



Appendix 2

Appendix 2



SMP Regulation in Practice

In this Appendix 2 we provide two examples of SMP regulation, illustrated by flowcharts. The first example is historical, showing a process of market definition and market assessment that leads eventually to regulation. This is provided for illustration only, and the example chosen reflects the way in which in Europe regulation of access to fixed telecoms networks has been imposed historically. As SMP regulation started in Europe, European countries have the most experience of conducting SMP analyses. As in Europe the telecommunications market is usually characterised by the near ubiquitous presence of a fixed operator, wholesale regulation of the fixed operator is a common occurrence. This would not apply in the African or the Asia context analysed, where typically fixed provision of telecommunications is not so advanced.

The second example is a prospective one, and considers a situation where at the retail level consumers have access to substitute products via use of data and where there is sufficient switching to make the products interchangeable. In that case, there may be no need to regulate (and certainly no need to regulate at the retail level) because the telecoms operators cannot increase the price of a call, or the price of call termination, if consumers can simply switch to a free product. In this case, even though evidence of switching may not be readily available, nevertheless the mere possibility that switching may occur would act as a deterrent against price increases by the regulated operator(s). This is so even though the two functionally equivalent products are provided over different technologies.

The 'Overview' flowchart identifies the steps to be followed for an SMP review. Starting from the retail level, the regulator should identify the products that belong to the same market and the geographic reach of the market. If, by applying the three criteria test, it appears that the market is not effectively competitive, the closest wholesale market should be identified and the analysis carried out at the

wholesale level. Only if the wholesale market is not effectively competitive, then an SMP review should be carried out and remedies imposed. The cases reviewed in this booklet show that advanced economies tend to impose regulation at the wholesale level. The European journey towards wholesale regulation is chartered in Figure 59.

The reason why regulation (if necessary) should be imposed at the wholesale level rather than at the retail level is that, as seen above (Figure 12), retail regulation has the potential to foreclose innovation. If, in the hypothesis, all operators in a market are obliged by regulation to impose at the retail level to comply with the same KPIs and to price their services at the same price, then the normal flow of competition is affected, and the markets do not function properly. In most countries identified, when there is retail regulation the KPIs are often different for the different operators and price regulation is flexible. But even an obligation to notify changes to prices can have a chilling effect on the normal course of competition, if it slows down the time to market for new products and services.

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The EU example is interesting because within the EU there is a need to ensure that all member States follow common rules as much as possible and there is an imperative to create a single market. This is the reason why the European Commission has published a Recommendation on markets, starting for the very first one in 2003, to the latest one in 2014. Looking at the market identified, it is clear that retail regulation has become less and less

important as liberalisation proceeds. Figure 59 illustrates this. In considering the European Recommendation(s), it would be important to bear in mind that each country is different and in each the conditions of competition are different. The fact that the European Commission has identified some markets, should not mean that the same markets should be identified by other countries.

Figure 59: Evolution of markets subject to review in the EU Recommendations on markets

2003 Recommendation ³¹⁶	2007 Recommendation ³¹⁷	2014 Recommendation ³¹⁸
Retail		
1. Access to the public telephone network at a fixed location for residential customers	1. Access to the public telephone network at a fixed location for residential and non-residential customers	
2. Access to the public telephone network at a fixed location for non-residential customers		
3. Access to the public telephone network at a fixed location for non-residential customers ⁵		
4. Publicly available international telephone services provided at a fixed location for residential customers		
5. Publicly available local and/or national telephone services provided at a fixed location for non-residential customers		
6. Publicly available international telephone services provided at a fixed location for non-residential customers		
7. The minimum set of leased lines (which comprises the specified types of leased lines up to and including 2Mb/sec as referenced in art 18 and Annex VII of the Universal Service Directive)		

316. Commission recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services (2003/31/EC).

317. Commission recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (2007/879/EC).

318. Commission recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (C(2014) 7174 final).

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Figure 59 (continued): Evolution of markets subject to review in the EU Recommendations on markets

2003 Recommendation	2007 Recommendation	2014 Recommendation
Wholesale		
8. Call origination on the public telephone network provided at a fixed location	2. Call origination on the public telephone network provided at a fixed location	
9. Call termination on individual public telephone networks provided at a fixed location	3. Call termination on individual public telephone networks provided at a fixed location	1. Call termination on individual public telephone networks provided at a fixed location
10. Transit services in the fixed public telephone network		
11. Wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services	4. Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location	3a: Wholesale local access provided at fixed locations (possible to include virtual access if requirements met)
12. Wholesale broadband access	5. Wholesale broadband access	3b: Wholesale central access provided at a fixed location for mass-market products
13. Wholesale terminating segments of leased lines	6. Wholesale terminating segments of leased lines, irrespective of the technology used to provide leased or dedicated capacity	4. Wholesale high-quality access provided at a fixed location
14. Wholesale trunk segments of leased lines		
15. Access and call origination on public mobile telephone networks, referred to (separately) in Annex I(2) of the Framework Directive in respect of Directives 97/33/EC and 98/10/EC		
16. Voice call termination on individual mobile networks	7. Voice call termination on individual mobile networks	2. Voice call termination on individual mobile networks
17. The wholesale national market for international roaming on public mobile networks		
18. Broadcasting transmission services, to deliver broadcast content to end users		

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Remedies must be appropriate, that is, targeted to the particular issues identified and proportionate. They must also minimise the risk of regulatory failure. The following table (Figure 60) identifies issues and potential remedies. This is also an illustrative table: whether, given the issue identified, one particular remedy should be adopted or not will depend on the evidence and the circumstances of the case. In reviewing the practice of regulators, it seems that in some cases the regulators use a table such as this as a kind of ‘menu’ and apply the remedy without a proper understanding of their impact on the market. As it should be clear by now, this approach is not sound and may lead to the adoption of over-regulation in a market whose dynamics are not properly understood.

Figure 60: Remedies in SMP regulation

Competition Issue	Potential Remedies
Excessive prices	Charge control
	Ex ante margin squeeze
	Cost accounting
Input foreclosure (e.g., refusal to supply)	Obligation to provide network access (general and/or specific)
	Requirement not to unduly discriminate
	Publication of Reference Offer
	Notification of changes to charges and technical information
	Equivalence of inputs
	Accounting separation
	Cost orientation
Reduction in service quality (wholesale)	Quality of Service obligations (e.g., minimum standards, KPI reporting)

In the following section, we provide illustrative flowcharts relative to examples given.