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Application of the Concept of Significant Market Power in Electronic Communications¹

Summary notes of an international conference held December 1–2, 2005²

The concept of significant market power is of paramount importance in regulating electronic communications markets. The notion of significant market power (SMP) is almost equivalent to the competition law concept of dominance, however, SMP requires a more pro-active regulatory approach since its aim is not primarily to ex post deal with competitive restraints as general antitrust rules do, but to establish a competitive market from an originally monopolistic situation in a network based economy where competitive bottlenecks are characteristic. In order to achieve a competitive market an active and continuous regulatory contribution is needed in order to help to open up those bottlenecks for competition, until sustainable competition is achieved on the relevant market.

On December 1, 2005 some 80 experts and professionals from all over Europe gathered in the headquarters of the Hungarian Academy of Sciences for an international conference on Application of the concept of significant market power in electronic communications. The conference was organized by the Centre for Infocommunication Laws in the Institute of Legal Studies, Hungarian Academy of Sciences (CIL), in cooperation with two well known German research and consulting centres, the Wissenschaftliches Institut für Infrastruktur- und Kommunikationsdienste (WIK), and the Institut für Informations-, Telekommunikations-, und Medienrecht (ITM) of the Westfälische Wilhelms-University of Münster, Germany.

The conference aimed at providing a systematic overview of the various legal and economic issues regarding the application of significant market power (in the following SMP) concept introduced by the new EC framework

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¹ *Experiences, procedural questions and protection of rights in the new and the old Member States.*

² Budapest, Hungary, organised by the Centre for Infocommunications Law, Institute for Legal Studies, Hungarian Academy of Sciences.

on electronic communications, at both national and EU level, and the practical and theoretic implications of the results of the SMP designation in the new and old Member States and on the policy-making of the EU itself. Special attention was attributed to the first practical experiences with regard to SMP decisions of the National Regulatory Authorities and to the so called Article 7 procedure, the harmonization in the new Member States and selected problem areas, which can have an effect on the 2006 review of the electronic communications framework.

The topic of the conference has been subject to different research projects conducted by CIL in the last two years and the program and some presentations contains scientific results of the above research projects, too.

For an unprecedented two days, the participants from Hungary and other fifteen European countries enjoyed the rare opportunity of meeting and sharing information with each other about their experience and discussing the common goals of the EU regulation with regard to SMP. At the conference there were nineteen presentations in six sections. The invited lecturers came from respected international and national organisations and institutes from all over Europe. The organisers and the academic background provided a neutral environment and a unique opportunity where both the EU and governmental-regulatory experts, practitioners and leading academics could exchange their views on the practical and theoretic issues of SMP regulation.

Prof. Dr. Ákos Detrekői, president of the National Council for Communications and Information Technology opened the international conference on Thursday, 1 December. In his opening speech, besides the introduction of the venue and the conference topic to the participants he pointed out that the managing the problems of the SMP procedures is in the spotlight of the European regulation.

A keynote presentation by *Krisztina Rozgonyi*, Member of the Board of the National Communication Authority Hungary outlined the problems of the regulation in Hungary and the main challenges of the emerging new technologies in today's EU policies. She stated that according to the changes in the technology and the market of electronic communications, a new and open environment should be created by the regulators, but of course the rules of that market should suit a lot of criteria, which are mentioned in the concerning programs of the EU. After the opening lectures, the conference continued with the presentations in six sessions following each other. The themes of the sessions outlined the whole problem circle of the SMP concept.

The presentations in the first session had the objective to give an overview on SMP regulation in the European Union. It was opened by the presentation of Mr. *Anthony Shortall* from the European Commission, Directorate General

Information Society. Mr. Shortall, who is currently working on the review of SMP rules gave a very detailed overview of the SMP regime in the European Union. First, he talked about the regulatory framework and current issues of its application. The so called “Three step approach” (i.e the identification of relevant markets susceptible for ex ante regulation, assessment of effective competition, application of remedies) has great importance in regulation. The lecturer noted that during the application of the processes, the definition of markets, competition and dominance have great importance. The dominance is near to the monopoly level of market power. The different kinds of common regulations contain almost clearly the obligations and the applicable remedies of the national regulatory authorities related to the SMP—but an update process of the Access Framework was started at the end of 2005. The planned timetable of the possible discussions was already known in December, no results of them were publicized till this time. As Mr. Shortall stated, the update is needed because of the considerable changes at the relevant market. The declared national consultation and the public workshop offer a great place for representatives of the authorities to meet with the market operators.

This presentation was followed by the lecture of *Dr. Ulrich Stumpf*, deputy director of the WIK. He outlined the economic aspects of the SMP concept. According to the analysis of the market notifications, it could be stated that some controversies came up after the application of SMP concept. The process of the notification of markets takes a lot of time, especially for the smaller countries with smaller background. The notification of markets needs an exact definition of markets, which require a lot of information. Markets could be circumscribed by legal measures, by the different type of services, retail customer groups and by the technologies used. All of the above mentioned facts should be considered during the NRA’s notification. As Dr. Stumpf stated, market analysis should include the forward looking and the greenfield approach, too. There’s a special kind of SMP, when joint dominance realizes. In case of SMP this special collective dominance is satisfied in relation to market for wholesale mobile access and call origination on public mobile telephony networks. The complexity of joint dominance requires the elaboration of specific tests by the NRAs for proper identification and analysis.

After a short coffee break the conference continued with a very interesting lecture of Mr. *Stefan Kramer* from the European Commission, DG Competition, Brussels. The theme of the lecture was the view of the Art. 7 Task Force on the result of market notifications. He illustrated the main aims and objectives of the of the Art. 7 procedure. According to the high number of received notifications, it can be stated, that it works in practice but not with the same efficiency in each Member State. He pointed out that during the last two years

the Commission had some key findings on the procedural issues. The cooperation between the National Regulatory Authorities and the National Communication Authorities sometimes has difficulties, which impact on the dynamism of the procedure. The veto decision was used only in a few cases. During the last two years it became clear that there are cases when the SMP analysis raises complex competition law issues, so a comprehensive approach is necessary. Mr. Kramer stated that a better targeted and consistent regulation is needed for the future. Probably, the ongoing public consultation regarding market review will bring important benefits.

The last theme of this session was the view of the European Regulators Group (ERG) with regard to applicable remedies. *Prof. Dr. Heinrich Otruba* talked in his lecture about the key findings of the common position of the ERG on the approach to appropriate remedies in the regulatory framework. In the presentation it was stated that the recent common rules and measures have many advantages, just as they give more competence for NRA's and allow flexible reaction to market conditions. The regulation of remedies is of great importance in order to create guidance for the authorities and certainty for the market operators. He also analysed the notifications received from the Member States, and the defined markets. The replies for these actions were quite soft as the Commission used veto only in four cases from the 303. This practice was also a reason for the update process which started with a call for public consultation in the end of 2005. The main changes will be in the clarification of the often used emerging market's definition, the charting of the new infrastructures, the removal of remedies and in the variation of remedies.

The second session was started at 2 p.m. with the presentation of *Anne Hombergs* from ITM, Germany. She was talking about the procedural rules concerning SMP. The regulation can be divided into three parts: the SMP could be defined in narrow sense, through flanking procedures and by general procedural rules. She detailed the market regulation procedure in the different kind of common papers. The so called flanking procedures contain the consolidation procedure, the veto procedure and the consultation procedure. During these acts the NRA's have high importance, but due to their high workload, to adopt the final decision takes a lot of time, which causes instability at the market.

Till that time the participants were able to listen to some lectures of the SMP concept and the relevant rules, but only a few words were spoken on the practical experiences of the procedure of Article 7. The expert of the German Bundesnetzagentur, *Dr. Annegret Groebel* presented a paper on the application of the SMP regulations in practice. She started her presentation with the review of the regulatory framework, its principles and role. After it the participants of

the conference heard a very deep study of the remedies process and some information on the form of consultation and consolidation in Germany. The notification of markets in Germany is close to the end. The proposed remedies were notified separately as the Bundesnetzagentur aims at monitoring the result of the consolidation procedure with regard to the notified markets before taking a decision on remedies. She also discussed the problems of the notification of different markets and the efficiency of the veto decision.

There is no debate that not only the rules and measures are important, but the regulators should also ensure the protection of rights. Both lecturers of the third session analysed the enforcement and protection of rights, but they emphasized two different aspects of the question. In his presentation *Prof. Robert Queck* vice director of the Research Centre for Computers and Law at the University of Namur (CRID) stated that the National Regulation Authorities (NRA) have a central role through the whole application process of the regulatory framework. The NRA's are mostly well adjusted to the system of the other national decision-making and executive organisations. There is no debate that as for the NRA's complex exercises the conditions for effective monitoring and proactive market regulation is a must. In the lack of these their functioning will not be appropriate. But one should not forget about the division of powers that Montesquieu prefers: the executive, legislative and judicial powers should be separated. The NRA's independence from both service providers and government has great importance as it guaranties the quality of the function. As sometimes there are high numbers of authorities concerned with electronic communication sector, Mr. Robert Queck outlined that it could cause problems in transparency and coordination. The role of NRA's should be analysed at a European level, as well, because there are a lot of common measures and rules which have influence on the national authorities. In the end, if we think about future amendments on regulation, we will have to consider both economic and social needs.

The last lecturer of the first day was *Christiane Seifert* from the Bundesnetzagentur (BnetzA), the German regulator, she talked about the problems regarding protection of rights. In Article 4 of the framework directive stands that for an effective and appropriate mechanism for the review of the decisions of the NRA an independent appeal body should be created. To meet these demands, the function of the NRA's needs to be analysed at a European level—this statement is common with the former lecture. Ms. Seifert raised problems of the approach among NRA's decision, standpoint of Commission and the decision of the Court. The efficiency of the NRA's function is sometimes bottlenecked by the Commission's decisions, but for solving the emerged problems not just a sector-specific but a comprehensive amendment is needed.

After the interesting and crowded day the participants were invited to take place at a gala dinner in a good and well-known restaurant in the downtown of Budapest where they had time to discuss the former lectures in an informal environment.

The second day started with the session titled SMP assessment in Member States. In the first lecture *Prof. Szabolcs Koppányi*, managing researcher of CIL, talked about legal problems associated with the SMP assessment procedure in Hungary. He affirmed the importance of the independent functioning of NRA's but he also mentioned the problem of regulatory capture, which means that the interest of the electronic communication industry raise its influence on the regulatory authorities—but lobby activity appears at common level, too. As Mr. Koppányi stated there are cross-area problems: the different legal areas follow several principles even ones in conflict with each other. In some cases the legislation is well written, but the preconditions for effective implementation are missing in lack of cross-area solutions. The new Member States have much more problematic points at the harmonisation. The emergence of the regulatory framework is an issue of continuous development and the countries of the EU-15 had the opportunity to affect even the regulation process, in contrast to the new member states. Without the experience in the application of the European regulation, the NRA's in the new member states often lack liberalisation experience and are reluctant to confront with the Commission. The problem of passive attitude emerges when the NRA does not act. There is also a special methodology for market analysis used by the Hungarian NRA, as it does not possess the quality of normativity nor the quality of a regulatory decision. As a consequence, the whole concept and methodology of the market analysis procedure is not subject to judicial review, contrary to Art. 4 FWD.; neither does it deal extensively with remedies.

After a short debate the conference continued with the regulation of broadcasting market—the lecturer was *György Molnár-Bíró*, an expert of the CATV project at the NRA of Hungary. He outlined in his presentation the high fragmentation levels of the cable TV broadcasting market, therefore the regulation faces with issue of problems. In the last few years technology had changed a lot and new challenges appeared at the market. To date, digitalization is an everyday issue at this market, but as the switch to the new technology is expensive, it will be a long procedure. In Hungary, there are more than five hundred cable TV providers, most of them has regional dominance at the market of this broadcasting service. Now the regulation of the sector needs changes, the application of light touch regulation would be useful at this case. Mr. Molnár-Bíró raised the question as the service providers do not have the interest to change, who would make the first step?

The third lecture of the day was held by *Krisztián Kecsmár*, who is responsible for the implementation of the framework in Hungary at the European Commission, DG INFSO, Brussels. He gave a general overview on the implementation processes and problems of the EU Member States. After a short overview of the SMP regulation, he talked about the decisional practice of the European Commission (Commission). The Commission has various tools to affect market regulation like making statements at formal and informal decisions, detecting problems at transposition or application of the common rules, and launching infringement proceedings. Even some of the old member States face with difficulties at the transposition of the SMP rules because of the discrepancies at the national system. In Finland, the rigour and inflexible regulation led to infringement proceedings. Most of the Member States have problems with the notification of markets, although it is one of the main tasks of the national authorities. In the end, we should only hope that the future amendments of the common regulation would be more applicable in the Member States.

Through the *roundtable discussion* on the specific problems of EC harmonisation a lot of actual and practical problems emerged. Although the discussion was focused on the difficulties of the new Member States, the questions of the participants were mostly about the whole operation of the SMP regulations.

The organizers of the conference had respect for the fact that in a few years a new round of enlargement will be completed, and both Romania and Bulgaria will have to apply the *acquis*. The representative of the Romanian Communication Authority, *Vlad Cercel*, had the opportunity to report on the proceeding transformation and the emerging problems in the Romanian electronic communication sector. The Romanian government set up the Regulation Authority in 2002, after the adoption of New Regulatory Framework. At that time the Romtelecom had still dominance of the fixed line services, although a liberalisation process was started in 2001. The most increasing part of the electronic communication market is the provision of internet services. Mr. Cercel gave detailed overview of the application of the SMP concept in Romania: he stated the main criteria for determination the individual and collective significant market power and described the NRA's cooperation with the Competition Council. According to the national environment, the Article 7 procedure is not applied, and no decisions on SMP were made by courts. He also analysed in his presentation the national wholesale and relevant retail markets. In the last few years competition increased in all markets, new technologies become available in short time for the costumers. The elaboration of the new national regulation on electronic communications sector is in progress, and the main objective is to get closer to the harmonisation of the EU framework.

Mr. *Ioannis Conostas* from the South Eastern Europe Telecommunications and Informatics Research Institute (INA) in Greece gave a more general overview of the case of the Balkan countries aiming to become a member of the EU. After the short introduction of the INA, he talked about the future enlargement procedures and the affected countries (Romania, Bulgaria, Croatia and Turkey). Although the governments in these countries have the will to adopt the EU's regulatory framework for electronic communications sector, they have problems through the realization. Some of the mentioned challenges are the following: strong protection of national markets, reduction of prices, free access to information for all citizens and to assure attractive environment for foreign investors. The lecturer analysed the states at the Balkan area from the viewpoint of SMP's legal basis, the applicable remedies and the operators. The main objectives for the further years in these countries are liberalisation of the markets, application of some EU measures, and adoption of a more effective national regulation. For the realisation they need real help from the EU Member States, as they can share experience and give proposes for the further steps.

The theme of the afternoon session was about the future of SMP regulation. Mr. *Alexandre de Streel* held a thought-provoking and impressive presentation on the new paradigm of SMP concept. The realization of the government's principles needed more time than expected, so till today only the technology neutrality and harmonisation of methods are successful. The evolution of technology and markets create new challenges in the sector: regulators should reflect convergence in their decisions and pay specific attention to retail services, the questions emerging infrastructure and the collision of IT firms using new technologies and the recent companies in the new market structure. The analysis of the regulatory framework in the United States would bringv some new ideas and Europe could learn from the experience. At the other shore of the Atlantic, the progressive removal of regulation had started in 2003. Mr. de Streel made some proposals for the future European amendments. According to his opinion, the sector regulation should have more attention to structural markets, and try to give solutions for its problems. The market should analysed in segments, and the regulator should focus on the most problematic ones. The recent regulation is very complex, and it is hard to apply. Mr. de Streel recommended to adopt more transparent regulation, define the phenomena and emerging markets more distinctly, and a clearer set of objectives for the NRA's.

The program of the conference continued with another predictive lecture offering ideas for the future regulation. The title of the presentation of *Prof. Dr. Martin Cave* from Warwick Business School was 'New solutions with regards to remedies'. According to the current regulations, remedies should be

based at Article 8 of the regulatory framework. The NRA's have to consider a lot of interests: technological neutrality, pluralism, support of effective competition, non-discrimination and consumer protection. Today the EU regulations and the aforementioned list of interests leave only small place to act. The common law after the changes should be more appropriate to the real conditions and the decision makers should avoid overregulation. Now the SMP has great role in many sectors, there are both retail and wholesale remedies, and a deregulatory theory emerged. Prof. Cave supported that last direction of changes, however he pointed out that deregulation should be regulated as well.

Prof. Dr. Pierre Larouche, a well-known expert from the Tilburg University held a presentation on possible scenarios for institutional divide of competences in the future. The idea of deregulation could seem to be an exemplary way for future regulation. But as the regulation was the main objective for a long time, the decision makers and the authorities have only experience on that. Now, the regulatory framework is incongruous to the Lisbon strategy, which means that a comprehensive consideration is needed. After analyzing the SMP procedure written down at Article 14 to 16 in the framework directive Prof. Larouche stated that from the relationship between SMP and effective competition it emerges the possibility of giving more discretion to the NRA's, which probably will increase the amount of regulation. The current regulation obligates the NRA's to take control and notify wide range of markets. The reduction of the markets will help the NRA's to relieve the work pressure, and parallel to the offered change the need for regulation will become lower. Prof. Larouche also made a review of the procedure under Article 7 of the framework directive. The wide possibility of veto decrease the efficiency—the conditions of veto and the whole measure should not be abolished entirely but tightened. The third problematic point of the current regulation is the judicial review of the NRA's decisions. Thinking about the future of the sector's regulation, an issue of creating the European Telecommunications Agency rose up. There are debates on how wide competency should it have, and what will be its objectives.

Prof. Dr. Bernd Holznel from ITM presented a paper on suggestions for the improvement of the procedural aspects concerning the SMP concept. He started his study with the review of the shortcomings of the SMP procedure. The efficiency would be increased with the use of time limits in the NRA's practice and at the elaboration of guidelines and market recommendations in the Commission. The current common regulations do not contain any restrictions for the length of the procedure, so sometimes it takes years, which cause uncertainty and decrease the growth of the sector. Now the Commission has the possibility to adopt measures which are binding to the national level, but the scope of these obligations are not laid down. The maintenance of the

national administrative background has great costs, which is disadvantageous for the smaller Member States. Prof. Holznel emphasized the need to tighten the Article 7 procedures and to combine the consolidation procedure with exceptional procedure in the practice of NRA's.

The conference was closed by a roundtable discussion on the future opportunities for regulation. The participants had questions on the emergence of new retail services, the protection of the first mover at a market, on the leverage at the electronic communications sector, and relations to the Lisbon strategy.

According to my opinion the conference offered a deep overview of the SMP regulation in the European Union and experiences of the National Regulatory Authorities in the Member States. The conference was extremely productive on a number of levels, as the invited lecturers had respectable knowledge of the main theme of the event, and the international and national participants were able to make conversations with these experts and to realize new connections and problems.