

# Imposing Additional Obligations

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## Introductory remarks

- Removal of market entry barriers
  - Liberalisation & harmonisation
- Create a level playing field
  - But, continuing market dominance
    - Structural or legal/regulatory barriers to market entry
    - For reasons of history (e.g. incumbent), inherent (e.g. natural monopoly) or market practice (e.g. calling party pays)
- Impose *ex ante* behavioural (or structural) controls
  - EECC, Chapter III
    - Promote deregulation

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## EU Regulatory Framework

- Phase I: 1985-1994
  - *Italy v Commission* (1985)
  - 1987 Green Paper
    - equipment & services (except voice telephony, a 'reserved service')
- Phase II: 1994-2002
  - networks
  - 1 January 1998 (1 January 2001)
  - The 1999 Communications Review
- Phase III: 2003-
  - New Regulatory Framework (NRF): 25 July 2003
    - Directives 09/136/EC & 09/140/EC – amendments
    - European Electronic Communications Code

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## Operator with ‘Significant Market Power’

- Phase II
  - 25% Share of Relevant Market
    - determined by National Regulatory Authority
    - factors to reverse presumption, e.g. access to financial resources
    - Germany
- Phase III
  - NRF: Framework Directive 2002/21/EC, art. 14
    - WTO Reference Paper (1997): ‘major supplier’
    - Local Loop Regulation (2887/2000)(repealed): ‘notified operator’
  - EECC, Art. 63

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## Operator with ‘SMP’

- “An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.”

*EECC, Art. 63(2)*

- Presumption if market share is persistently over 50%
  - < 40% is unlikely, unless other relevant factors, e.g. control of essential inputs
  - By volume (e.g. minutes) or value (e.g. retail products) of sales
- Joint dominance: ‘abuse by one or more undertakings’
- Leverage into ‘closely related markets’

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## Step 1: Market Definition

- Product/service
  - customers: retail/wholesale, business/consumers
- Geographic
  - network coverage/reach, urban/rural, regulatory limitations
- Tools
  - demand substitutability, i.e. for other services
    - ‘user experience’
  - supply substitutability, i.e. switch or increase supply
    - Hypothetical monopolist & SSNIP test (Small but Significant Non-Transitory Increase in Price)

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## Step 1: Market Definition

- Art. 64: Commission Recommendation
  - Commission Recommendation (2003/311/EC): 18
  - Commission Recommendation (2007/879/EC): 7
  - Commission Recommendation (2014/710/EU): 4
  - Commission Recommendation (2020/2245/EU): 2
- Art. 65: transnational markets
  - Nothing to date
- NRAs obligation
  - “appropriate to national circumstances”
  - “in accordance with the principles of competition law”
    - Case 424/07, *Commission v Germany*, 3 December 2009, [2009] E.C.R. I-11431
  - give ‘utmost account’ to Recommendation
    - C-28/15, *Koninklijke KPN BV v ACM*, 15 September 2016, at para. 38

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## Retail Markets

1. Access to the public telephone network at a fixed location for residential customers.
2. Access to the public telephone network at a fixed location for non-residential customers.
3. Publicly available local and/or national telephone services provided at a fixed location for residential customers.
4. Publicly available international telephone services provided at a fixed location for residential customers.
5. Publicly available local and/or national telephone services provided at a fixed location for non-residential customers
6. Publicly available international telephone services provided at a fixed location for non-residential customers
7. Minimum set of leased lines for end-users

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## Wholesale Markets

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

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## Wholesale Markets

- Wholesale local access provided at a fixed location
  - “most difficult part of the network to replicate”
- Wholesale dedicated capacity
  - “dedicated and uncontended connections and symmetrical speeds”
  - For businesses and organisations

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## Step 2: Market Analysis (art. 67)

- Review markets
  - Identify undertaking(s) with SMP or, if ‘effectively competitive’, do not impose or withdraw obligations
    - within every 5 years (art. 67(5)(a)), or
    - 3 years after revised Recommendation or newly identified markets
- NRAs obligation
  - ‘in accordance with the principles of competition law’
    - High and non-transitory structural, legal or regulatory barriers to entry
      - Absolute (e.g. spectrum), strategic (e.g. ‘first mover’) & exclusionary (e.g. vertical integration) advantages
      - Cumulative analysis
    - Market structure “does not tend towards effective competition within the relevant time horizon.”
      - Recommendation (2020): 5-10 years

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## Step 2: Market Analysis

- Countervailing buyer power
  - Buyer is well informed & can switch readily
  - Commence production or ‘sponsor’ new entrant
  - Buyer is an important customer
  - Buyer can intensify competition through competitive procurement process
- Insufficiency of competition law in the absence of *ex ante* regulation

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## Step 2: Market Analysis

- Commission Guidelines for market analysis and the assessment of significant market power (2018)
  - NRAs to give 'utmost account'
  - Analyse upstream markets in supply chain first
- 'Modified Greenfield approach'
  - Commission decision DE/2005/0144 re: call termination on fixed networks
    - "to avoid circularity in the market analysis by avoiding that, when as a result of existing regulation a market is found to be effectively competitive, which could result in withdrawing that regulation, the market may return to a situation where there is no longer effective competition."

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## Step 3: Remedies

- Shall impose a remedy
  - Notification in 'exceptional circumstances' + Commission decision
- Retail remedy only if wholesale remedy can not achieve objective (Art. 83(1)(b))
- Proportionate ('least intrusive') and justified to meet general objectives (art. 3):
  - Promote competition
  - Develop internal market
  - Promote interests of EU citizens
- Investment concerns
  - Especially in 'new market developments'
- Commitments procedure (Art. 79)

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## Remedies (NRF)

Retail  
(Directive 02/22/EC)

1. Retail tariff regulation
2. Cost accounting systems
3. No undue preference to specific end-users or unreasonable bundle services
4. Provision of minimum set of leased lines
5. Carrier selection & pre-selection

Wholesale  
(Directive 02/19/EC)

1. Transparency
2. Non-discrimination
3. Accounting separation
4. Access to, and use of, specific facilities
5. Price control & cost accounting obligations
6. Functional separation

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## Remedies (EECC)

### Access

(Chapter IV, Arts. 69-74 & 76-78)

1. Transparency
2. Non-discrimination
3. Accounting separation
4. To civil engineering
5. To specific network elements & associated facilities
6. Price control and cost accounting obligations
7. Functional separation
8. Voluntary separation

### Retail

(Chapter V, Arts. 83)

1. Retail price cap measures,
2. Control individual tariffs,
3. Orient tariffs towards costs or prices on comparable markets (+ cost-accounting systems)

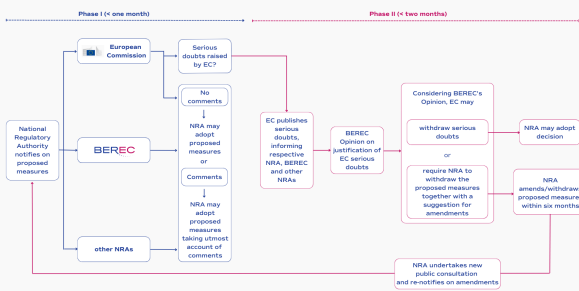
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## Step 4: Notification

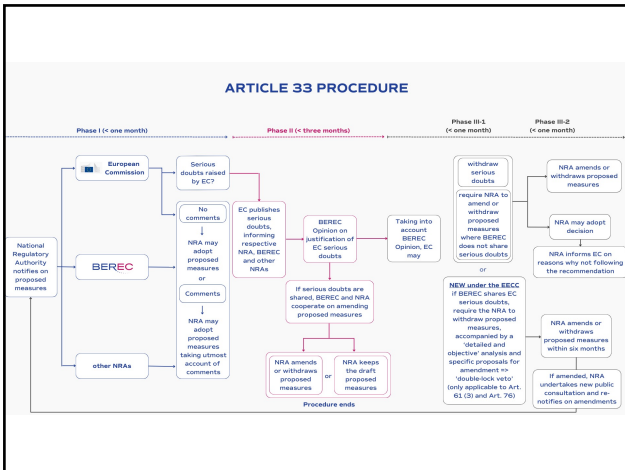
- Article 32(3): draft measures
  - Public consultation with interested parties (Art. 23)
  - Notification to Commission, BEREC and NRAs
    - Commission Recommendation 2021/554 (OJ L 112/5, 31.3.2021)
  - Measures defining a new market (1) or designating an undertaking as SMP (2)
    - & it would affect trade between Member States
    - 3 months stay
      - Commission can request withdrawal of measure (Art. 32(6)(a)) if it would create a barrier to the internal market or serious doubts about its compatibility with Union law
  - Measure on remedies (3)
    - 1 month stay + 3 months if Commission notify the NRA
    - Article 33 procedure
      - Commission can request withdrawal of measure (Art. 33(5))

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### ARTICLE 32 PROCEDURE



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## Step 4: Notification

- **Cases**
  - *Ireland (2021)* re: designation of Eircom as SMP
  - *Denmark (2022)* re: 5 SMP designations & market for high capacity infrastructure
  - *Poland (2022)* re: non-compliance with notification obligation
  - *Czech Republic (2023)* re: SMP assessment in wholesale market for access to mobile services
- **Court challenges**
  - EU: Case C-395/14, *Vodafone GmbH v Germany* (14 January 2016)
  - Member State: *Vodafone & ors v BT & Ofcom* [2010] EWCA Civ 391

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