

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 63

Undertakings with significant market power

1 Where this Directive requires national regulatory authorities to determine whether undertakings have significant market power in accordance with the procedure referred to in Article 67, paragraph 2 of this Article shall apply.

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

In particular, national regulatory authorities shall, when assessing whether two or more undertakings are in a joint dominant position in a market, act in accordance with Union law and take into the utmost account the guidelines on market analysis and the assessment of significant market power published by the Commission pursuant to Article 64.

3 Where an undertaking has significant market power on a specific market, it may also be designated as having significant market power on a closely related market, where the links between the two markets allow the market power held on the specific market to be leveraged into the closely related market, thereby strengthening the market power of the undertaking. Consequently, remedies aiming to prevent such leverage may be applied in the closely related market pursuant to Articles 69, 70, 71 and 74.

Article 64

Procedure for the identification and definition of markets

1 After public consultation including with national regulatory authorities and taking the utmost account of the opinion of BEREC, the Commission shall adopt a Recommendation on

Relevant Product and Service Markets ('the Recommendation'). The Recommendation shall identify those product and service markets within the electronic communications sector the characteristics of which may be such as to justify the imposition of regulatory obligations set out in this Directive, without prejudice to markets that may be defined in specific cases under competition law. The Commission shall define markets in accordance with the principles of competition law.

The Commission shall include product and service markets in the Recommendation where, after observing overall trends in the Union, it finds that each of the three criteria listed in Article 67(1) is met.

The Commission shall review the Recommendation by 21 December 2020 and regularly thereafter.

2 After consulting BEREC, the Commission shall publish guidelines for market analysis and the assessment of significant market power ('the SMP guidelines') which shall be in accordance with the relevant principles of competition law. The SMP guidelines shall include guidance to national regulatory authorities on the application of the concept of significant market power to the specific context of ex ante regulation of electronic communications markets, taking account of the three criteria listed in Article 67(1).

3 National regulatory authorities shall, taking the utmost account of the Recommendation and the SMP guidelines, define relevant markets appropriate to national circumstances, in particular relevant geographic markets within their territory by taking into account, inter alia, the degree of infrastructure competition in those areas, in accordance with the principles of competition law. National regulatory authorities shall, where relevant, also take into account the results of the geographical survey conducted in accordance with Article 22(1). They shall follow the procedures referred to in Articles 23 and 32 before defining the markets that differ from those identified in the Recommendation.

Article 65

Procedure for the identification of transnational markets

1 If the Commission or at least two national regulatory authorities concerned submit a reasoned request, including supporting evidence, BEREC shall conduct an analysis of a potential transnational market. After consulting stakeholders and taking utmost account of the analysis carried out by BEREC, the Commission may adopt decisions identifying transnational markets in accordance with the principles of competition law and taking utmost account of the Recommendation and SMP guidelines adopted in accordance with Article 64.

2 In the case of transnational markets identified in accordance with paragraph 1 of this Article, the national regulatory authorities concerned shall jointly conduct the market analysis taking the utmost account of the SMP guidelines and, in a concerted fashion, shall decide on any imposition, maintenance, amendment or withdrawal of regulatory obligations referred to in Article 67(4). The national regulatory authorities concerned shall jointly notify to the Commission their draft measures regarding the market analysis and any regulatory obligations pursuant to Articles 32 and 33.

Two or more national regulatory authorities may also jointly notify their draft measures regarding the market analysis and any regulatory obligations in the absence of transnational markets, where they consider that market conditions in their respective jurisdictions are sufficiently homogeneous.

Article 66

Procedure for the identification of transnational demand

1 BEREC shall conduct an analysis of transnational end-user demand for products and services that are provided within the Union in one or more of the markets listed in the Recommendation, if it receives a reasoned request providing supporting evidence from the Commission or from at least two of the national regulatory authorities concerned indicating that there is a serious demand problem to be addressed. BEREC may also conduct such analysis if it receives a reasoned request from market participants providing sufficient supporting evidence and considers that there is a serious demand problem to be addressed. BEREC's analysis is without prejudice to any findings of transnational markets in accordance with Article 65(1) and to any findings of national or sub-national geographical markets by national regulatory authorities in accordance with Article 64(3).

That analysis of transnational end-user demand may include products and services that are supplied within product or service markets that have been defined in different ways by one or more national regulatory authorities when taking into account national circumstances, provided that those products and services are substitutable to those supplied in one of the markets listed in the Recommendation.

2 If BEREC concludes that a transnational end-user demand exists, is significant and is not sufficiently met by supply provided on a commercial or regulated basis, it shall, after consulting stakeholders and in close cooperation with the Commission, issue guidelines on common approaches for national regulatory authorities to meet the identified transnational demand, including, where appropriate, when they impose remedies in accordance with Article 68. National regulatory authorities shall take into utmost account those guidelines when performing their regulatory tasks within their jurisdiction. Those guidelines may provide the basis for interoperability of wholesale access products across the Union and may include guidance for the harmonisation of technical specifications of wholesale access products capable of meeting such identified transnational demand.

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;
- 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 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.