

Summary of ERG responses to the consultation of the ERG Working Paper on the SMP concept for the new regulatory framework

Most contributions welcome discussion on SMP, but are afraid the scope of the document goes beyond ERG competences.

In this regard, the ERG note that annex II to the Framework Directive and the SMP-Guidelines contain a number of demonstrative criteria which should be taken into account when NRAs conduct market analysis and decide if there is effective competition or single/joint dominance in a relevant market. However, while the guidelines provide explanation on several methodological aspects of market definition and market analysis, it only explains the relevance of some criteria for market analysis and the assessment of SMP.

The ERG Work Programme for 2004 therefore identified the need for further work on a common position on the concept of significant market power in order to close the existing gap, stating that “Further work will be done on the theoretical implications of the SMP-criteria as set out in §78 and 97 of the SMP-guidelines. Specific attention will be given to the theoretic economic background, and its practical implications on market analysis in the new regulatory framework”.

Hence, the paper of reference primarily aims at

- i) explaining further the economic rationale behind the criteria as well as the interpretation of the criteria which are provided in the SMP- Guidelines and in Annex II of the FD,
- ii) providing a basis for making the criteria operational, and
- iii) adding some indicators that are considered to be relevant in the context of market analysis.

The document therefore has several merits for NRAs as well as for operators:

- It promotes a common understanding of the interpretation and measurement (if possible) of SMP indicators, trying to ensure that every criterion is understood and interpreted equally across member states. It therefore fosters legal certainty and the predictability of the results of market analysis.
- It serves as reference, providing a systematic and complete overview of the indicators, and a useful and clear explanation of the interpretation and measurement (if possible) of the criteria identified by the European Commission.
- For most criteria, it goes beyond the scope of the SMP Guidelines and thus provides a valuable input for NRAs and is useful in cases of uncertainty over the economic relevance or application of various criteria to particular markets. In this sense, the document has been used by NRAs to better understand the SMP criteria in the Guidelines, both for single and collective dominance.
- The document constitutes an effective “container” for the experiences of NRAs and EC in what refers to the use of the SMP Guidelines criteria and other indicators in the market analysis. The addition of these experiences to the document makes it an important tool both for old and new members when applying the new framework.
- It fosters constructive dialogue amongst experts from the different NRAs.

Concerning the additional criteria of Chapter 5 of the paper, the Guidelines explicitly state that the criteria listed on single and joint dominance are demonstrative and other criteria may also be considered when assessing the effectiveness of competition. In fact, what has to be proved in a market review is the overall state of competition and the existence of dominance. In that sense, other indicators (which may not yet have been taken into account in European jurisprudence and

are not included in the SMP-guidelines) can provide valuable input to inform the analysis of the market. Chapter 5 of the paper of reference takes this into account and adds (and explains) some further indicators to support a thorough and overall analysis of the economic characteristics of the relevant market.

The document recognises that these indicators are, rather than further indicators for an SMP position, indicators of problems that may characterise certain markets, which in turn will prompt further investigation of SMP within those markets. Even if the indicators cannot in themselves be evidence of SMP, they have been used by NRAs to further support conclusions in the market analysis (in particular price trends and pricing behaviour, which have turned out to be important in many markets).

In conclusion, the paper of reference constitutes an evolution of the Guidelines, in the sense that it goes deeper in the concepts, and tries to incorporate the experience attained by both the European Commission and NRAs. The paper therefore is a positive contribution to improving the predictability and facilitating the carrying out of market reviews as required under the new electronic communications regulatory framework.

Below the summary of main contributions to the public consultation on the SMP concept for the new regulatory framework and ERG reasons to decline.

1 General issues

- SMP Concept

Telefonica, ETNO, 01051 Telecom, Vodafone, Deutsche Telekom, KPN and France Telecom consider Commission guidelines on the market analysis and the assessments of SMP sufficient.

ETNO, Deutsche Telekom, 01051 Telecom and KPN although welcome the effort to interpret and harmonise the use of SMP concept think that the current working paper mainly summarizes the guidelines instead of providing clarity and effective added value.

Deutsche Telekom In particular states that the paper creates legal uncertainty and suggests keeping the document as working paper and not a common ERG position.

ERG has already explained the document can be useful for NRAs as well operators.

KPN considers guidelines contain enough jurisprudence and references with regard to the legal interpretation of the SMP concept and that there is no need for additional indicators outside boundaries of EC Competition Law principles.

ERG agrees that the guidelines contain enough jurisprudence and references, but the aim of ERG Working paper is to deepen the guidelines' conclusions thanks to existing experiences of NRA.

O2 Stressed the importance and requirement to interpret concept of SMP in accordance with EC case law and SMP Guidelines.

Deutsche Telekom notices that a reference to case law (as made in § 25 for joint dominance) is missing in the context of single dominance.

ERG Document's aim is not to link the criteria to case law, which is extensively done in the SMP-Guidelines. It is already clear in the framework and therefore implicit in the paper that NRAs must take good account of relevant case law in their analysis of markets/competition. The CFI ruling in the Airtours/First Choice case is mentioned in the joint dominance section only because it has crucially influenced the legal concept of joint dominance, but is not reflected properly in the SMP-Guidelines (as it occurred after the Guidelines have been issued).

O2 welcomes notion of how ERG document envisage reconciling national differences in order to ensure an harmonised application of principles.

ERG Not the purpose of the paper to explicitly do so. The paper itself will contribute to harmonisation through a common understanding.

O2, France Telecom and KPN's opinion is that two separate documents, i.e. the Commission guidelines and the ERG Working Paper, will probably give rise to confusion. They suggest the possibility for update Commission guidelines instead as it is the only authority that has dealt and still deals with the application of competition law and the SMP concept. Specifically, the ERG should not to elaborate further on the concept of collective or joint dominance.

ERG does not share this opinion on the basis that ERG Working Paper explicitly states that:

this document is merely a starting point and cannot prejudice the interpretation or weight attributed to certain criteria by NRAs in the market analysis procedure. In this respect, it is important to note that this document only serves as guidance for NRAs and is not a substitute for the SMP Guidelines.

It is also very important to notice that even additional indicators for assessing effective competition listed in the chapter 5 of the document are strictly linked to the Guidelines and gathered experienced of NRAs.

As far as the suggestion not to elaborate further on the concept of collective or joint dominance, the ERG points out that the relationship between New Framework Package and EC Competition law is still new and needs additional explanation. Not always the use of the same methodologies ensures that the relevant market or undertaking with SMP assigned for the purpose of sector – specific regulation (i.e. telecommunications) will correspond to the market definitions or SMP that would apply under competition law. § 31 of SMP Guidelines allows for this situation:

“In practice, it cannot be excluded that parallel procedures under ex-ante regulation and competition law may arise with respect to different kinds of problems in relevant markets.” Moreover, § 70 states: However, the application of new definition of SMP, ex-ante calls for certain methodological adjustments to be made regarding the way market power is assessed.”

- Effective competition analysis

Deutsche Telekom and 01051 Telecom call for a reduction of SMP criteria, which potentially increase the discretion of NRAs and welcome further exchange between NRAs on how to identify factors pointing towards effective competition. Only criteria supporting the finding of SMP are considered.

ERG SMP criteria have been identified by the European Commission and have been supplemented by some further possible indicators to identify market problems. In order to get a complete picture of and to fully understand the state of competition an analysis of several criteria is necessary (although different criteria will have different degrees of importance in different markets).

KPN considers the theoretic economic background and its practical implications on market analysis are not further regulated in the ERG Working Paper.

ERG does not agree with this objection on the theoretic economic background. The ERG points out that §78 of Guidelines contains a list of criteria that should also be taken into account by NRAs when undertaking the overall market analysis. These criteria are not further elaborated by the Commission. Instead the ERG Working Paper specifies for ex:

- Additional means of measurement of market concentration (i.e. Hirshmann-Herfindahl Index or concentration ratios which had been used by Commission in some cases but are not mentioned directly in SMP Guidelines)

- Additional means of measurement excessive pricing (Price Cost Margins) or in general the relation between market shares and profitability (the Lerner Index)
- More detailed explanation of the concept of: overall size of undertaking, technological advantages or superiority, absence of or low countervailing power, product/services diversification, economies of scale and scope;
- Adds one more criteria to take into consideration: cost and barriers to switching (p.8) which in Guidelines are not explicitly stated as a criteria for finding SMP (§ 78), but in the opinion of Commission should be analysed by NRAs when determining the demand-side substitution (§49,50 of SMP Guidelines).

Telefónica notices that SMP Guidelines could be improved and reviewed insofar they do not include an effective competition analysis. ERG Working Paper should include a first step in market analysis, basically related to additional indicators of the document. SMP designation will take place only when there is a lack of effective competition. Effective competition analysis should include an analysis on rivalry among competitors and should also take into account special features of relevant market.

ERG Although is out of the scope of this document, § 19 of SMP Guidelines establishes that an effective competition analysis is equivalent to SMP identification. Therefore this proposal is outside current EC Framework and ERG could not adopt such approach in this document. Never the less, SMP document covers, as additional indicators (§ 42-47), what could be an effective competition analysis, but in any case they could be considered as substitute criteria to those included in EC Recommendation, as Telefónica proposes.

Telefónica proposes an effective competition analysis based on price competition, service competition, quality competition, advertising and commercial activities and possibility of customer exchange.

ERG considers that this proposal is out of the scope of this document as well as outside the current RF. Therefore, it should not be taken into account.

Deutsche Telekom sees the danger of a “negative checklist approach”: only criteria supporting the finding of SMP are considered. DT would welcome further exchange between NRAs on how to identify factors pointing towards effective competition.

ERG the criteria listed can both support the finding of SMP as well as the finding of effective competition.

COLT and ECTA argue that under current RF, there is a “gap” that exists between a lack of effective competition on the one hand and single/joint SMP on the other. They consider as well important to differentiate between the drivers for effective competition in the market already regulated in order to avoid premature withdrawal of regulation.

ERG considers that this argument does not explicitly refer to the ERG working paper, but rather to the practice and SMP Guidelines or to the mayor challenges for regulators. Moreover it can be added that conducting the analysis when the market competition is considered to be effective goes beyond the scope of ERG working paper that focus on the criteria to be analysed in case of non-existing effective competition on the market.

- wholesale/retail interrelationship

VODAFONE notes that the ERG has not taken account of the question where a market at the retail level may be competitive, but there may be the absence of competition at the wholesale level –

there will be no need for wholesale remedies. Vodafone suggests that document should include reference from Remedies paper.

ERG does not consider this issue within the scope of ERG document. NRAs should carry out market analysis absent regulation; therefore an analysis of the sufficiency of wholesale remedies is not appropriate. It may be relevant when choosing appropriate remedies.

- Market definition

COLT and ECTA welcome further examination of geographic market definition in particular to ensure that when considering geographic segmentation regulators take account of the practical consideration such as fragmentation of product offerings, difficulties with costing and enforcement of non-discrimination conditions.

ERG does not consider this issue within the scope of ERG common position paper. Moreover, besides especially geographic segmentation of markets in all ERG/IRG countries could turn out to be an issue where national circumstances should be taken into a consideration of NRA, so the common position with regard to it would be difficult to achieve.

BT's position on the Hypothetical Monopolist test is that it should not be used only to define relevant markets but also to identify SMP operators. A dominant undertaking could be able to raise prices in a profitable way. This criterion is relevant in SMP designation and it is not included in SMP Guidelines.

ERG declines this opinion as the dominant operator has several dimensions to behave independently and not just in prices (quality reduction implies a price increase). Nevertheless, the possibility to raise prices, and thus behave independently, is covered by the document in §20.

- Indirect and self-supply effects

ECTA and COLT suggest to include in the Working Paper indirect and self-supply effects – e.g. including cable as a constraint on DSL.

ERG This comment refers to the market definition practice (to include or not to include some products in the relevant market) and this is why it goes beyond the scope of the ERG document which does not deal with the individual practice of NRAs when defining the scope of the relevant market. A separate document prepared by the ERG will deal with the issue of different market definitions.

- Leveraging

ECTA and COLT Given industry structure, the paper should incorporate a discussion of leveraging, especially “wholesale-wholesale” margin squeezes and “inter-temporal” squeezes. This would essentially devolve the leveraging paper into this one.

ERG agrees on relevance of a discussion on leveraging. The leveraging concept goes beyond the scope of the ERG document and it is discussed in the separate paper.

- informational asymmetries

COLT Importance of incentives to foreclose and informational asymmetries suggests that the complaint model should change – specifically, the burden of proof in an initial complaint should be shared between complainant and the incumbent (via the NRA)

ERG This opinion is presented in the form of recommendation for NRA to change the existing practice with regard to the burden of proof regarding competition problems. It is not possible to include this kind of recommendation in the common position paper.

Besides it might be country specific case.

- Market Phase

Vodafone, ECTA and COLT do not agree that an NRA can apply different criteria at different stages of the market's development. It could be interpreted as meaning that there may be more of a presumption against dominance once competition has been in place for some time. NRA should provide reasoning on the use of criteria and the reliance placed on each.

ERG Taking into account different criteria at different stages of the market's development does not exclude providing reasoning on the use of criteria.

Whilst **O2** complains the paper does not set out past experiences, **Vodafone** notes that ERG Working Paper should emphasize the importance of a forward looking assessment of the market and that dominance is a position that can not be transitory. § 24-41 ignore the dynamic aspects of market developments that characterize the telecoms markets. NRAs should assess the move from non-SMP to SMP position.

ERG The analysis should be forward looking. However an appropriate analysis should be based on past and present market conditions. SMP Guidelines mention very often the importance of past data and that NRAs should take it into account in their analysis where such data are relevant (§20).

2 Specific issues

2.1 Criteria for assessing single dominance

- §7 Market shares analysis

Telefónica, Vodafone and Deutsche Telekom consider that it is essential having a dynamic approach to the market and its prospective evolution.

ERG In § 7 of the document it is covered dynamic aspects of market shares, as they are present in SMP Guidelines. This paragraph takes into account that in liberalised markets it is expected a decline in incumbent's market share. As this argument depends on market share losses, the paragraph is considered appropriate.

O2 is wary of relationship between market shares and profit margins.

Vodafone holds that NRA is not in a position to assess the correlation between the market share and the individual price cost margin (PCM), robustly to establish any firm conclusion; Lerner indices in telecom may provide poor evidence as costs are not easily established.

ERG shares the opinion that there is no clear cut relation between a certain market share and the existence of dominance. Lerner index is mentioned as a theoretical tool to demonstrate the relation between market shares and profitability. Limitations to the use of PCMs are clearly caveated in § 20 of the ERG document.

O2 notices that the document does not explain more "common analysis of market shares".

ERG did not consider necessary to further elaborate on this issue as the common measure of market share is simply in percentage terms for each firm.

Vodafone also holds that the reference to the erosion of market share as a 'natural' effect of monopolistic markets opening is incorrect.

ERG The note relating to 'natural decline' only refers to a drop in market share at the beginning of liberalization. The intention of this sentence is put into context by the previous sentence.

Telefónica believes all communications markets show a high degree of concentration because of entry barriers which could hide real behaviour in markets. Moreover, Telefónica points out that EC does not use HHI.

ERG notices that according to SMP Guidelines, market shares are considered a relevant indicator for the assessment of single dominance. Therefore, concentration ratios are also relevant, as long as they analyse market share of undertakings in relevant market. On the other hand, it is not true that EC does not rely on this kind of indicators, as long as it did a reference to them in market analysis notification (see footnote 5 of the document).

ECTA and COLT clear that even where an operator with high market share is not highly profitable that should not be taken to signify absence of SMP. Lack of profitability can still be consistent with dominance – can arise from inefficiencies or predatory behaviour.

ERG considers that it is not necessary to include this argument in the paper as the focus is not on whether profit is an indicator of dominance. Rather, the focus is on profit being the potential result of dominance. Clearly, NRAs understand that predatory behaviour is a possible result of dominance.

COLT recommended slight edit: 'In emerging markets, high market shares "*could be*" less indicative of market power; and be wary of leveraging from historical dominance'.

ERG when stating that, "In emerging or fast growing markets, high market shares are less indicative of market power than in mature or slow markets", ERG Working Paper is more in line with the SMP Guidelines, which suggest that any ex-ante regulation of emerging markets should be fully justified. The fact that market leader is likely to have a substantial market share should not result with inappropriate ex-ante regulation (§ 32 of SMP Guidelines).

Further, it is true to say that high market shares in emerging markets are less indicative of market power. It does not preclude a finding of dominance in an emerging market on the facts of the case, but generally it is not a contentious general statement.

O2, COLT and ECTA In the context of using volume or value data relative merits should not be prejudged and differentiated product concept should be further clarified.

ERG considers that differences exist in differentiated markets. Volume comparison is not always useful. The purpose of this point is merely to say that value measure is a better measure in cases where there are large differences in prices.

- § 8 overall size of the undertaking

O2 considers overall size of the undertaking criteria irrelevant

Vodafone claims that there is an omission of whether these factors may be short term sources of competitive advantage.

ERG does not agree with this statement and argues that SMP Guidelines consider this criterion to be relevant for the assessment of single dominance. ERG Working Paper recognises that this criterion relies on other criteria to be relevant, e.g. financial resources. The paper does not need to refer to the short term sources of competitive advantages as the whole ERG position is in favour of forward-looking analysis.

- §9 Control of Infrastructure not easily duplicated

ETNO and Telecom Italia disagree with ERG's decision to delete § 47 of previous draft, which provided an obligation on NRAs to take account of the objective to foster infrastructure based competition, consistent with Article 8 of the Framework Directive.

ERG does not agree with these comments on the deletion of § 47 of previous draft because the point made about infrastructure and service competition does not relate directly to the finding of SMP but will be relevant at the remedies-stage. Deletion of § 47 does not change anything about the SMP-position as such.

Telecom Italia disagrees with the revision of control of infrastructure not easily duplicated and the reference to assess non replicability of a network. The NRA should examine whether the competitor would find it costly and time consuming to build that infrastructure.

Telecom Italia also suggests that further indicators, taking into account the level of investment needed, the character of innovation of the relevant market and an assessment of market competitiveness and the degree of risk investment should be used to identify non replicable infrastructure.

ERG notices that "*network that a competitor would find costly and time-consuming to build*" is just an example of (point iii) in § 9), which alludes to high and non-transitory barriers to substitute the infrastructure in question.

About the indicators suggested by Telecom Italia they may be considered under the scope of barriers to entry or economies of scale. Such detail is clearly beyond the scope of the paper and rather refers to the remedies stage than to SMP assessment.

01051 Telecom Control of infrastructure not easily duplicated may allow leveraging into other markets. § 16 mentions vertical leveraging, but lack to mention horizontal leveraging, (e.g. by means of bundled tariffs and optional products).

ERG draws attention to § 9 where states that the control of infrastructure not easily duplicated may allow "... the supplier to lever its market power horizontally (to adjacent markets), or vertically (downstream markets)."

O2 states that regulatory choices in themselves impact on importance of infrastructure versus services-based competition.

ERG Discussion of this issue was removed from the original paper.

O2 paper should note that it is the asymmetries between entrant and incumbent that are relevant in assessing barriers to entry. Also, important to preserve investment incentives.

ERG This issue has been addressed in §14.

- §10 Technological advantages or superiority

COLT and ECTA ask for further discussion on technological 'advantages'.

ERG This point is relevant to other criteria, e.g. "control of infrastructure" and "costs and barriers to switching".

- §11 Absence of or low countervailing power

ECTA and COLT state that countervailing power is important in single operator markets; however weight/sophistication is not sufficient counterweights where options are limited.

ERG There is no need to accept or reject this point of view as it is the mere opinion on the effective competition, SMP and dominance. With regard to the ERG document, in COLT's opinion "the countervailing power criterion has been carefully analysed".

ECTA and COLT are not sure whether business segment is included in the ERG concept.

ERG considers that this is a generic paper and specific conditions such as serving the business market at the retail level and its association with countervailing power should not be included.

Vodafone notes that countervailing power can occur in the retail market not only in the wholesale market.

ERG the document does not claim that. It only states that this criterion is more meaningful with respect to the wholesale market than to the retail market, where consumers are less powerful.

- §12 Capital markets

COLT notes government backing on capital markets.

ERG There is no need to state these special cases in this generic paper.

- §14 Economies of scale

COLT introduces a clearer link between this criterion and the criterion set out in § 9

ERG This document as well as SMP Guidelines describes these two criteria separately, as the economies of scale are not only linked to the infrastructure and sunk costs.

- §18 Absence of potential competition

COLT The timeframe for the review of absence of potential competition is not defined.

ERG does not share this point as the specific period of the timeframe for the review cannot be specified throughout the whole EU due to different national obligations.

- § 20 Excessive pricing

Deutsche Telekom questions the addition of excessive pricing as an additional indicator. Under competition law a finding of dominance is a prerequisite for the finding of (the abuse of) excessive pricing, not vice versa. Under competition law, the finding of excessive pricing is subject to high evidentiary requirements. The text of the document does not reflect this.

ERG declines this opinion as the SMP-Guidelines state: “ [...] in an ex ante environment, market power is essentially measured by reference of the power of the undertaking concerned to raise prices by restricting output without incurring a significant loss of sales or revenues.” The indicator “excessive pricing” therefore attempts to directly measure the extent of market power with regard to price setting of a particular undertaking.

Proving the abuse of dominance in an ex-post environment is different from investigating the state of competition in an ex-ante environment, where lasting excessive prices are one indicator among others.

Vodafone, COLT and ECTA would caution against a simplistic use of price comparisons between incumbents and new entrants as varying factors drive pricing; cost analysis usually required. There is a failure of the paper to caution against false inferences.

ERG considers this issue not critical in itself, rather encouragement to use cost analysis instead of benchmarks as a more secure tool. The paper with regard to cost margins explicitly claims in § 20 that “price cost margins can only be measured for an undertaking as a whole, with the disadvantage that this in general will not allow a conclusion on whether or not prices are excessive”.

O2 notes that appropriate price comparator needs to be selected. O2 also notes that it is difficult to specify WACC in particular to multi-product firms. Little practical value and benefit of doubt to undertaking.

ERG Paper already recognises difficulty with this criterion.

- §21 Ease of Market Entry

Telefónica notes effective competition can be observed in markets despite of high entry barriers. Therefore it should be analysed competition among competitors in the market before concluding SMP identification.

ERG believes that this argument cannot be incorporated in the document because markets that will be analysed by NRAs have to comply with criteria included in Recommendation. The second criterion stated that *“Therefore the second criterion admits only those markets the structure of which does not tend towards effective competition within the relevant time horizon. The application of this criterion involves examining the state of competition behind the barriers of entry.”* Obviously, NRAs take into account the argument pointed out by Telefónica, although in a different stage of the market analysis.

ECTA and COLT suggest further discussion on barriers to entry which may become less relevant where markets are associated with ongoing technological change and innovation. Be wary of wholesale bottleneck – i.e. the basic components underlying new technologies. Strategic, as well as structural, barrier to entry should be addressed by ex ante measures.

ERG no critical in itself, underlines the necessity to examine more factors than only a possibility to raise prices above competitive levels and **ERG** is of the opinion that this part of document fulfils the request to develop this criterion. In addition, the framework takes into account the distinction between retail and wholesale markets, so is therefore able to distinguish where the true bottleneck lies.

- §22-23 Costs and barriers to switching

COLT also considers switching between incumbent products, (e.g. bistream vs. LLU).

ERG argues that there is no need to measure switching between the incumbent products as this indicator aims to measure the possibility for a migration between incumbent and alternative provider's products.

Vodafone suggests to delete or redraft last sentence to emphasize (a) the need to be forward looking (b) importance/practical difficulties in distinguishing between legitimate competitive advantage and market power.

ERG notes that the prospective nature of the market analysis follows from the SMP Guidelines and therefore is not reiterated in the document. Additionally, the burden of proof is to assess whether any operator can act independently of its competitors and consumers; the NRA does not have to specify whether that market power is 'legitimate' or not.

2.2 Criteria for assessing joint dominance

- §27 Transparency

Deutsche Telekom On lack of transparency states that it should be acknowledged that price intransparency can also be to the advantage of new entrants as they might be able to give customers the impression that their services are a lot cheaper, offer more features or have a simpler pricing where differences are in fact small.

O2 be careful not to overstate degree of transparency, e.g. where there are bespoke deals and non-price competition.

ERG believes that the primary effect of a lack of transparency is as described in the document. O2 input is not worth adding to the paper.

- § 29 stagnant or moderate growth on demand side

Vodafone takes issue with statement that strong growth increases the incentive to collude – hold that this is too simplistic in case of joint dominance analysis

ERG This opinion came out as a result of analysis of the economic theory and is shared by the EC – according to the footnote 10. Nevertheless, ERG Working Paper cautions NRAs that with respect to the joint dominance case, interpretation of this criterion is ambiguous (last sentence of § 29)

- §31 Homogeneity

Telefonica affirms that product homogeneity could be the result of a competitive process, through product monitoring, and therefore it will not be the result of a coordinated behaviour.

ERG declines this opinion on the basis that the document only points out the circumstances when a coordinated behaviour could be found. In any case, product homogeneity is not an endogenous variable but exogenous, so it cannot be chosen by undertakings or competitive pressures.

- §32 Similar cost structures

O2 Paper should discount similarities relating to portfolios of network infrastructure, spectrum bands, and population/geographic coverage as these are largely dictated by licensing and spectrum rights of use obligations.

ERG declines this opinion as it is too detailed to be put in the paper.

- §39 Informal links

O2 Paper's reference to patterns of price movements would be more appropriate under lack of price competition. Patterns should still be treated with caution, due to adaptation over time to market conditions.

ERG declines this opinion as the paper already recognises that “evidence must be interpreted with caution.”

- §33 Similar market shares

01051 Telecom claims that the argument that similar market shares facilitate collusion is rebutted by the situation in Germany, where mobile network operators despite differences in market shares cooperate intensively when their interests are at stake.

ERG The document does not claim that collusion is impossible with differences in market shares, only that it is facilitated if market shares are symmetric.

- §34 Lack of technical innovation, mature technology

KPN Innovation as indicator of dominance leaves too much room for multiple interpretations and ambiguity.

ERG Nevertheless it is nothing new. §97 explicitly states that lack of technical innovation or mature technology in the market promotes the possible existence of joint dominance. § 78 also mentions “technological advantages or superiority as one of the criteria to measure the power of undertaking.

- §36 High barriers to entry

Deutsche Telekom suggests that:

- a/ An evaluation must take into account existing regulatory obligations on other markets.
- b/ Text should include a reference to the EC’s analysis of structural and legal barriers to entry.
- c/ NRAs must assess whether *new* market entry is still a valid indication for the state of competition when already numerous firms are active on the market. Entry barriers due to low margins, for example, are not an indicator for SMP, and recent market entry and exit may not be a helpful criterion in such cases.
- d/ If entry barriers are low, the size of the next biggest competitor is no longer a relevant indicator (e.g. on fixed voice telephony retail markets).

ERG rejects these statements on entry barriers and argues that:

- a/ does not directly relate to the interpretation or measurement of SMP indicators and therefore is out of the scope of this document;
- b/ ERG does not see the necessity of such a reference;
- c/ the document does not refer to low margins as a barrier to entry. Of course, the state of competition will not only depend on the potential for new entry but also on the situation behind the barriers to entry which is captured by most of the other criteria;
- d/ A market can only be a relevant market in the new framework if it is characterised by high and non-transitory barriers to entry.

- § 41 Price movement in a narrow range are evidence of collective dominance

Vodafone There may be a number of reasons why prices move in a narrow range (the most obvious being that costs do not move). Suggests that cost trends should be considered.

ERG The document states that price movement in a narrow range is a potential result of collective dominance. So it is not a categorical opinion and it allows for different conclusions.

2.3 Further possible indicators to identify market problems

- §42 Evidence of previous anticompetitive behaviour

Vodafone and **Deutsche Telekom** observe that evidence of previous collusion is an indicator of market failure is incorrect. Analysis should be prospective, statement is simplistic and without foundation.

ERG Although the analysis is forward-looking evidence from the past is usually highly relevant for evaluating the current state of competition and future developments. SMP Guidelines mention very often the importance of past data and that NRAs should take it into account in their analysis where such data are relevant (§20).

COLT Evidence of previous anticompetitive behaviour terms of SLAs and other non-price access issues are critical.

ERG There is no need to discuss with this opinion as it is generally in favour of this indicator.

KPN considers being not effective indicators to measure anticompetitive behaviour. Furthermore, there is no need to measure it under new concept of SMP assessment.

ERG disagrees with KPN's position as footnote 73 of Guidelines says:

"it should be noted that NRAs do not have to find an abuse of dominant position in order to designate and undertaking as having SMP".

It doesn't mean that this indicator is wrong or confusing. SMP Guidelines in § 70 explain that "often the lack of evidence or of records of past behaviour or conduct will mean that the market analysis will have to be based mainly on a prospective assessment".

SMP Guidelines itself mention very often the importance of past data and that NRAs should take it into account in their analysis where such data are relevant (§20). § 27 explicitly states that "NRAs' market analysis should not ignore, where relevant, past evidence when assessing the future prospects of the relevant market. § 35 adds that any records, information gathered, studies or reports should serve as a starting point of market analysis.

- §43 Active Competition on other parameters

Deutsche Telekom considers that high advertising expenditures should not be regarded as an entry barrier but be seen in the context of overall competition on the market (as in § 43 of the document).

ERG proposes to delete 'marketing' as an example from § 43.

01051 Telecom considers too vague and that only increases NRAs discretion.

ERG It is recognised that price is not the only parameter firms can compete in, which is recognised by this paragraph in the paper.

- §44 Existence of standards/conventions

KPN Indicators such as the non-existence of standards/conventions and the customers inability to access and use information (i.e. lack of tariff transparency), cannot be considered to be straight forward indicators of SMP.

ERG does not share this view on the basis that the ability to access and use information concerning prices is very important to measure the demand side substitution which is one of the main criteria for the relevant market definition. According to the Guidelines (§49): *"Where available, an NRA should examine historical price fluctuations in potentially competing products, any records of price movements and relevant tariff information.(...) evidence showing that consumers have in the past promptly shifted to other products or services, in response to past price changes, should be given appropriate consideration"*. This is why lack of tariff information can influence very much the level of competition in the market. Moreover, NRAs cannot ignore it in the absence of such data, but have to seek and access the response of consumers and suppliers with regard to this issue.

KPN Existence of standards/conventions means that the market is more transparent comparing to that where these kinds of standards don't exist.

ERG Commission itself in France Telecom/Orange looked into the matter of pricing behaviour of the two existing operators, Proximus and Mobistar, and stated that they were in position to exercise joint dominance. Both operators had almost similar and transparent pricing, their prices following exactly the same trends (§ 106 of the Guidelines). Conclusion is: the analysis of this criterion could have different interpretations – some clarification is needed.

KPN notes SMP and emerging markets not sufficiently treated in existing documents.

ERG believes that it goes beyond the scope of the paper.

Vodafone holds that the last sentence of the paragraph is ambiguous and should be deleted; if not, footnotes should be provided to expand upon the precise ERG concerns regarding reference to 'calling party pays' and 'international roaming agreements'. Vodafone holds that telecommunications markets cannot function without interoperability.

ERG The last sentence of the § 44 is clear from the ERG's point of view, as it only indicates that standard conventions should be taken into account when assessing other indicators mentioned in the document. The first sentence of § 44 explains the reasons for including this indicator in the list of possible market problems which are discussed in Chapter 5.

- §45 Customer ability to access and use information

Vodafone Text should reflect that consumer surveys should be approached with care, can't substitute for more sophisticated analysis.

ERG The document points out that consumer surveys can be source of helpful information, especially when they are conducted on a regular basis. ERG does not see the need to add more tools in this case, as also SMP Guidelines consider the response of consumers and suppliers as a very important source of information (§ 49 of SMP Guidelines with regard to the tariff transparency). ERG does not propose that surveys should be used in isolation.

- § 46 Pricing trends and pricing behaviour

COLT It must be taken into account the influence of wholesale regulation.

ERG There is no need to discuss with this opinion as it is generally in favour of this indicator.

- §47 International Benchmarking

O2 and COLT do not consider international benchmarks a sufficient tool to assess, broadly, if prices have been competitively set.

ERG replies that ERG document does not state it is a sufficient tool itself, but it points out that it can serve as an additional valuable source of information when comparable economies are taken into account.