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Danish Non-Paper on the Review of the Significant Market Power (SMP) Guidelines

New and updated SMP guidelines are a welcome and logical step in order to address future market developments and situations.

The Danish Government welcomes the opportunity to comment on the Commission's public consultation on the Review of the Significant Market Power (SMP) Guidelines.

The Danish Government finds it positive and relevant that the Commission has taken the initiative to initiate a process with the purpose to update the guidelines for conducting market reviews in the telecommunications sector.

The update is particularly relevant given the technological and market development that has taken place in the telecommunications market since 2002, when the latest SMP guidelines were designed. In addition, the Commission, as well as the Member States, have gained experience and developed practices and routines that should be reflected in the forthcoming guidelines.

The complexity in the broadband market rises sharply in these years as a result of the NGA (Next Generation Access) and VHC (Very High Capacity Networks) rollout. In Denmark and many other Member States, this is because the rollout does not occur homogeneously across the country, but is carried out by different local or regional players with different rollout strategies, investment potentials and time horizons. Therefore, the roll-out of broadband networks, with the exception of the incumbent's network, is not nationwide.

This means that today the nationally defined markets for access to broadband infrastructure can be expected to be replaced by a number of regional or perhaps even locally-defined markets for high speed access products with different competitive conditions (monopolies) as there is no economic basis for rolling out parallel high-speed networks. This could limit competition in the fixed broadband market as well as reduce consumer choice as in these areas there will potentially be only a single operator to provide a high-speed broadband connection.

The geographical definition of these markets cannot be expected to be stable over time, but will change with the rollout or upgrading to high-speed infrastructure. These structural conditions pose a challenge in promoting long-term competitive competition.

The development means that NRAs should progressively define and analyse a large number of smaller sub-national markets in order to assess competitive conditions and possibly designate different operators with SMP in defined geographic areas and impose, when justified, on them the necessary and proportional access regulation in the respective areas.

This development can be seen in Europe in general but in different pace and in different variations, e.g. in relation to the types of operators involved in the rollout in some Member States and in relation to the deployment of NGA and VHC infrastructure. The Nordic countries are already seeing examples of this development, and the development is expected to accelerate in the coming years.

Therefore, the Danish Government finds it important that the Commission take the above-described developments in the telecommunications market since 2002 into account when the new guidelines are being designed. The Commission should take into account the completely different regulatory picture of today's markets than when the guidelines were formulated in the early years of liberalisation. Today, there is a need for targeted regulation of a limited number of markets with potentially intrinsic barriers to market-based competition. At the same time, due account should be taken that markets can no longer by definition be considered homogenous at national level for regulatory purposes.

In this regard, the updated guidelines should provide more flexibility when defining the geographic markets in order to be able to address smaller geographically defined areas at subnational and regional levels. Furthermore, developments in the demand for high- or low-capacity networks should be reflected in the updated guidelines.

Today, there is quite limited guidance on how to handle market structures such as duopolies, oligopolies, joint dominance and other similar market structures. The lack of guidance could be the reason why several NRAs are reluctant to try and determine joint SMP. In this regard, the updated guidelines should provide detailed guidance on how to handle such market structures which are becoming more relevant in the different Member States.

Furthermore, the changes in market conditions described above will potentially give rise to new issues in regard to the size of the regulated SMP operators when small operators in a fragmented market could be subject to extensive obligations. Therefore, guidance on the application of the SMP regime in regard to smaller entities could be useful. Moreover, the guidelines should continue to emphasize the use of regulatory tools and interventions that are the least burdensome while still being able to achieve the regulatory objectives.

Finally, the guidance on leverage between related markets should be elaborated, especially seeing as the Commission proposes to delete the relevant provision from the European Electronic Communications Code. The use of this concept should be clarified in the updated guidelines.