

Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) (Text with EEA relevance)

PART II

NETWORKS

TITLE II

ACCESS

CHAPTER III

Market analysis and significant market power

Article 67

Market analysis procedure

1 National regulatory authorities shall determine whether a relevant market defined in accordance with Article 64(3) is such as to justify the imposition of the regulatory obligations set out in this Directive. Member States shall ensure that an analysis is carried out, where appropriate, in collaboration with the national competition authorities. National regulatory authorities shall take utmost account of the SMP guidelines and shall follow the procedures referred to in Articles 23 and 32 when conducting such analysis.

A market may be considered to justify the imposition of regulatory obligations set out in this Directive if all of the following criteria are met:

- a high and non-transitory structural, legal or regulatory barriers to entry are present;
- b there is a market structure which does not tend towards effective competition within the relevant time horizon, having regard to the state of infrastructure-based competition and other sources of competition behind the barriers to entry;
- c competition law alone is insufficient to adequately address the identified market failure(s).

Where a national regulatory authority conducts an analysis of a market that is included in the Recommendation, it shall consider that points (a), (b) and (c) of the second subparagraph have been met, unless the national regulatory authority determines that one or more of such criteria is not met in the specific national circumstances.

2 Where a national regulatory authority conducts the analysis required by paragraph 1, it shall consider developments from a forward-looking perspective in the absence of regulation imposed on the basis of this Article in that relevant market, and taking into account all of the following:

- a market developments affecting the likelihood of the relevant market tending towards effective competition;

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- b all relevant competitive constraints, at the wholesale and retail levels, irrespective of whether the sources of such constraints are considered to be electronic communications networks, electronic communications services, or other types of services or applications which are comparable from the perspective of the end-user, and irrespective of whether such constraints are part of the relevant market;
- c other types of regulation or measures imposed and affecting the relevant market or related retail market or markets throughout the relevant period, including, without limitation, obligations imposed in accordance with Articles 44, 60 and 61;
- d regulation imposed on other relevant markets on the basis of this Article.

3 Where a national regulatory authority concludes that a relevant market does not justify the imposition of regulatory obligations in accordance with the procedure in paragraphs 1 and 2 of this Article, or where the conditions set out in paragraph 4 of this Article are not met, it shall not impose or maintain any specific regulatory obligations in accordance with Article 68. Where there already are sector specific regulatory obligations imposed in accordance with Article 68, it shall withdraw such obligations placed on undertakings in that relevant market.

National regulatory authorities shall ensure that parties affected by such a withdrawal of obligations receive an appropriate notice period, defined by balancing the need to ensure a sustainable transition for the beneficiaries of those obligations and end-users, end-user choice, and that regulation does not continue for longer than necessary. When setting such a notice period, national regulatory authorities may determine specific conditions and notice periods in relation to existing access agreements.

4 Where a national regulatory authority determines that, in a relevant market the imposition of regulatory obligations in accordance with paragraphs 1 and 2 of this Article is justified, it shall identify any undertakings which individually or jointly have a significant market power on that relevant market in accordance with Article 63. The national regulatory authority shall impose on such undertakings appropriate specific regulatory obligations in accordance with Article 68 or maintain or amend such obligations where they already exist if it considers that the outcome for end-users would not be effectively competitive in the absence of those obligations.

5 Measures taken in accordance with paragraphs 3 and 4 of this Article shall be subject to the procedures referred to in Articles 23 and 32. National regulatory authorities shall carry out an analysis of the relevant market and notify the corresponding draft measure in accordance with Article 32:

- a within five years from the adoption of a previous measure where the national regulatory authority has defined the relevant market and determined which undertakings have significant market power; that five-year period may, on an exceptional basis, be extended for up to one year, where the national regulatory authority has notified a reasoned proposal for an extension to the Commission no later than four months before the expiry of the five-year period, and the Commission has not objected within one month of the notified extension;
- b within three years from the adoption of a revised Recommendation on relevant markets, for markets not previously notified to the Commission; or
- c within three years from their accession, for Member States which have newly joined the Union.

6 Where a national regulatory authority considers that it may not complete or has not completed its analysis of a relevant market identified in the Recommendation within the time limit laid down in paragraph 5 of this Article, BEREC shall, upon request, provide assistance to the national regulatory authority concerned in completing the analysis of the specific market and the specific obligations to be imposed. With this assistance, the national regulatory authority

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concerned shall, within six months of the limit laid down in paragraph 5 of this Article, notify the draft measure to the Commission in accordance with Article 32.