different conclusion. IRG would welcome if the Commission could be more explicit on this procedural aspect.

Despite the fact, that the proposed methodology corresponds with the views of IRG, there are nevertheless some important issues which IRG wants to address by the following remarks:

[5] Working paper on definition of markets in the new regulatory framework and Working Paper on candidate markets in the electronic communications sector (both documents were submitted on 26th of February 2001).

2.2 Specific Comments

- *Concerning paragraph 5:* IRG would like to point out, that even though NRAs (according to Art 14 of the Draft Framework Directive) should not define the geographical scope of Pan-European markets, they should have the authority to determine that the scope of a certain market is Pan-European.

- *Concerning paragraph 9:* IRG would like to clarify, that it is not the understanding of NRAs that regulation only intends to substitute for effective competition. Although this might be the case sometimes, IRG is committed to the understanding that the first scope of regulation is to facilitate and foster effective competition not merely to substitute for it.

- IRG welcomes the Commission's statement that market definition is neither a static nor a mechanical process, but dynamic in nature. Thus it is appreciated that the guidelines do not propose a rigid methodological approach but consider any experiences gained by NRAs as relevant (paragraph 26). It is also appreciated that the guidelines addresses the difference between defining markets ex ante and ex post (paragraph 28). What remains unclear in this context, however, is whether uncertainty about future developments and the intention to define relevant markets for all Member States (despite existing differences, see for examples the remarks to paragraphs 56 and 60 below) through the "Decision/Recommendation on Relevant Product and Service Markets", will lead the Commission to rather broad ex ante definitions of markets (compared to an ex post analysis according to competition law). The answer to this question will influence the need for NRAs to deviate from the proposed market definitions in order to follow the accepted principles laid down in Art. 7 of the Draft Framework Directive. The fact that the Commission stressed (in its presentation at the NRA/NCA hearing as well as in paragraph 27), NRAs responsibility to define the geographic dimension of markets (nationally), suggests that the list of relevant markets could either be rather fragmented and/or rather prescriptive. Both approaches, although for other reasons, are not considered appropriate by the IRG.

  In addition IRG would like to underline that it is necessary that the Commission's "Decision/Recommendation on Relevant Product and Service Markets" covers systematically all communication markets (all economic activities of the industry). This is important for the following reason:
  IRG agrees, that market definition should be based on sound economic criteria as prescribed by the principles in these guidelines, but if markets are not defined systematically, NRAs may encounter difficulties in assessing the effectiveness of competition due to leveraging of market power e.g. from an upstream to a downstream market.

  Calculation of (significant) market power (and an assessment of leveraging of the same) can only be done on the basis of a market definition and therefore there is a need to cover all economic activities in the "Decision/Recommendation on Relevant Product and Service Markets". While IRG does not believe that this problem should be solved by too broad market definitions, it is concerned that very narrow market definitions may lead to decisions which are not in the best interest of fostering competition in these markets. They may, at first glance, seem to be effectively competitive, while a broader perspective may reveal that the competitive conditions are much more restricted. Therefore IRG suggests that market definition should always be carried out in a way in which NRAs are in the position to prove whether or not a market is effectively competitive. Recognising the fact that leveraging of market power is increasingly a strategy being adopted by former dominant operators (e.g. through bundling of products), is something that should be considered more carefully by the Commission.

The relevant product/service market

- *Concerning paragraph 37:* IRG agrees that differences in pricing models and offerings for a given product or service may lead to separate markets for business and residential customers for essentially the same service. As an example the guidelines give the international retail electronic communications services. However, it could be deduced from this, that differences in pricing models and offerings similarly lead to a situation where e.g., an operator could have different interconnection obligations regarding business and residential customers. IRG would appreciate if the Commission could clarify if this is/is not the case.

- *Paragraph 38* stresses the (technological) process of convergence and its consequences for substitutability. IRG regards this process as relevant for both, demand and supply substitutability, but it is of particular practical importance when considering supply-side substitutability at the wholesale market level. IRG agrees with the Commission's conclusion in paragraph 43 that a mere hypothetical supply-side substitution is not sufficient for the purposes of market definition, but would like to add, that complete consideration to supply-side substitutability should incorporate opportunity costs (which in turn would require information on price-cost margins). Overall, any investigation on substitutability should be based, according to IRG, on the principle of technological neutrality as set out in the framework directive.

Demand-side substitution

- *Concerning paragraph 40*: While IRG agrees that for the analysis of demand substitution, any evidence showing that consumers have in the past promptly shifted to other products or services in response to price changes, would be extremely useful, it should be noted that such information (on historical price fluctuations in potentially competing products, records of price movements and relevant tariffs) is not always available to NRAs. Even if recent records of price movements are available, it is in many cases a challenging econometric task to filter out single sources of a demand side reaction considering the rather dynamic development of communication markets (introduction of new services, changing prices of other products etc). Therefore IRG would like to underline again the importance of paragraph 26 (which states that market definition is not a mechanical process but requires an analysis of available evidence) and paragraph 39 (which clearly states that the SSNIP test should be done in cases that the NRAs see fit).

- *Concerning paragraph 41:* IRG would like to stress that the reference given to switching costs may be confusing. Switching costs should more naturally be considered at the stages of an assessment of effective competition and market power rather than at the earlier stage of market definition. It is true that very high switching costs may lead to different market definitions, however, this should be the case only when switching costs reflect a substantial 'state of the nature' difference (such as a technological difference). When switching costs in general are considered at the market definition stage, the IRG sees a danger that an analysis of market power is pre-empted on the basis of switching costs alone e.g. an NRA may conclude that different Pay-TV broadcasters are in different markets (and each one of them dominant in its own market) because users must bear costs in order to switch from one to the other. This in IRG's opinion, would be an aberration in the current circumstances. A general rule might suggest that switching costs should be regarded as a symptom of market power (and therefore be analysed at the market power assessment stage) when they arise as a consequence of a strategic choice of a single company. IRG would welcome if the Commission could develop further thoughts to clarify this issue.

Geographic Market

- *Concerning paragraph 52:* While IRG in principle agrees with the Commissions view that in certain cases the geographic market for international retail or wholesale services might be defined on a route-by-route basis, we would regard this degree of market segmentation on the national level only relevant under exceptional circumstances. Defining markets on a route by route basis, in most cases, will not be justified on a national level and could impose a substantial burden on NRAs.

Other issues of market definition

- *Paragraph 33*, underlines the relevance of the starting price for the „hypothetical monopolist test" and describes elasticities of demand in the context of the market power of a single firm. IRG understands that demand elasticities are of course relevant for the assessment of market power, but this should not be mixed up with the market definition process, which – according to IRGs understanding – does not start its analysis from the perspective of a single firms product. According to our understanding the starting point for market definition is a certain product/service which in general is offered by several firms. While perfect competition (and homogeneity of the product) may lead to a single price, this will often not be the case in reality (due to product differentiation, pricing strategies etc). Therefore NRAs believe it is not clear how to estimate the starting price for the „hypothetical monopolist test".

- *Concerning paragraph 53:* IRG agrees with the Commissions view on chain substitutability, but we would suggest that it incorporates the view that chain substitutability may also occur where an operator providing services at a national level, constrains the prices of operators providing services in separate geographic regions e.g. prices charged by cable operators operating in franchised areas are constrained by a former incumbent operating nationally.

- The guidelines do not specifically address infant markets. If there is any level of insignificance the Commission has in mind when defining markets this should be made clear. IRG would particularly welcome an explanation from the Commission about the relationship between Art. 12 Sec. 2 c of the Draft Access and Interconnection Directive and the market definition process with respect to the determination of undertakings with SMP.

The Commission's own practice

- *Referring to paragraphs 54 – 61:* IRG would like to ask the Commission whether this section should be read as a review of the methodologies developed in the preceding sections or if it should be interpreted as a reference to the Commissions "Decision-/Recommendation on Relevant Product and Service Markets" according to Art. 14 of the Draft Framework Directive. IRG understands the examples given in this section as being demonstrative, because they do not give a systematic and up-to-date analysis based on the criteria developed in the preceding chapters. If the Commission on the other hand intends to define product markets as outlined in this section, at a similar level of disaggregation, IRG would like to state, that this would not coincide with the views of NRAs in different Member States and could impose an unacceptable burden on NRAs, particularly in countries which have a rather fragmented landscape in terms of geographical markets. This again leads IRG to underline that an appropriate market definition will depend, on rather specific circumstances, in which substitutable and complementary products are available in any given area. In IRGs view it is not economically feasible to define markets rigidly on a Pan-European basis.

- *Concerning paragraph 56*: IRG would like to give the following comments on this particular paragraph:
  - IRG has some doubts about the statement that the data market is primarily used by businesses; in most European countries there is also an ever-growing residential data market.
  - While it may be appropriate for some countries to differentiate between several classes of business users, this might not be the case in all of the Member States.
  - Concerning the market of fixed telephony retail services, a distinction between access and monthly rental may not be appropriate for all Member States.
  - In IRGs view XDSL services should not be included in the "market of fixed telephony services offered to residential users"; it may be more appropriate to look at xDSL services in terms of the service provided (e.g. high speed Internet/broadcast services) rather than under a banner of 'fixed telephony retail services'.

- *Concerning paragraphs 59, 60 and footnote 47:* There seems to be a contradiction between footnote 47 and paragraph 60 concerning the question whether there are alternatives to PSTN. Apart from this, IRG would like to stress, that in several Member States cable networks are already prepared to provide fast internet access and basic telephony services and it would be reasonable to consider this as a substitute for the fixed voice telephony network.

3 Calculating Significant Market Power (Dominance)

3.1 General comments

- The European Commission has decided to align the definition of SMP to the definition of dominance as developed by the European Court of Justice, the Court of First Instance and the Commission's own practice, within the meaning of Article 82 of the EC Treaty. The IRG has certain concerns regarding the practical applicability of concepts developed in an *ex-post* framework as instruments for *ex-ante* determination of the position of an undertaking in the electronic communications markets with a view of imposing sector-specific obligations.

- The IRG understands that, using the distinction between an *ex ante* as opposed to an *ex post* approach, some of the duties that fall on National Competition Authorities (NCAs) can be regarded as *ex ante*. Such is the case, for example, in merger regulation, where NCAs need to assess whether a proposed merger between two or more firms would create a dominant position in a particular market before the merger takes place. However, the IRG believes that there still is a clear difference between regulation and competition law, in that while competition law aims to remedy situations where anti-competitive behaviour has arisen (or preventing it from arising, as is the case only in merger regulation), regulation needs to focus on remedying market failures in general. While preventing dominant positions from arising in a market as a result of a merger may be considered to be an *ex ante* activity, the IRG is not convinced it can be representative of the somewhat vaster scope of issues which is of concern to NRAs.

- While the IRG fully accepts the aim of aligning, as far as possible, sectoral regulation with competition law, the Commission's proposed definition of Significant Market Power (SMP) does not seem to meet all the concerns that NRAs share. It may work well in markets where there is a single large player i.e. a "dominant" operator.

- However, where there are a few large operators (i.e. oligopolistic markets which are of importance in the communications sector, for example digital broadcasting and mobile

telephony) the situation is more complex. Given the nature of communications markets with high barriers to entry and economies of scale, there may well arise circumstances where a firm is not individually dominant but has the ability to disadvantage consumers. Proportionate regulation may be justified to avoid restricted choice, excessive prices, or poor quality of service.

- The European jurisprudence necessary to underpin a definition of "joint dominance" for such markets is currently not sufficiently developed. It may develop satisfactorily in the near term. Equally, it may not.

- Thus, there are many incentives for operators to challenge an NRA's decision. Long drawn out legal challenges would undermine confidence in the regulator's ability to act. In the end, national regulators may be left powerless to deal with competition problems in markets of considerable importance to the disadvantage of consumers and national governments may not be able to intervene, as the European Directives specify the reasons for intervention.

- One way of achieving more focus on communication markets in this chapter could be to develop a more logical order of the paragraphs and offer more guidance on the applicability and relevance of the criteria. The chapter could begin with the relevant general case-law of the CFI/ECJ for assessing SMP (1). In the following paragraph, information could be given on the specific character of the telecommunication sector and its participants (2). In this part it should be noted, among other things, that communication sectors are generally more oligopolistic in nature than mature markets and demands a different approach than generally assumed under competition law. For example, the oligopolistic structure of the mobile industry, which is unlikely to evolve due to market forces, could have undesirable economic consequences that need to be examined and proved ex ante.[6] After a description of the peculiarities of the sector, the paragraphs on dominance in the telecommunication sector (3) would be well placed - these include the relevant jurisprudence and the Commission's decision-making practice in telecommunication markets. In the last part of chapter 3, the Commission could explain the relevant criteria and its practical applicability in the communication sector by giving examples of possible analyses (4). Criteria, which is especially relevant in communication markets, should be highlighted here.

- IRG believes it is possible to improve the Commission's definition by adding complementary text, that would satisfactorily close perceived gaps in the Commission's text. Nevertheless, there are still many uncertainties in the way the concept of market power is associated to the concept of joint dominance. While these concepts are clearly linked to attribute to the latter a degree of solidity, these uncertainties put at risk the scope to appropriate regulatory intervention in the case of competition problems.

- Moreover, market power seems to be predominantly considered in one of its more traditional manifestations, i.e. through prices set above competitive level and analysis of market shares. This may make it more difficult for NRAs to consider different forms of market power, e.g. control of the basis of provision of service, low quality of service, control of difficultly replicable facilities. The concept of market power should be considered in its overall complexity.

- As the concept of collective dominance is not clarified sufficiently in the view of IRG, it may not capture all the situations that need to be addressed by NRAs. The main concern that IRG continues to harbour is a view that to be deemed to be collectively dominant, firms need to act "as a single company", or to have "certain links" between them. This is

[6] Examples are international roaming, no price competition on mobile termination access and collectively raised retail prices as a consequence of financial problems of the industries.

clearly the language of collusion, yet most of the situations NRAs face on a daily basis relate to mere oligopolistic interdependence. The synopsis below provides the main theoretical arguments which lead the IRG to the position that the concept of collective dominance may not be the most appropriate tool for the purpose of regulating the situations that are common to our respective electronic communications markets.

- One can categorise a firms behaviour in an oligopoly in two ways. First, the collusive oligopoly, or cartel, which is strictly forbidden by modern antitrust legislation, as embodied, for the EU, in Art. 81(1) of the European Community Treaty. Second, the non-collusive, or non-cooperative, oligopoly, which includes all the forms of interdependent behaviour that firms might put in place in an oligopolistic market. While a comprehensive understanding of non-collusive oligopolistic strategies has not yet been reached, economic analysis suggests that a certain degree of interdependence among firms is always present in oligopolistic markets.

- These two broad categories of oligopoly represent two extremes, with explicit collusion at one end (the typical case of a cartel where interdependence is strong enough to allow firms to collude in a non-explicit way, through different forms of signalling behaviour) and a non-competitive, non-collusive outcome at the other end. The crucial point seems to be that both forms of oligopoly, collusive and non-collusive, represents a clear threat to users' welfare. While this is obvious in the case of collusive oligopolies, it is also a possibility in non-collusive oligopolies. Even though it is possible for firms in an oligopolistic market to behave in an effectively competitive way, this is far from being the guaranteed outcome of non-collusive oligopolies.

- The fact that firms may possess market power in oligopolistic markets implies that they will have an incentive in exploiting that market power (because they are rational), by relaxing competitive pressure on the market in order to avert retaliation by the other members of the oligopoly, which might result in a net loss of profit for all of them. Consequently, non-collusive oligopolies may cause substantial detriment to customers in the present by providing them with the products or services at more disadvantageous terms than those characteristic of a competitive market. Additionally, and maybe more importantly, they can cause substantial detriment in the long-term, as new firms' ability to innovate may be seriously and irreversibly distorted by oligopolistic firms.

- The IRG does not believe that electronic communications industries deserve exceptional treatment with respect to other industries: the analysis of oligopolistic markets referred to above is indeed valid for any industry, as most of the National Competition Authorities, and indeed the Directorate General Competition of the EC, would agree. However, for technical, economic or historical reasons, at least some, if not most, segments of the communications industries are in fact, oligopolistic (or monopolistic). This makes it more likely that the problems mentioned above might arise with more frequency in these industries. Therefore, it is necessary to ensure that there is a clear understanding of joint dominance in this particular industry.

- Art. 13 in its current wording covers single dominance, joint dominance, and the leveraging of a dominant position onto a related market. While the concept of single dominance is already quite well established in European competition law and in its application by Courts, joint dominance still needs to be clarified in terms of its application to situations where ex ante obligations may need to be imposed. In particular, it is quite clear that joint dominance covers all forms of collusive oligopoly, such as cartels. However, it is at the moment not clear whether joint dominance can be used to address situations of non-collusive oligopoly.

- Even for 'intermediate' situations, such as tacit collusion, joint dominance might not be an appropriate tool. In particular, case law from the application of Art. 81(1) of the EC Treaty suggests that evidence of concerted practice be sufficiently precise and coherent for NRAs to be able to deem oligopolistic firms to be jointly dominant[7]. In the *Access Notice*, the Commission stated that it would consider two or more undertakings to be in a collectively dominant position when they presented themselves vis-à-vis their customers and competitors as a single company[7]. In *Compagnie Maritime Belge*, the Court considered that in order to show that two or more undertakings hold a joint dominant position, it is necessary to consider whether the undertakings considered together constituted a collective entity[8].

- In other words, the concept of joint dominance as it stems out of the current relevant case law seems to be able to capture at the very limit situations of tacit collusion from an *ex post* perspective, and even then, evidence of parallel pricing may not be enough to deem two or more firms to be tacitly colluding, in the absence of more evidence about the existence of a concerted action. However, IRG is not convinced that the current interpretation of joint dominance may capture situations of non-collusive oligopolies from an *ex ante* perspective. This is the main reason why NRAs, which deal with such situations on a daily basis, have serious reservations about the use of collective dominance. It seems clear that without the introduction of some element of further clarification, there is little certainty as to whether joint dominance may be applied to all those situations which are of most concern to NRAs.

3.2 Specific comments

- *Concerning paragraph 62:* The Commission states that the application of the new definition of SMP, *ex-ante*, calls for certain "methodological adjustments" to be made to the way market power is assessed. However, the difference in the type of assessment undertaken by NRAs and by competition authorities cannot be described as a mere "methodological adjustment", given that the type of considerations and the objectives taken into account are substantially different.

- *Concerning paragraph 63:* The IRG welcomes the Commission's view that 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 this context, NRAs will follow the policy objectives identified in the Draft Framework Directive and in the EC Treaty.

3.3 Criteria for assessing SMP

- *Concerning paragraph 65:* The Commission states that in an *ex-ante* environment, market power is "essentially measured" by reference to the power of the undertaking concerned, to raise prices by restricting output without incurring a significant loss of sales of revenues. Although, generally, market power may be conceptualised in this way, it might be too strong an assertion to say that in an *ex-ante* environment, market power should be "essentially measured" by using only this yardstick. Specifically, in the sector of electronic communications, there are other criteria, such as, the practice of predatory pricing, the control of the basis on which users are serviced, the quality of the service and, the control

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7 See "CRAM SA vs Commission", 1984, ECR 1679 (1985) 1 CMLR 688 and 'Meridian Communications Limited and Cellular Three Telecommunications Limited vs Eircell Ltd', 2000, Irish High Court.

7 See Notice on the application of the competition rules to access agreements in the telecommunications sector, OJ C 265, 22 August 1998, paragraph 79.

8 Compagnie Maritime Belge transports and Others v Commission, [2000] ECR I-1365.

of particular facilities which cannot be easily duplicated among others, which are particularly relevant to measure market power.

- *Concerning paragraph 66:* The Commission asks NRAs to 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. In our view, NRAs should be able to take into account potential competition within a shorter time frame (from 6 months to over a year) than the period suggested by the Commission implicit in an expression of the "medium term".

- *Concerning paragraph 67:* The Commission states that 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 time. In footnote 61, the Commission adds, "in dynamic 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". The IRG is of the opinion that given the speed with which electronic communications markets develop, the need to show dominance over three years would constitute a serious barrier to imposing *ex-ante* sector-specific obligations on operators. In the light of the annual review of SMP-designations the period for prospective assessing the existence of dominance of one year should be more appropriate.

- *Concerning paragraph 73:* The Commission states that the notion of "essential facilities" 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.

  The IRG is of the view that the Commission should clarify this assertion which, otherwise, can be easily misunderstood.

  In our opinion, the Commission's statement in paragraph 73 shows its concern about using the notion of essential facilities for the *ex-ante* assessment of SMP given the restrictive interpretation of the "essential facilities doctrine" - following the Court's decision in the Bronner case[9]. In that context, we understand that the restrictive interpretation of the "essential facilities doctrine" should neither affect the *ex-ante* assessment of SMP within the communications sector, nor the correlative imposition of sector-specific obligations.

  Moreover, we still believe that the notion of essential facilities is a valid criterion that should be taken into account when assessing SMP. In paragraph 70, the Commission includes as a criterion to measure market power "the control of infrastructure not easily duplicated". In the electronic communications sector, dominance is often based upon the control of certain infrastructure, facility or means not easily duplicated to which other providers require access at reasonable conditions in order to provide services. Therefore, we consider it essential that the control of bottlenecks can be a determinant for SMP.

3.3.1 Collective dominance and the jurisprudence of the CFJ/ECJ

General comments

- Statements about how collective SMP is manifested appear to some degree contradictory, and not all might be particularly relevant to the case at hand – ie assessment of SMP ex ante in the communications sector:

- The Commission's Access Notice (para 78) states that the undertakings 'present themselves… as a single company'

[9] C-7/97 Oscar Bronner v. Media Print [1998] I E.C.R. 7791

- The Gencor case (para 82) found that 'undertakings are strongly encouraged to align their conduct in the market'
- Compagnie Maritime Belge (para 83) states that the undertakings must 'present themselves as a collective entity' and 'adopt a uniform conduct or policy on the market'
- Para 85 talks of 'co-ordinated effects' or 'parallel anticompetitive behaviour'
- Para 88 talks of 'market operators having a strong incentive to converge to a co-ordinated market outcome'

- Many of these examples are inappropriate because wording is suggestive of links between the undertakings, whether conscious (explicit collusion) or otherwise (tacit collusion). The IRG's view (confirmed to some degree in the Gencor case, para 82) is that no links are necessary for two or more firms to have a potentially detrimental degree of market power, because their mere interdependence (which cannot be captured under the term 'co-ordination', 'adopting a uniform conduct', 'align their conduct' etc) can generate a degree of market power (non-cooperative oligopoly). It would be helpful for the Commission to explain the difference between various forms of collective dominance and focus on the form that is most likely to be exhibited in the communications sector – non-collusive oligopoly. The IRG would suggest, to ensure that non-collusive oligopoly is captured, that any explanation in the text of collective dominance should focus on the outcome (behaviour appearing aligned) and not the means by which that outcome was achieved (co-ordination, alignment of behaviour etc).

- The IRG would also like to question, whether it is appropriate in the context of ex ante regulation to talk of companies being 'collective entities' or 'single companies'. This may be the case in some circumstances, but equally it may not be the case in the context of complex product sets and pricing arrangements adopted in the communications sector. This might be a too rigid a test and the Guidelines should make clear that while 'identical' behaviour could be an indication of joint SMP, behaviour does not need to be absolutely 'identical' for SMP to be found.

- Existing case law and previous notices from the Commission have placed an overly rigid interpretation on the level of competition that may exist between players that are collectively dominant.

  Paragraph 78: In the Access Notice, the Commission had stated that it would consider two or more undertakings to be in a collectively dominant position when they presented themselves… as a single company, provided that no effective competition existed between them.

  Paragraph 83: Compagnie Maritime Belge:… This will be the case when (i) there is no competition among the undertakings in question.

  More helpful text is found in paragraph 88, which states that undertakings that are collectively dominant must be 'refraining from reliance on competitive conduct'. This could be interpreted not as meaning that there is no effective competition between them, but that they are not acting at all times and in all respects in a way which would be expected of undertakings operating in an effectively competitive market. IRG would ask the Commission to clarify this point in the guidelines.

- The fact that two lists of indicators are presented (at paragraph 70 and at paragraph 86) seems to indicate that there are two different approaches to be taken when an NRA determines market power in an oligopoly and in a market dominated by a single player. The criteria that are common to the assessment of market power in general (which should include high barriers to entry, presence of excess capacity) should be placed in a single list with criteria relating to finding players 'jointly dominant' (eg retaliatory mechanisms,

transparent market conditions, informal links, homogeneous products, similar costs structures/market shares etc), identified as such.

Specific comments

- *Concerning paragraph 77:* It seems that this paragraph seeks to distinguish between a dominant position and a position of SMP. This seems to contradict paragraph 62, where it is clearly stated that SMP equals dominance. IRG would ask the Commission to address this apparent confusion and provide for greater clarity on the issue.

- *Concerning paragraph 79:* It may be worth noting that the concept of collective dominance has not been tested outside of ex post merger-type assessments. Similarly, the case cited in paragraph 81 (*Gencor*) is a merger decision.

The Commission's decision-making practice

- *Concerning paragraph 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 Regulation. In doing so, the Commission has relied upon a certain number of criteria which can be summarised as follows:

- *few market players*
- *mature market*
- *stagnant or moderate growth on the demand side*
- *low elasticity of demand*
- *homogeneous product*
- *similar cost structures*
- *similar market shares*
- *transparent market conditions*
- *lack of technical innovation, mature technology*
- *absence of excess capacity*
- *high barriers to entry*
- *lack of countervailing buying power*
- *lack of potential competition*
- *various kind of informal or other links between the undertakings concerned*
- *retaliatory mechanisms*
- *lack or reduced scope for price competition"*

Some of the criteria included above will exclude the application of the concept of collective dominance to the electronic communications sector characterised by including dynamic and growing markets (e.g., 3G mobile telephony). In addition in IRG's view a reference to "market conventions which discourage cost competition or cost effectiveness" should be inserted in the list of relevant criteria for dominance. Examples of such conventions are the system of 'calling party pays', which makes price competition on mobile termination access less likely or the system of roaming agreements.

- *Concerning paragraph 86 and footnote 85*: decisions on JD so far only refer to oligopolies with 2-3 undertakings. Having 4 to 6 undertakings may make it particularly difficult to use collective dominance, although in principle such a situation will be very common.

Concerning paragraph 88: The phrase in paragraph 88 'oligopolistic markets where most, if not all, of the above mentioned criteria are met' could be read as being contradictory to paragraphs 71 and 87, which make it clear that the criteria listed in paragraphs 70 and 86 are not cumulative although equally are not necessarily individually determinative of SMP in their own right. IRG's reading of paragraph 88 is that these criteria (however many of them are met) are still not sufficient for a finding of dominance because the central test is where 'market operators have an incentive to converge to a co-ordinated market outcome and refrain from reliance on competitive conduct'. The wording should be amended to make this clear. Also, the IRG would contend that the list provided is purely indicative and not exhaustive and we would welcome wording to this affect from the Commission.

4 Imposition, Amendment or Withdrawal of Obligation under Article 14 of the Framework Directive

4.1 Designation of Significant Market Power

- *Concerning paragraph 98:* "Effective competition is equivalent to the absence of a dominant position". The relationship between effective competition and SMP has not been fully clarified by the Guidelines to the extent that the IRG was hoping. In particular, there may be situations in which SMP designations may need to be unrelated to effective competition reviews. The Guidelines do not shed light on whether effective competition reviews are a necessary prerequisite for any type of SMP determination. We think the process should look more like that illustrated by the diagram put forward by the Swedish Presidency in CWG or indeed the handout provided by the Commission at the hearing in April.

4.2 Regulatory obligations

- *Concerning paragraph 100:* "…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." This may be read as meaning that there are two separate decisions to make – one on SMP and a separate one on obligations. If this is the case, it would contradict paragraph 120.

4.3 Regulatory obligations and WTO commitments

- *Concerning paragraph 102:* The Commission believes that dominance covers the "major supplier" notion in WTO. However, IRG has it's doubts whether the WTO's legal definition of a major supplier is consistent with the Commissions definition of SMP. The problem may arise and a Court may be called to decide on it. For one thing, paragraph 73 of the guidelines states "as regards the notion of 'essential facilities' [.....] has no bearing on the ex ante assessment of SMP within the meaning of Art 13 of the Draft Framework Directive", whereas the WTO's definition of 'major supplier' explicitly refers to essential facilities. The WTO define a major supplier as a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of:

  a) control over *essential facilities*; or
  b) use of its position in the market.

5 Procedures for Public Consultation and Publication of Proposed NRA Decisions

5.1 Overview of Procedures by NRAs

- *Concerning paragraph 108:* According to the Commission, NRAs should have the same rights and duties with respect to confidentiality in the exchange of information as a 'competent authority' for the purposes of regulation 17/62. The Commission should explain the term 'competent authority' in regard to the competencies and responsibilities of NRAs here. Furthermore, the relevant provisions concerning the rights and duties of NRAs in respect of confidentiality of information should be mentioned directly (rather than referred to) in this section.

5.2 Market analysis and power of investigation

- *Concerning paragraph 110:* The Commission acknowledges that the job that has to be done by NRAs is very ambitious by stating: "*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 analysis be completed within the two month period, although NRAs should do their utmost to reach the final result by this time."* In our opinion, the general time plan of two month is too demanding for a *substantive analysis* - on significant market power and effective competition - in the intermediate stage to the new framework. Already under the current legal status, there are many problems for NRAs to receive sufficient information from operators in time. NRAs know from experience that gathering information can be very time consuming. The IRG fears that, after the establishment of the new consultation procedures and mechanisms for information circulation, it will become even more difficult to receive confidential information from operators. Operators will probably have problems with the fact that confidential information could be submitted to third parties (Commission, other NRAs, NCAs).

- *Concerning paragraph 111:* It is not clear to IRG what precisely the Commission means by stating 'NRAs are required to *associate* NCAs to such analyses'

5.3 Co-operation Procedures

General comment

- A distinction has to be made between co-operation procedures among NRAs, between NRAs and the Commission and between NRAs and NCAs at a national level. We would like to propose the inclusion of more information on the procedures among NRAs under a new header. The procedures between the Commission and NRAs are very important in terms of consistency, but the IRG does not welcome the approach of a one-way responsibility in the current texts. The procedures between NRAs and NCAs need more clarification, although detailed procedures should only be laid down on a national rather than a European level, if necessary.
- It has to be stated that certain member states in the Council Working Group opposed the provisions on information exchange in the Commission's proposal. If NRAs have to supply the Commission or other authorities with (confidential) information, this obligation may stand contrary to national law.

Co-operation procedures among NRAs

- The introduction of the guidelines and the section on co-operation procedures seem inconsistent. According to the introduction (last sentence of paragraph 5), the relevant section should include recommendations about co-operation procedures for NRAs to use in their dealings with other NRAs. However, there is no information on this in section 5.3 and this information seems to be important considering, for example, the possibility of trans-national market analysis in the future.
  The current discussions on regulation 17 could be relevant in this respect. In future, the NCAs (or 'competent authorities') and the Commission will work together in a kind of network for the joint handling of cross-border cases under general competition law. If the Commission has already published a notice on the co-operation mechanisms and the role for NRAs in handling trans-national cases in the telecommunication sector, the IRG would ask that this be made clear.

Co-operation procedures between NRAs and NCAs

- IRG believes the guidelines could be clearer about the responsibilities of the different authorities as to how consistency with legal certainty can be achieved. The section deals mainly with issues concerning the gathering and sharing of information. There are other aspects which may deserve more guidance, such as the risk of forum shopping by companies and possible actions to be taken in case of conflicts or inconsistencies between national authorities. However, this does not mean that the IRG requests the Commission to provide detailed rules on these issues. In some countries, procedures for co-operation have been laid down already.[10]
  An important aspect of co-operation that could be clarified in the guidelines is defining which parties have the primary responsibility for cases. While the NRA is primarily responsible for liberalisation of the (tele)communications market, it should also make maximum use of the experience and knowledge of the NCA. However, SMP-investigations, defining relevant markets, applying remedies and the principle of forbearance should primarily be the responsibility of NRAs in the (tele)communication sector. In any case, should the NCA take a different point of view than the NRA, the NRA must still be able to fulfil its tasks and to solve its cases effectively and in time.

Co-operation procedures between the Commission and NRAs

- There is no mechanism foreseen to the effect that the Commission is required to provide information to NRAs. The IRG would welcome the imposition of a mechanism which would facilitate an exchange of information from the Commission. This could be an important means to achieving a higher level of transparency and could assist an effective and coherent case handling procedure.

- *Concerning paragraph 117: The Commission's request for information must also respect the principle of proportionality.* The IRG would like to add that such a request should be reasoned.

- *Concerning paragraph 119:* Confidentiality of information

[10] In the Netherlands e.g., the NRA and the NCA have laid down procedures for co-operation in a formal protocol. Co-operation procedures can be essential in case of overlaps in the application of sector-specific telecommunication regulation and general competition control. The procedures laid down in the NMa/OPTA protocol are about the exchange of information, the allocation and referral of tasks, processing in the case of concurrent powers, consultations and joint case handling, among other things.

- This provision seems an insufficient guarantee for companies and states concerning the confidentiality of their information.
- IRG would appreciate if the Commission could clarify who is to be held accountable when problems should arise e.g. such as a breach of confidentiality under national law.
- The relevant provisions of the new regulation 17 could be mentioned and explained here directly (and in paragraph 108 also).

6 Procedures for Public Consultations and Publication of Proposed NRA Decisions

This section describes the procedure laid down in Article 6 of the Framework Directive. IRG has already taken the opportunity to express its deep concerns with regard to paragraph 3 and 4 of Article 6. Accordingly, paragraph. 124 and 125 of the Guidelines seem to be inappropriate.