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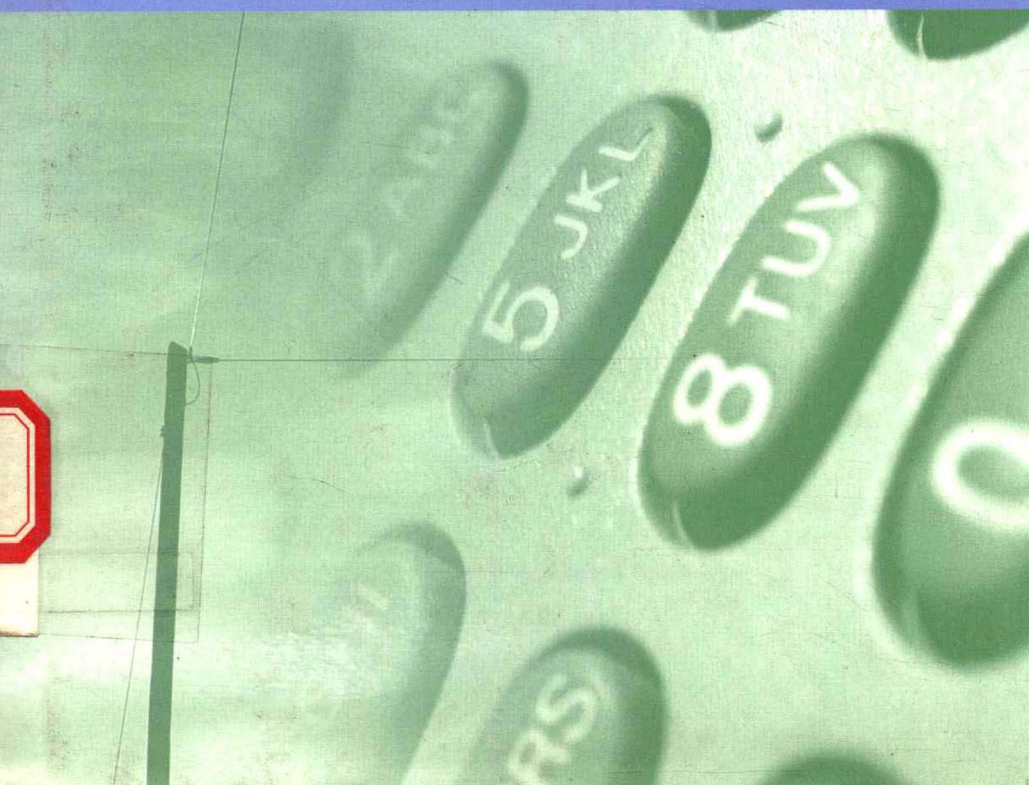

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Significant Market Power in the Mobile Sector

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Edward Elgar
Cheltenham, UK • Northampton, MA, USA

Published by
Edward Elgar Publishing Limited
Glensanda House
Montpellier Parade
Cheltenham
Glos GL50 1UA
UK

Edward Elgar Publishing, Inc.
136 West Street
Suite 202
Northampton
Massachusetts 01060
USA

A catalogue record for this book
is available from the British Library

ISBN 1 84542 416 6

Printed and bound in Great Britain by MPG Books Ltd, Bodmin, Cornwall

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The study presented in this book was realised with the support of Proximus in the context of a broader research project conducted in cooperation with WIK Consult GmbH. We wish to thank Dirk-Frans Segers, Florence Leder, Isabelle Dieltiens, Rachid Hammi (Proximus), Dominique Grenson (Belgacom), Paul Ryan (Vodafone) and Alexandre de Streel (University of Namur) for useful comments. All opinions expressed are solely those of the authors and any eventually remaining errors are our own.

Executive Summary

Chapter 1 of this book gives a general presentation of the system which leads, under the new 2003 European regulatory framework for electronic communications networks and services, to the imposition of remedies upon undertakings with significant market power (SMP). It also highlights some relevant differences with the system foreseen by the 1998 regulatory framework. Basically, while the 1998 regulatory framework installed a relatively rigid and inflexible system, the 2003 framework gives much more flexibility to the national regulatory authority (NRA) and is, for important aspects, based on competition law concepts and methodologies.

This implies that, first, relevant markets are in principle no longer defined in advance by directives, but have to be selected on the basis of a 'three criteria test' and delineated on the basis of competition law principles. Second, different forms of SMP are foreseen (single dominance, collective dominance and leverage). Third, with regard to remedies, there is no longer an 'automatic' link between the designation of an operator as having SMP on a specific market and the application of the full set of remedies envisaged by the directives. This allows the NRA, subject to the respect of a certain number of principles, to impose tailored remedies.

Chapter 2 deals with the first step of the new SMP regime, namely market definition. In this phase, markets to be analysed for sector-specific purposes are defined in two sequences: market selection and market delineation. The European Commission periodically adopts a Recommendation that defines, in accordance with the principles of competition law, the product and service markets within the electronic communications sector, the characteristics of which may be such as to justify the imposition of regulatory obligations. In practice, the European Commission has to select the markets justifying *ex ante* regulation because of their structural problems and then, delineate the boundaries of these markets on the basis of antitrust methodologies. Taking the 'utmost account' of this Recommendation and the SMP Guidelines, the NRA then defines markets appropriate to national circumstances, in particular their geographical dimension within its territory, in accordance with the principles of competition law. This chapter focuses on the 'sub-step' of market selection, for which the European Commission has elaborated a so-called 'three criteria test'.

Chapter 3 of the book explores the redefined concept of SMP that will be applied under the new regulatory framework (NRF) in greater detail. The main feature of the SMP 'new style' is its alignment with the notion of dominance as it is known in the context of EU competition law. This equation is explicitly stated in Article 14 of the Framework Directive. Consequently, not only the strength of a single undertaking on a relevant market is considered; as in competition law also joint SMP or consequences of an undertaking's position on a specific market for closely related markets are taken into account.

Chapter 4 discusses specific issues regarding the imposition of remedies. Section 1 of Chapter 4 examines a number of principles which apply to national regulatory authorities when imposing remedies on undertakings with SMP, especially in the context of access and interconnection. These principles form a counterbalance to the leeway given to NRAs by the 2003 regulatory framework regarding the choice of remedies. As an introduction, the section discusses the fact that the concepts of 'remedies' and 'obligations' have to be considered as synonyms and that the concept of obligation does not only include so-called generic obligations, but also encompasses the practical application and concrete putting into practice of the latter.

With regard to the principles to respect, on the one hand, NRAs are subject to principles which they should follow in their everyday action and therefore also when imposing remedies. Such principles are impartiality (which is related to the general principle of non-discrimination), transparency, light-handed regulation, fulfilment of sector-specific objectives and technology neutrality. Some of those principles (light-handed regulation, fulfilment of sector-specific objectives) are also explicitly foreseen by Article 8.4 of the Access Directive and Article 17.2 of the Universal Service Directive. They will therefore be recalled in the second part of the section more specifically concerning the imposition of obligations on undertakings with SMP.

NRAs should respect the principle of impartiality in their everyday action. Furthermore, they should act in a transparent manner and their decisions imposing remedies should be transparent and well argued. A third principle NRAs should respect requires that regulation is light-handed. Every intervention by the regulator should be kept to the minimum and regulators should in general give priority to mechanisms that lead to less regulatory pressure. This principle is the electronic communications sector-specific expression of the general principle of proportionality. Measures taken by regulators should aim at achieving the sector-specific objectives, set out in Article 8 of the Framework Directive. The fifth and final principle NRAs should take into account in their everyday action, is the 'technology neutrality' principle. Due to convergence of networks and technologies,

regulation should, as far as possible and appropriately, not differentiate between technologies over which services are provided.

On the other hand, a number of principles are applicable specifically to the decision that imposes remedies as such and to its content. The first principle to guide NRAs in selecting appropriate remedies is the 'reasoned decision' principle. This implies that a remedy should be based on the nature of the problem identified, proportionate and justified in relation to the objectives for NRAs foreseen by the Framework Directive (promote competition, contribute to the development of the internal market and promote the interests of citizens of the European Union). The second principle NRAs should take into account is the promotion of service competition. NRAs should ensure sufficient access to wholesale inputs and thus protect consumers, where infrastructure replication and competition is not likely to be feasible (services competition). The third principle NRAs should adhere to, is to choose remedies which assist in the transition process to a sustainable competitive market by supporting feasible infrastructure investment, where replication of the incumbent's infrastructure is viewed as feasible (infrastructure competition). The fourth and final principle boils down to the fact that NRAs, wherever possible, should design incentive compatible remedies, that is building in mechanisms that give incentives to the undertaking with SMP to comply with the remedy.

The following sections of Chapter 4 deal with certain specific remedies under the new framework, notably non-discrimination and reciprocity.

Section 2 explores the concept of non-discrimination as a general principle of European Community law, as a principle in the context of competition law and as (a principle and) a remedy under the new regulatory framework. Non-discrimination as an *ex ante* obligation in the new regulatory framework consists of two components. On the one hand, the operator subject to a non-discrimination obligation, is not allowed to discriminate by differentiating its treatment of other operators and must deal with operators providing similar services on a similar basis. On the other hand, the operator must provide both services and information to other operators under the same conditions and of the same quality that he/she provides to his/her own subsidiaries, partners or downstream operating arms. The European Regulators Group (ERG) Remedies paper provides illustrations of competition problems to which an obligation of non-discrimination possibly can be applied. These instances are described and an assessment is made whether non-discrimination is an appropriate remedy in each case. The section concludes by putting forward possible arguments to avert the imposition of a non-discrimination obligation in the on-net–off-net context.

The third section analyses the concept of reciprocity both under the old and the new framework. The discussions which have already arisen about

reciprocity under the old regulatory framework are explored, in order to list the main arguments put forward by the parties concerned. Similar to the old directives, the new framework contains no explicit reference to reciprocity. The ERG Remedies paper touches upon the topic, but from two different angles (which indicates an ambiguous attitude with regard to reciprocity): on the one hand, the Remedies paper considers the setting of symmetrical termination rates as a possible indication of tacit collusion; on the other hand, it deals with reciprocity in the framework of implementing price control as a remedy in cases of excessive pricing.

By way of conclusion, Chapter 5 gives a comparative overview of the SMP regime (sector-specific regulation) on the one hand and general competition law on the other hand. Both sets of rules are compared on the basis of some core elements, such as objectives, market definition, burden of proof, and so on.

Contents

1. General Context

For the imposition of obligations on undertakings with SMP, both the 1998 and the 2003 regulatory framework[1] apply a procedure in three steps:

- definition of markets relevant for *ex ante* regulation;
- analysis of those markets in order to determine undertakings with SMP and;
- imposition of obligations or remedies.

In this regard, the 1998 regulatory framework installed a relatively rigid and inflexible system with regard to the imposition of obligations on organisations with SMP,[2] especially insofar as steps 1 (definition of markets) and 3 (imposition of obligations or remedies[3]) of the procedure were concerned. But even with regard to step 2, the analysis of markets and the designation of organisations with SMP, the criteria were chosen in a way not sufficiently linked to economic reality.

The relevant markets were defined in advance and 'once and for all' by the directives concerned, and this in a very broad and encompassing manner. Four markets were distinguished: fixed telephony, mobile telephony, leased lines and the national market for interconnection (fixed and mobile interconnection).[4]

The SMP of an organisation was assessed by the NRA only with regard to the position of a single undertaking on a specific market. Joint SMP or consequences of an undertaking's position on a specific market for closely related markets were not taken into account. Furthermore, under the 1998 regulatory framework, SMP was presumed if an undertaking had 'a share of more than 25 per cent of a particular telecommunications market'.[5] Nevertheless, although this presumption was the principle, on the basis of certain criteria, organisations with less than 25 per cent of market share could be considered by the NRA as having SMP, while organisations with more than 25 per cent of market share could also be considered as not having SMP.[6] The origin of the choice of 25 per cent market share was the assumption that with this trigger, one was sure to cover incumbent organisations (the former 'telecommunications organisations' defined on the basis of their exclusive or special rights granted 'for the provision of a public

telecommunications network and, where applicable, public telecommunications services'),[7] while new entrants would be exempt and would therefore not suffer from a entry barrier. This assumption proved rather quickly outdated and needed some nuances as certain mobile operators swiftly gained market shares.[8]

Finally, as we pointed out above, once an organisation was designated as having SMP, it was in principle submitted *ipso facto* to the obligations foreseen by the directives of the 1998 regulatory framework for organisations with SMP on the identified markets, and to all of these obligations (see for example Articles 4.2, 6, 7, 8 of Directive 97/33/EC). This way of proceeding could lead to serious 'over-regulation' as the risk was always present that some of the obligations imposed were not really needed. This 'automatism' or 'mechanistic approach'[9] suffered only very few exceptions, like the possibility for a Member State to impose the obligations regarding the provision of a minimum set of leased lines only to some of the organisations having SMP in the relevant markets[10] or the existence of very few sunset clauses which the NRA could apply.[11] Also, Member States could choose to impose some obligations regarding accounting separation only on organisations with SMP presenting an annual turnover in telecommunications beyond a certain threshold.[12]

Furthermore, that if, under the 1998 regulatory framework, an NRA had in principle no freedom to decide whether or not to impose a specific generic obligation upon an organisation with SMP on a relevant market, the same NRA disposed of a certain margin of manoeuvre in putting into practice, with regard to a specific situation, this generic obligation[13] applicable to organisations with SMP by reason of the directives themselves.

With regard to the new 2003 regulatory framework, it should first be noted that the overall goal of the telecommunications regime, that is 'to develop the conditions for the market to provide European users with greater variety of telecommunications services, of better quality and at lower cost, affording Europe the full internal and external benefits of a strong telecommunications sector',[14] has been maintained together with its three 'sub-objectives'. The latter, that is the promotion of competition, the development of the internal market and the promotion of the interests of the citizens of the European Union, have now been explicitly stipulated[15] in the Framework Directive as general objectives to be achieved by the NRA.[16]

Specifically with regard to the SMP regime,[17] the 2003 regulatory framework entrusts NRAs with a broad leeway and creates the flexibility that is needed to avoid rapid obsolescence of the rules in place due to speed and unpredictability of technological and market change.[18]

Concerning the first step of the SMP process (that is market definition), relevant markets are therefore in principle no longer defined in advance by

directives.[19] However they are on the one hand selected on the basis of the 'three criteria test'[20] aiming at allowing to identify product–service markets, the characteristics of which may be such as to justify the imposition of sector-specific regulatory obligations,[21] that is markets where competition law remedies are not sufficient to address the problem;[22] and on the other hand more precisely delineated on the basis of competition law principles and methodologies.[23]

Under the 2003 regulatory framework this first step happens in two sequences, involving the European Commission as well as the NRA. First, the Commission selects, in a Recommendation,[24] relevant product and services markets on the basis of the above-mentioned 'three criteria test'. The three criteria, which should be applied cumulatively, are: the existence of high and non-transitory entry barriers; the presence of a market structure that does not tend towards effective competition within the relevant time horizon; and the inefficiency of competition law alone to adequately address the market failure(s) concerned. In the same Recommendation, the Commission delineates the boundaries of the selected markets applying competition law methodologies.[25] The exercise was conducted for the first time in the Recommendation on relevant markets 2003.[26] According to Article 16.1 Framework Directive, the Commission Recommendation shall be regularly reviewed. In principle this had to happen for the first time no later than 30 June 2004,[27] but the Commission decided to reschedule the review for the end of 2005.[28] In the second sequence, the NRAs define on the basis of the Commission's Recommendation, 'relevant markets appropriate to national circumstances, in particular geographic markets within their territory, in accordance with the principles of competition law'.[29] With regard to the definition of geographic markets, the NRA enjoy a wide leeway. They may also deviate from the Commission Recommendation and define other product–services markets, but in this case they are subject to the veto power of the Commission foreseen by Article 7 Framework Directive.

Regarding the second step of the SMP procedure (market analysis), different forms of SMP are foreseen (single dominance, collective dominance and leverage),[30] again based on a competition law approach but assessed under sector-specific regulation through a more prospective approach.[31]

With regard to the third step of the procedure (imposition of obligations or remedies),[32] there is no longer an 'automatic' link between the designation of an operator as having SMP on a specific market and the application of the full set of remedies[33] foreseen by the directives. Even as in the case of finding SMP at least one remedy must be imposed,[34] the choice of this or these remedy(ies) is up to the NRA, which may even choose remedies not explicitly foreseen by the directives.[35] This flexibility, the goal of which is to ensure that regulators choose remedies tailored to the competitive problem

encountered and to easily adapt the remedies to the fast evolving market of electronic communications, is counterbalanced and flanked by measures ensuring legal certainty, harmonisation of NRA measures and a consistent application, in all Member States, of the new European regulatory framework provisions. Legal certainty is *inter alia* served by the fact that the new framework sets out 'basic rules, principles and objectives'[36] to be followed by the NRA and which are complemented by 'softlaw' like the SMP Guidelines. Harmonisation is pursued for example through the electronic communications consultation mechanism foreseen by Article 7 of the Framework Directive and through an obligation for the NRAs of different Member States to cooperate[37] with each other.[38]

Although the three steps of the procedure (market definition, market analysis, imposition of obligations) leading to the imposition of obligations on undertakings with SMP can theoretically be considered individually, as such, they are nevertheless in practice intrinsically linked since they form part of one and the same process. To illustrate this we can refer to the fact that when assessing whether or not an undertaking enjoys SMP and whether or not a market is competitive, the NRA must take existing remedies (and their effects) into account.[39]

Furthermore, if an undertaking is designated as having SMP, this means that, on the relevant market, concerned competition is not effective. This in turn implies, as pointed out above, the need for a remedy, more specifically for a remedy that can solve the competitive problem discovered.[40] In this regard, the ERG Remedies paper notes that 'satisfying the tests set out at step 1 and 2 does establish the presumption that some form of ex ante regulation is warranted, and therefore at least one remedy will have to be applied to the undertaking(s) identified as having SMP'.[41]

To conclude on the general context, it is pertinent to note that the relative importance of competition law is increasing over time. In the 1990s and under the 1998 regulatory framework both sets of rules, sector-specific regulation and competition law, were considered as complementary[42] and applied in a parallel way. This complementary application continues under the 2003 regulatory framework[43] but beyond this, a 'hybridisation'[44] of the sector-specific rules is to be noted as they now integrate competition law principles and methodologies.

Finally, the question arises whether the mere application of competition law should over time substitute and replace sector-specific regulation in the electronic communications sector as foreseen during the 1999 Review process.[45] As social regulations concerning guaranteed provision of services of general interest like universal service or concerning specific consumer protection rules, as well as economic regulations ruling the access to markets and in particular the management of resources (for example frequencies,

numbers) might be considered as permanent, the question is especially relevant regarding economic regulation addressing transactions between market players (in particular the SMP regime and other obligations aiming at the control of market power in the context of access and interconnection).[46] In this context it currently appears that at least for the foreseeable future sector-specific regulation will still be needed and that there will be a number of markets the characteristics of which will be such as to justify the imposition of regulatory obligations under the sector-specific rules.[47]

NOTES

1. A list of the main regulatory documents considered in the context of this book, including indication of the way in which this book refers to them is given in Annex 1.
2. For a general description of this system under the 1998 regulatory framework see Defraigne, Philippe and Robert Queck (1999), 'Réflexions sur la notion de "puissance sur le marché" en droit des télécommunications: concept autonome ou chimère', in Etienne Montero (ed.), *Droit des technologies de l'information. Regards prospectifs*, Cahiers du CRID, **20**, Bruxelles: Bruylant, pp. 335–370. On the transfer of the SMP procedure towards the 2003 regulatory framework, see de Streel, A. and R. Queck (2002), 'La "puissance significative" nouvelle est arrivée! L'évolution de la réglementation asymétrique dans le secteur des communications électroniques', *Revue Ubiquité*, **13**, 43–71.
3. Both terms have to be considered as synonyms (see ERG Explanatory Memorandum, p. 6).
4. See: note from the Commission services/DG XIII, Determination of Organisations with Significant Market Power (SMP) for implementation of the Open Network Provision (ONP) Directives, available at http://europa.eu.int/ISPO/infosoc/telecompolicy/en/SMPdeter.pdf. The relevant regulatory documents are: Directive 98/10/EC and Annex 1 Part 1 of Directive 97/33/EC (fixed voice telephony); Annex 1 Part 3 of Directive 97/33/EC (mobile voice telephony); Directive 92/44/EEC and Annex 1 Part 2 of Directive 97/33/EC (leased lines); Article 7.2 of Directive 97/33/EC (national market for interconnection); Directive 92/44/EEC designates Council Directive 92/44/EEC of 5 June 1992 on the application of ONP to leased lines, *O.J.* 19.06.1992, *L* 165/27, as modified by Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997 amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications, *O.J.* 29.10.1997, *L* 295/23 and by Commission Decision 98/80/EC of 7 January 1998 on amendment of Annex II to Council Directive 92/44/EEC, *O.J.* 20.01.1998, *L* 14/27; Directive 97/33/EC designates Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of ONP, *O.J.* 26.07.1997, *L* 199/32, as modified by Directive 98/61/EC of the European Parliament and of the Council of 24 September 1998 amending Directive 97/33/EC with regard to operator number portability and carrier pre-selection, *O.J.* 3.10.1998, *L* 268/37; Directive 98/10/EC designates Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of ONP to voice telephony and on universal service for telecommunications in a competitive environment, *O.J.* 1.04.1998, *L* 101/24.
5. Article 4.3 Directive 97/33/EC.
6. See for example Article 4.3 and Recital 6 Directive 97/33/EC.
7. See for example Article 2 of Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision, *O.J.* 24.07.1990, *L* 192/1.

8. Defraigne and Queck, op. cit., pp. 348–9.
9. ERG Remedies paper, p. 23.
10. Article 7.1 but also 13.2 Directive 92/44/EEC and E.C.J, British Telecommunications III, C–302/94, 12.12.1996, E.C.R. I–6417, §§ 54–56. In this case the Court accepted that although 120 undertakings were designated in the UK as having SMP, the relevant obligations were only imposed on British Telecommunications and on Mercury. Although the latter refers to the concepts of 'Telecommunications Organisation' as used by Directive 92/44/EEC before its modification, we believe that the reasoning of the Court remained applicable to the 'new' concept of SMP under the 1998 regulatory framework.
11. They concern tariff obligations: Article 10.4, § 2 Directive 92/44/EEC and Article 17.6 Directive 98/10/EC.
12. Article 8.2 Directive 97/33/EC.
13. If, indeed, on the one hand an organisation with SMP on a relevant market is *ipso facto* submitted to all of the obligations foreseen for such undertakings for example by Directive 97/33/EC and therefore to the obligation of cost orientation (Article 7.2), it was up to the NRA to define was this actually meant and consequently, 'where appropriate [the NRA] shall require charges to be adjusted' (Article 7.2 Directive 97/33/EC).
14. Communication by the European Commission of 30 June 1987, Towards a Dynamic European Economy: Green Paper on the Development of the Common Market for Telecommunications Services and Equipment, COM(87) 290, Summary Report, p. 3.
15. Article 8 Framework Directive. It should be noted that Article 9.1, 1st to 3rd indent of Directive 97/33/EC already explicitly set those objectives in the context of an NRA's intervention in interconnection agreements (see also Article 9.5 of the same Directive regarding dispute resolution).
16. Articles 7.1 and 8.1 Framework Directive.
17. See for example Bak, M. (2003), 'European electronic communications on the road to full competition: the concept of significant market power under the new regulatory framework', *Journal of Network Industries*, 293–324; de Streel, A. (2003b), 'Market definitions in the new European regulatory framework for electronic communications', *Info*, **5** (3), 27–47; de Streel, A. (2003c), 'The new concept of "significant market power" in electronic communications: the hybridisation of the sectoral regulation by competition law', *European Competition Law Review*, **24** (10), 535–542.
18. Communication by the European Commission of 10 November 1999, Towards a new framework for Electronic Communications infrastructure and associated services. The 1999 Communications Review, COM(1999) 539, p. 11 (hereinafter *1999 Review communication*).
19. There are nevertheless some exceptions, like the market for conditional access systems (Article 6 Access Directive), the market of provision of part or all of the minimum set of leased lines (Article 18 Universal Service Directive), the market of provision of connection to and use of public telephone network at a fixed location (Article 19 Universal Service Directive).
20. Recommendation on relevant markets 2003, Recitals 9–16 and Explanatory Memorandum, pp. 9–12.
21. Article 15.1 Framework Directive.
22. Recital 27 Framework Directive.
23. SMP Guidelines, §§ 33–69. See also Notice on market definition.
24. Article 15.1 Framework Directive. A specific regime is foreseen by Article 15.4 Framework Directive for transnational markets.
25. The sector-specific context of the delineation requires nevertheless some methodological adjustments compared to the use of the same methodology for the purposes of competition law (SMP Guidelines, §§ 27, 35).
26. It could be noted that this initial market Recommendation had to proceed in accordance with Annex I of the Framework Directive. It nevertheless identified an additional market, the market for broadcasting transmission services, to deliver broadcast content to end-users (Market 18).