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# EU4Digital Facility

Electronic Communications Market  
Analysis Process and Key Elements  
Under the European Union Law

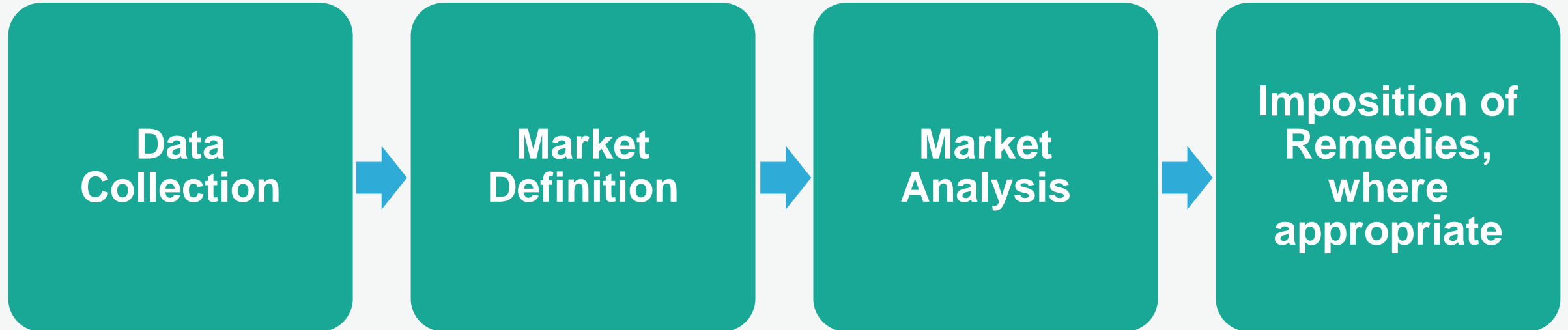
21 May 2021 | Online Event, Zoom



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# Market Analysis

## Procedure - Elements





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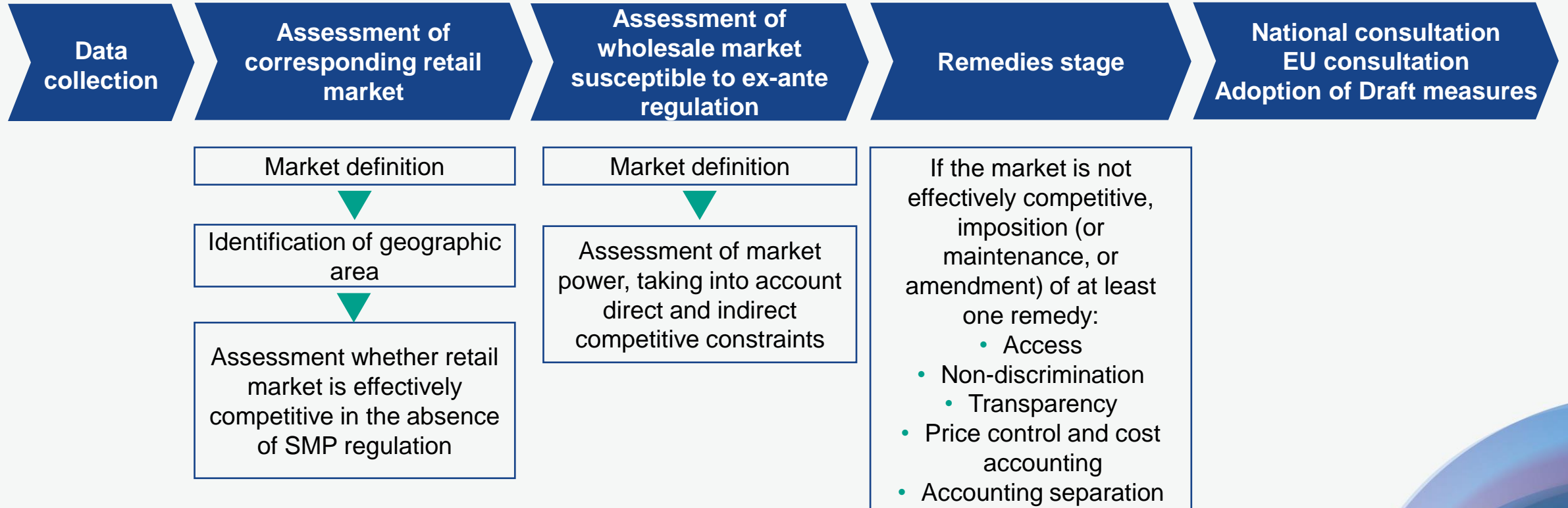
# 1. Market analysis process – the procedure in a nutshell



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# Asymmetrical regulation under SMP framework

## Market Analysis Procedure



# EU Regulatory Framework

## SMP definition

An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors customers and ultimately consumers

**Is this to be reflected in national legislation?**





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## 2. Market analysis process – timing



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# EU Regulatory Framework

## Timeline

National regulatory authorities shall carry out an analysis of the relevant market and notify the corresponding draft measure in accordance with Article 7:

- (a) within three years from the adoption of a previous measure relating to that market. However, exceptionally, that period may be extended for up to three additional years, where the national regulatory authority has notified a reasoned proposed extension to the Commission and the Commission has not objected within one month of the notified extension;
- (b) within two years from the adoption of a revised Recommendation on relevant markets, for markets not previously notified to the Commission; or
- (c) within two years from their accession, for Member States which have newly joined the Union.





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# 3. Market analysis process – market definition



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# EU Regulatory Framework

## Market definition (1/2)

### Framework Directive (2002/21/EC)

#### Article 15

#### Market definition procedure

3. National regulatory authorities shall, taking the utmost account of the recommendation and the guidelines, define relevant markets appropriate to national circumstances, in particular relevant geographic markets within their territory, in accordance with the principles of competition law. National regulatory authorities shall follow the procedures referred to in Articles 6 and 7 before defining the markets that differ from those defined in the recommendation.

4. After consultation with national regulatory authorities the Commission may, acting in accordance with the procedure referred to in Article 22(3), adopt a Decision identifying transnational markets.



# EU Regulatory Framework

## Market definition (2/2)

### Framework Directive (2002/21/EC)

#### Article 15

#### Market definition procedure

After public consultation and consultation with national regulatory authorities the Commission shall adopt a recommendation on relevant product and service markets. The recommendation shall identify those product and service markets within the electronic communications sector, the characteristics of which may be such as to justify the imposition of regulatory obligations set out in the Specific Directives. The Commission shall define markets in accordance with the principles of competition law.

The Commission shall regularly review the recommendation.

*Art. 64 of the EECC*



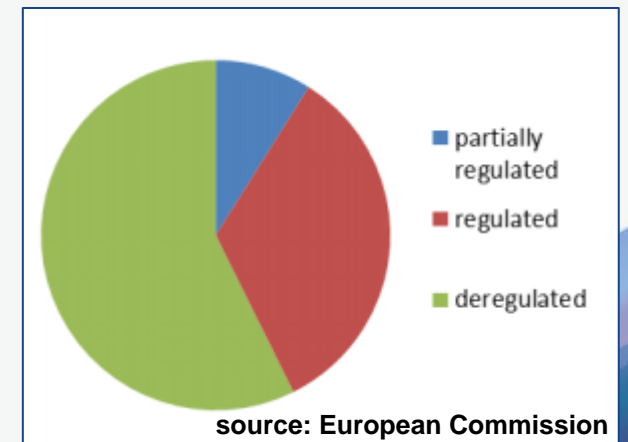
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### Commission Recommendation

of 11 February 2003 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*

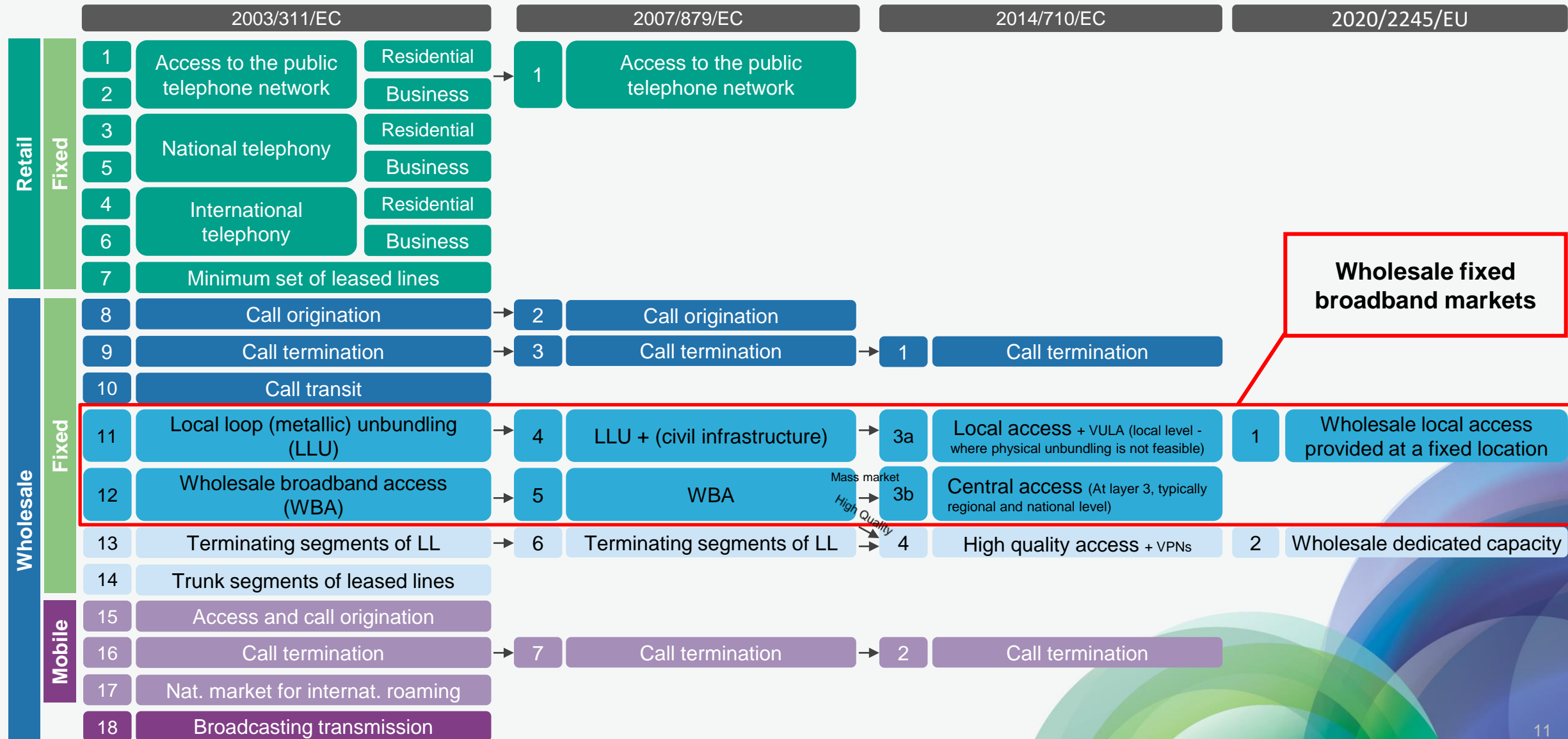


- (2003/311/EC)
- (2007/879/EC)
- (2014/710/EU)
- (2020/2245/EU)



# Asymmetrical regulation under SMP framework

## Recommendations on Relevant Markets



# EU Regulatory Framework

## Commission Guidelines (2002/C 165/03)

### Para 38

#### Market definition

The extent to which the supply of a product or the provision of a service in a given geographical area constitutes the relevant market depends on the existence of competitive constraints on the price-setting behaviour of the producer(s) or service provider(s) concerned.

There are **two main competitive constraints** to consider in **assessing the behaviour** of undertakings on the **market**:



1. Demand-side substitution



2. Supply-side substitution



# EU Regulatory Framework

## Commission Guidelines (2002/C 165/03)

### Para 49

#### Demand-side substitution

Demand-side substitution enables NRAs to determine the substitutable products or range of products to which consumers could easily switch in case of a relative price increase.

Shall take into account price fluctuations in potentially competing products, any records of price movements, and relevant tariff information.

SSNIP test (Small but significant and nontransitory increase in price )





# EU Regulatory Framework

## Commission Guidelines (2002/C 165/03)

### Para 52

#### Supply-side substitution

In circumstances where the overall costs of switching production to the product in question are relatively negligible, then that product may be incorporated into the product market definition.

In assessing the scope for supply substitution, likelihood that undertakings not currently active on the relevant product market may decide to enter the market, within a reasonable time frame, following a relative price increase, that is, a small but significant, lasting price increase, shall be taken into account.



# EU Regulatory Framework

## Commission Guidelines (2002/C 165/03)

### Para 56 and 59

### Geographic Market

Relevant geographic market comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which area the conditions of competition are similar or sufficiently homogeneous and which can be distinguished from neighboring areas in which the prevailing conditions of competition are appreciably different.

In electronic communications **geographic markets** are traditionally **characterized by**



The area covered by a network



The existence of legal and other regulatory instruments





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# 4. Market analysis process – market analysis



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# EU Regulatory Framework

## Market definition procedure

### Framework Directive (2002/21/EC)

#### Article 15

#### Market definition procedure

2. The Commission shall publish, at the latest on the date of entry into force of this Directive, guidelines for market analysis and the assessment of significant market power which shall be in accordance with the principles of competition law.



Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services

- **(2002 / C 165 / 03)**
- **(2018/C 159/01)**

*Art. 64 of the EECC*



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# EU Regulatory Framework

## SMP clarification of thresholds

Undertakings with market shares of **no more than 25% are not likely** to enjoy a (single) dominant position on the market concerned. In the Commission's decision-making practice, single dominance concerns **normally arise** in the case of undertakings with market shares **of over 40 %**, although the Commission may in some cases have concerns about dominance even with lower market shares, as dominance may occur without the existence of a large market share. According to established case-law, **very large market shares — in excess of 50 % — are in themselves**, save in exceptional circumstances, **evidence of the existence of a dominant position**.

An undertaking with a large market share may be presumed to have SMP, that is, to be in a dominant position, if its market share has remained stable over time. The fact that an undertaking with a significant position on the market is gradually losing market share may well indicate that the market is becoming more competitive, but it does not preclude a finding of significant market power. On the other hand, fluctuating market shares over time may be indicative of a lack of market power in the relevant market.





# EU Regulatory Framework

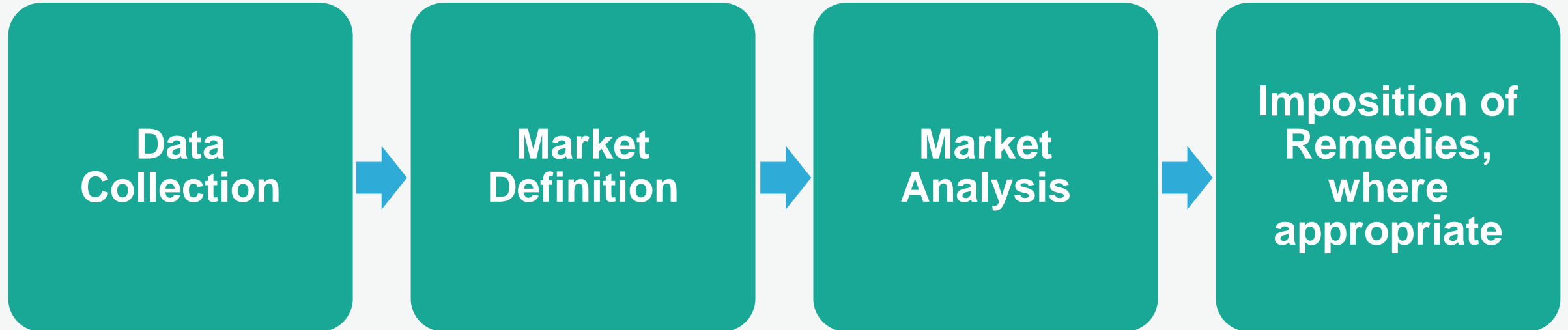
## SMP criteria in addition to the main definition

- overall size of the undertaking,
- control of infrastructure not easily duplicated,
- technological advantages or superiority,
- absence of or low countervailing buying power,
- easy or privileged access to capital markets/financial resources,
- product/services diversification (e.g. bundled products or services),
- economies of scale,
- economies of scope,
- vertical integration,
- a highly developed distribution and sales network,
- absence of potential competition,
- barriers to expansion.



# Market Analysis

## Procedure - Elements





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# 5. Market analysis process – remedies



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# EU Law

## Wholesale remedies

Member States shall **ensure** that national regulatory authorities are **empowered to impose the obligations**.

Where an operator is designated as having significant market power on a specific market as a result of a market analysis carried out in accordance with Article 16 of Directive 2002/21/EC (Framework Directive), national regulatory authorities shall impose the obligations (set out in Articles 9 to 13 of Access Directive) **as appropriate**.

### Access Directive:

**Article 9** - Obligation of transparency

**Article 10** - Obligation of non-discrimination

**Article 11** - Obligation of accounting separation

**Article 12** - Obligations of access to, and use of, specific network facilities

**Article 13** - Price control and cost accounting obligations

**Article 13a** - Functional separation



# Obligation of transparency

## Article 9

National regulatory authorities may, in accordance with the provisions of Article 8, impose obligations for transparency in relation to interconnection and/or access, requiring operators to make public specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, including any conditions limiting access to and/or use of services and applications where such conditions are allowed by Member States in conformity with Community law, and prices.

In particular where an operator has obligations of nondiscrimination, national regulatory authorities may require that operator to publish a reference offer, which shall be sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested, giving a description of the relevant offerings broken down into components according to market needs, and the associated terms and conditions including prices. The national regulatory authority shall, inter alia, be able to impose changes to reference offers to give effect to obligations imposed under this Directive





# Obligation of non-discrimination

## Article 10

A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations of non-discrimination, in relation to interconnection and/or access.

A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations for accounting separation in relation to specified activities related to interconnection and/or access.

In particular, a national regulatory authority may require a vertically integrated company to make transparent its wholesale prices and its internal transfer prices inter alia to ensure compliance where there is a requirement for non-discrimination under Article 10 or, where necessary, to prevent unfair cross-subsidy. National regulatory authorities may specify the format and accounting methodology to be used.



# Obligation of accounting separation

## Article 11

A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations for accounting separation in relation to specified activities related to interconnection and/or access.

In particular, a national regulatory authority may require a vertically integrated company to make transparent its wholesale prices and its internal transfer prices inter alia to ensure compliance where there is a requirement for non-discrimination under Article 10 or, where necessary, to prevent unfair cross-subsidy. National regulatory authorities may specify the format and accounting methodology to be used.



# Obligations of access to, and use of, specific network facilities (1/3)

## Article 12

A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations on operators to meet reasonable requests for access to, and use of, specific network elements and associated facilities, inter alia in situations where the national regulatory authority considers that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest.



# Obligations of access to, and use of, specific network facilities (2/3)

## Article 12

Operators may be required inter alia:

- (a) to give third parties access to specified network elements and/or facilities, including access to network elements which are not active and/or unbundled access to the local loop, to inter alia allow carrier selection and/or pre-selection and/or subscriber line resale offers;
- (b) to negotiate in good faith with undertakings requesting access;
- (c) not to withdraw access to facilities already granted;
- (d) to provide specified services on a wholesale basis for resale by third parties;
- (e) to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services;
- (f) to provide co-location or other forms of associated facilities sharing;
- (g) to provide specified services needed to ensure interoperability of end-to-end services to users, including facilities for intelligent network services or roaming on mobile networks;
- (h) to provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services;
- (i) to interconnect networks or network facilities.
- (j) to provide access to associated services such as identity, location and presence service.

National regulatory authorities may attach to those obligations conditions covering fairness, reasonableness and timeliness.



# Obligations of access to, and use of, specific network facilities (3/3)

## Article 12

When national regulatory authorities are considering the obligations referred in paragraph 1, and in particular when assessing how such obligations would be imposed proportionate to the objectives set out in Article 8 of Directive 2002/21/EC (Framework Directive), they shall take account in particular of the following factors:

- (a) the technical and economic viability of using or installing competing facilities, in the light of the rate of market development, taking into account the nature and type of interconnection and/or access involved, including the viability of other upstream access products such as access to ducts;
- (b) the feasibility of providing the access proposed, in relation to the capacity available;
- (c) the initial investment by the facility owner, taking account of any public investment made and the risks involved in making the investment;
- (d) the need to safeguard competition in the long term, with particular attention to economically efficient infrastructure based competition;
- (e) where appropriate, any relevant intellectual property rights;
- (f) the provision of pan-European services.



# Price control and cost accounting obligations (1/2)

## Article 13

A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of interconnection and/or access, in situations where a market analysis indicates that a lack of effective competition means that the operator concerned may sustain prices at an excessively high level, or may apply a price squeeze, to the detriment of end-users. To encourage investments by the operator, including in next generation networks, national regulatory authorities shall take into account the investment made by the operator, and allow him a reasonable rate of return on adequate capital employed, taking into account any risks specific to a particular new investment network project.

National regulatory authorities shall ensure that any cost recovery mechanism or pricing methodology that is mandated serves to promote efficiency and sustainable competition and maximise consumer benefits. In this regard national regulatory authorities may also **take account of prices available in comparable competitive markets.**





# Price control and cost accounting obligations (2/2)

## Article 13

Where an operator has an obligation regarding the cost orientation of its prices, the **burden of proof** that charges are derived from costs including a reasonable **rate of return on investment shall lie with the operator concerned.**

**For the purpose of calculating the cost of efficient provision of services, national regulatory authorities may use cost accounting methods independent of those used by the undertaking.** National regulatory authorities may require an operator to provide full justification for its prices, and may, where appropriate, require prices to be adjusted.

Compliance with the cost accounting system shall be **verified by a qualified independent body.**

A statement concerning compliance shall be **published annually.**



# Functional separation

## Article 13a

Where the national regulatory authority concludes that the appropriate obligations imposed under Articles 9 to 13 have failed to achieve effective competition and that there are important and persisting competition problems and/or market failures identified in relation to the wholesale provision of certain access product markets, it may, as an exceptional measure, in accordance with the provisions of the second subparagraph of Article 8(3), impose an obligation on vertically integrated undertakings to place activities related to the wholesale provision of relevant access products in an independently operating business entity.

That business entity shall supply access products and services to all undertakings, including to other business entities within the parent company, on the same timescales, terms and conditions, including those relating to price and service levels, and by means of the same systems and processes.





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# 6. Market Analysis – Imposition and Remedy selection process



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# Remedies (obligations) stage (1/2)

Effective competition?

Yes

No obligations or withdrawal of obligations

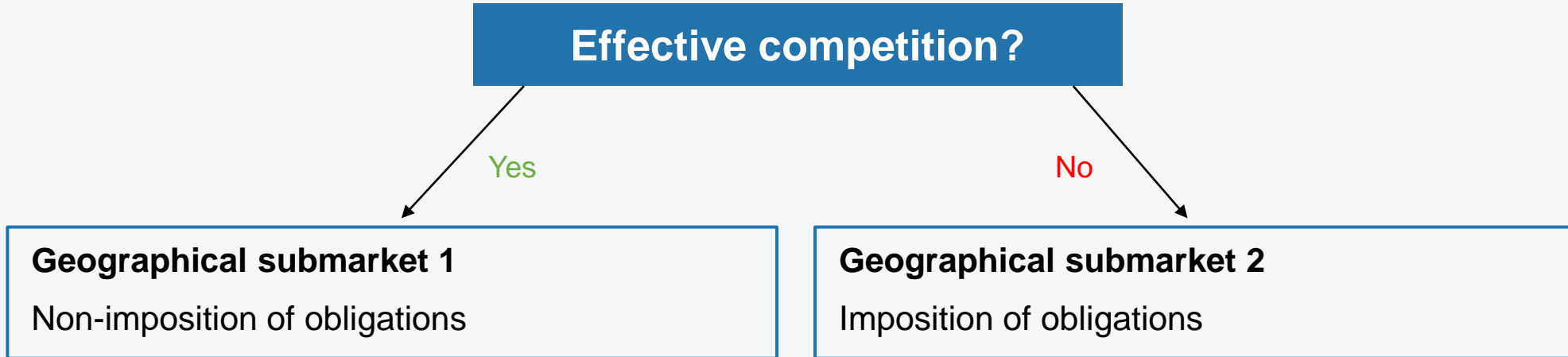
No

Imposition of one or more appropriate obligations on operator with SMP or maintenance / amendment of obligations if such obligations were imposed before

The imposition of specific obligations on an undertaking with SMP **requires a justification** that the obligation in question **is appropriate and proportionate** in relation to the competition problem identified



# Remedies (obligations) stage (1/2)



# Selection of appropriate remedies

NRAs identify the nature of the market problem to be addressed during market definition and market analysis stages. This gives NRAs a clear insight to the nature of the market failure that they are considering. NRAs can then apply the available remedy (or the series of remedies) that most clearly addresses the competition problems identified

NRAs justify the remedies **based on competition problems identified** and in light of the objectives laid down for them

The **benefits** which society derives from the restrictions imposed on SMP operator **must be greater than the restrictions on its rights or legal interests**

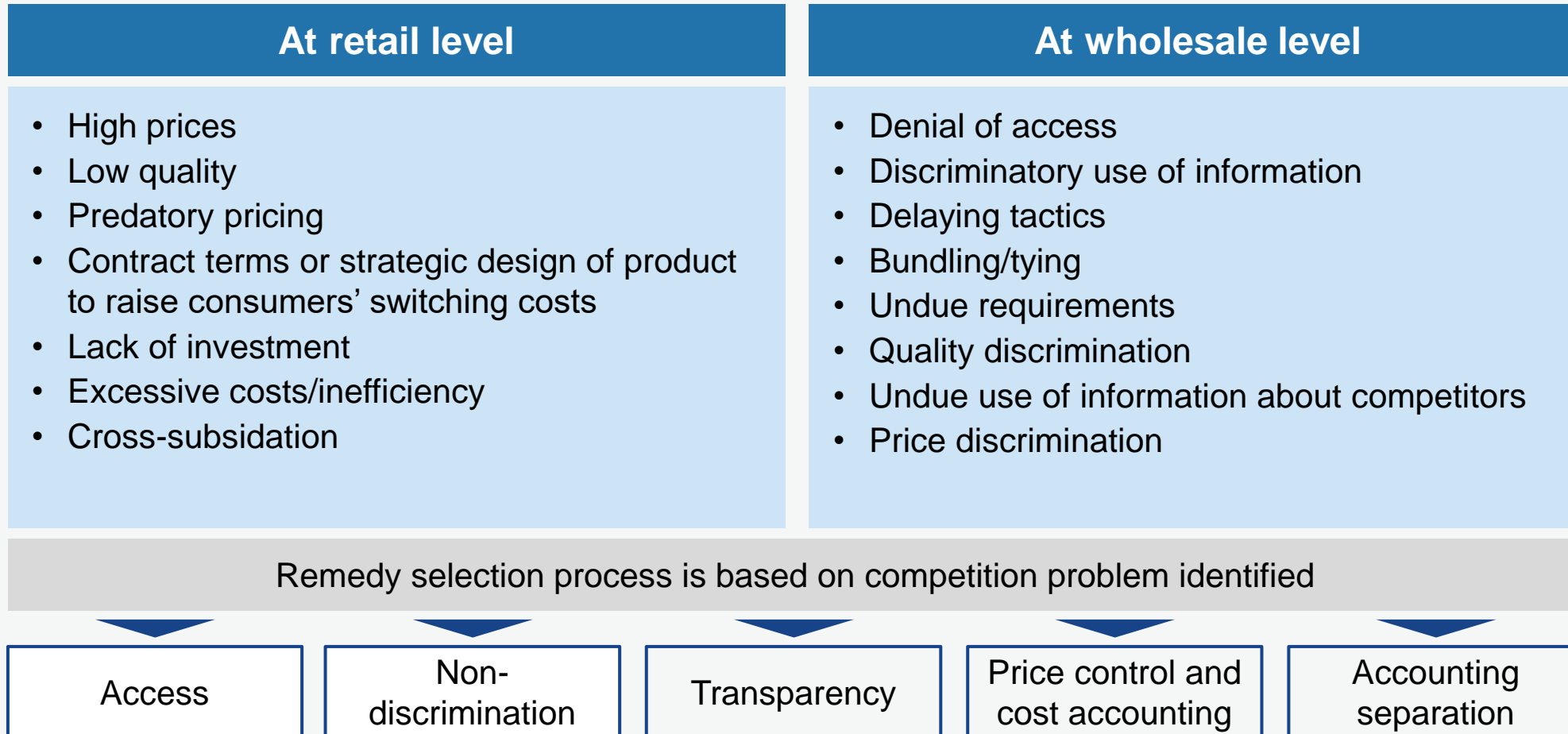
When choosing the most effective remedy and in order to avoid over-regulation, NRAs should focus their attention on the **anti-competitive behavior** that is most likely to occur in the specific market situation

NRAs should balance the burden of the remedy and potential costs imposed on the SMP operator against its prospective benefits – **Regulatory options assessment**





# Typical competition problems



# Possible negative effects

Competition problems might lead to possible negative effects at the retail level

## Retail and/or wholesale market foreclosure

- Raising rivals' costs
- 1st mover advantage
- Margin squeeze
- Restriction of competitors' sales
- Negative welfare effects



# Wholesale remedies (1/3)

## Access obligation

Operators may be required **to give** third parties **access to** specified **network elements and/or facilities**

## Obligation of non-discrimination

Obligation of non-discrimination shall ensure that the SMP operator applies:

- **equivalent conditions** in equivalent circumstances to other undertakings providing equivalent services, and
- **provides services and information to others under the same conditions and of the same quality as it provides for its own services**, or those of its subsidiaries or partners.

NRAs may impose on that undertaking obligations to supply access products and services to all undertakings, including to itself, on the same timescales, terms and conditions, including those relating to price and service levels, and **by means of the same systems and processes, in order to ensure equivalence of access.**



# Wholesale remedies (2/3)

## Obligation of transparency

NRAs may impose obligations for transparency requiring operators to make public specified information, such as:

- technical specifications,
- network characteristics and expected developments,
- terms and conditions for supply and use, including any conditions altering access to or use of services and applications, in particular with regard to migration from legacy infrastructure
- prices.

In particular where an operator has [an obligation of non-discrimination](#), NRA may require SMP operator to [publish a reference offer](#), which shall be sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested.



# Wholesale remedies (3/3)

## Price control and cost accounting obligations

NRA may impose obligations relating to cost recovery and price controls, including [obligations for cost orientation of prices and obligations concerning cost accounting systems](#) in situations where a market analysis indicates that a lack of effective competition means that the operator concerned may sustain prices at an excessively high level, or may apply a price squeeze, to the detriment of end-users.

To encourage investments by the operator, including in next generation networks, [NRAs shall take into account the investment made by the operator, and allow him a reasonable rate of return](#) on adequate capital employed, taking into account any risks specific to a particular new investment network project.

NRAs may also take account of prices available in comparable competitive markets.

## Obligation of accounting separation

NRA may require a vertically integrated company to [make transparent its wholesale prices and its internal transfer prices](#) inter alia to ensure compliance where there is a [requirement for non-discrimination](#) or, where necessary, to prevent unfair cross-subsidy.



# Wholesale remedies +

## Access to civil engineering (new obligation)

Access to civil engineering as an obligation may be necessary to meet the general objectives

Refers to:

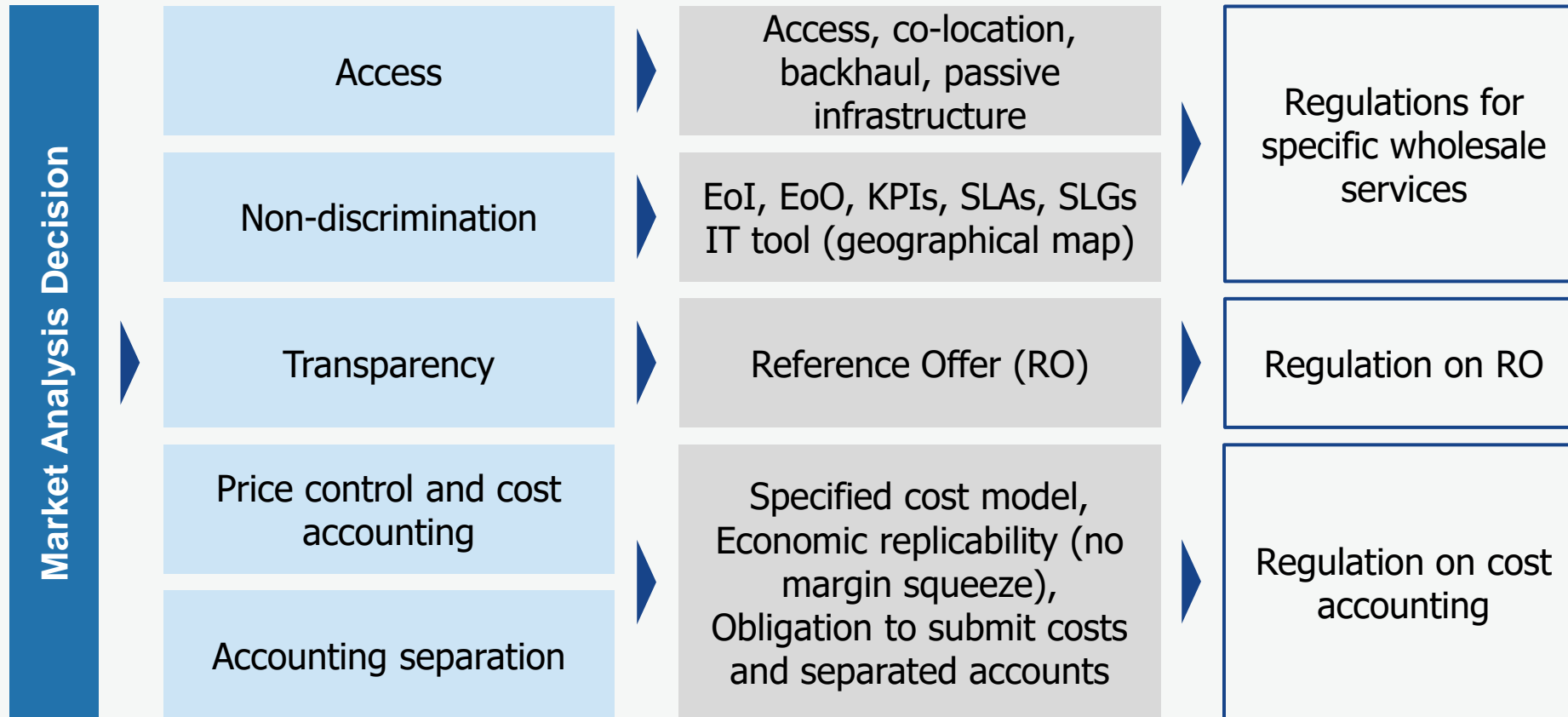
- buildings or entries to buildings,
- building cables, including wiring,
- antennae, towers and other supporting constructions,
- poles, masts,
- ducts, conduits, inspection chambers, manholes, and cabinets.

NRAs may impose access obligation to civil engineering on an undertaking, irrespective of whether the assets that are affected by the obligation are part of the relevant market.





# Examples of supporting remedies and appropriate regulations to be adopted by NRAs



# EC Recommendation on Non-discrimination and costing

‘Equivalence of Inputs (**EoI**)’ means the provision of services and information to internal and third-party access seekers on the same terms and conditions, including price and quality of service levels, within the same time scales using the same systems and processes, and with the same degree of reliability and performance.

‘Equivalence of Output (**EoO**)’ means the provision to access seekers of wholesale inputs comparable, in terms of functionality and price, to those the SMP operator provides internally to its own downstream businesses albeit using potentially different systems and processes.

‘Key Performance Indicators (**KPIs**)’ are indicators that measure the level of performance in the provision of the relevant wholesale services.

‘Service Level Agreements (**SLAs**)’ means commercial agreements under which the SMP operator is obliged to provide access to wholesale services with a specified level of quality.

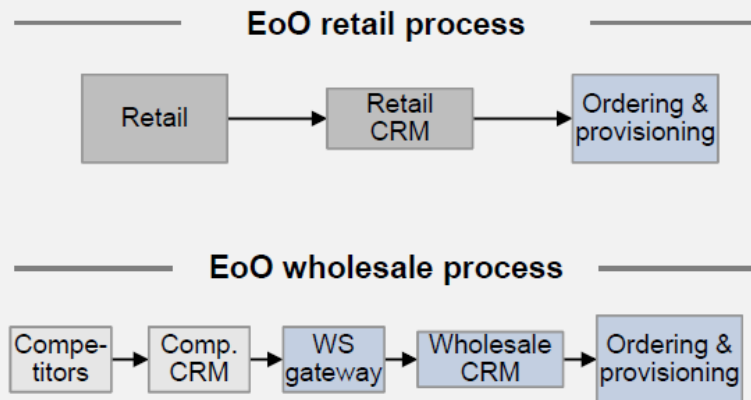
‘Service Level Guarantees (**SLGs**)’ form an integral part of SLAs and specify the level of compensation payable by the SMP operator if it provides wholesale services with a quality inferior to that specified in the SLA.



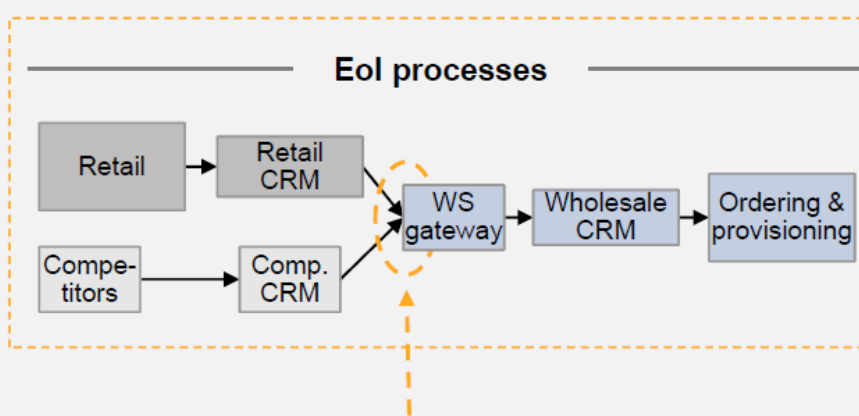
# With regard to the implementation complexity, the main step between EoO and EoI whereas the latter requires significant changes as the regulated entity

- The Equivalence of Output principle implies a parallel usage of WS CRM for external wholesale customers and of a separated CRM for “internal” retail customers.
- In Equivalence of input the WS CRM must be used by retail unit in the same way as by ISPS, i.e. the usage of WS CRM will not be parallel, but cascaded and used after the orders will come to RT CRM.

## EoO



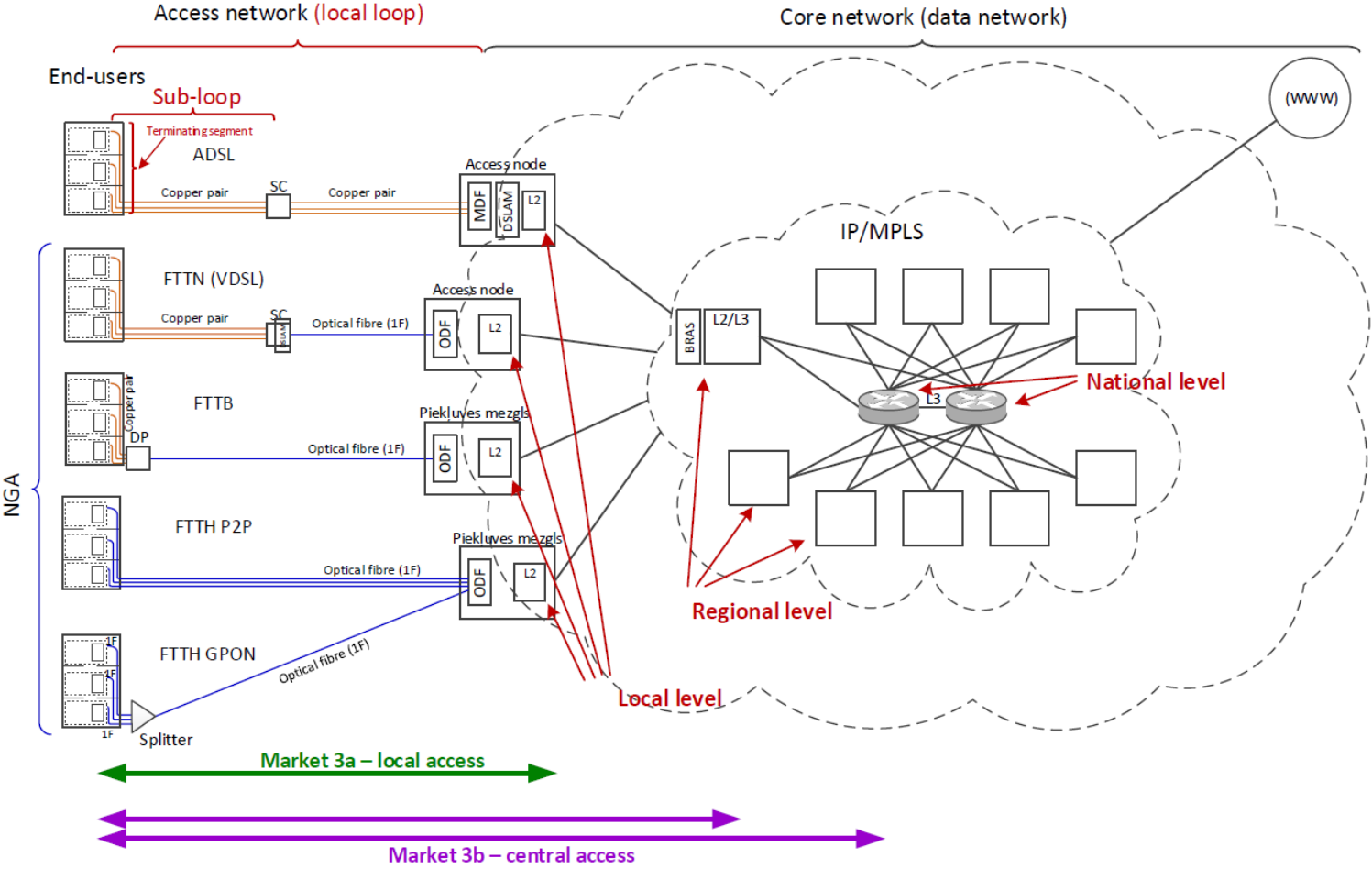
## EoI



- Requirement that same systems and processes shall be used for provision of identical products and services to external and internal customers.



# Typical network architecture and schematic difference between market 3a and 3b



# Monitoring of ROs

NRA may develop regulation and details and adopt **Regulation on RO**, which contains requirements for the information to be included in the RO and necessary level of detail. The Regulation on RO may be closely linked to the **Regulation on access to ducts, Regulation on unbundling and VULA, and Regulation on bitstream access** elaborated and adopted by NRA, which imply technical requirements for the provision of the wholesale access.

If there is a transparency obligation imposed on SMP operators, **NRA may request to amend the ROs** based on the results of market analysis, the Regulation on RO, and technical Regulations adopted by the NRA.

Extensive process, **NRA may request to update the ROs several times**. If the published or updated RO does not meet the requirements, NRA has the right to require to amend it.





# Supporting remedies – SLAs and SLGs example

Should KPIs have been complemented by SLAs and SLGs. The designated has to comply with different quality conditions within wholesale regulation of markets 3a & b, which are part of the RO, i.e. SLAs for ordering, delivery, and repair including specific timescales for the acceptance or refusal of a request, testing, completion etc.

Example of SLAs in case of access to ducts	Mandatory timescale (SLAs)	Corresponding SLGs (EUR)	SLG based on working days (wd) or hours (h)
Response to theoretical testing for the segment not exceeding 1 km	1 wd	10.00	wd
Response to theoretical testing for the segment exceeding 1 km	Additional 1 wd for the next 1 km	10.00	wd
Response to practical availability testing for the segment not exceeding 100 m	14 dd	10.00	wd
Response to practical availability testing for the segment exceeding 100m	Additional 2 wd for the next 250 m	10.00	wd
Processing of the notice on damage/fault without interruption of the electronic communication service	1h	1.00	h
Damage/fault repair without interruption of the electronic communication service	30 wd	1.00	wd
Processing of the notice on damage/fault with interruption of the electronic communication service	1 h	1.00	h
Damage/fault repair with interruption of the electronic communication service	72 h	1.00	wd







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# 7. Market Analysis – role of international bodies



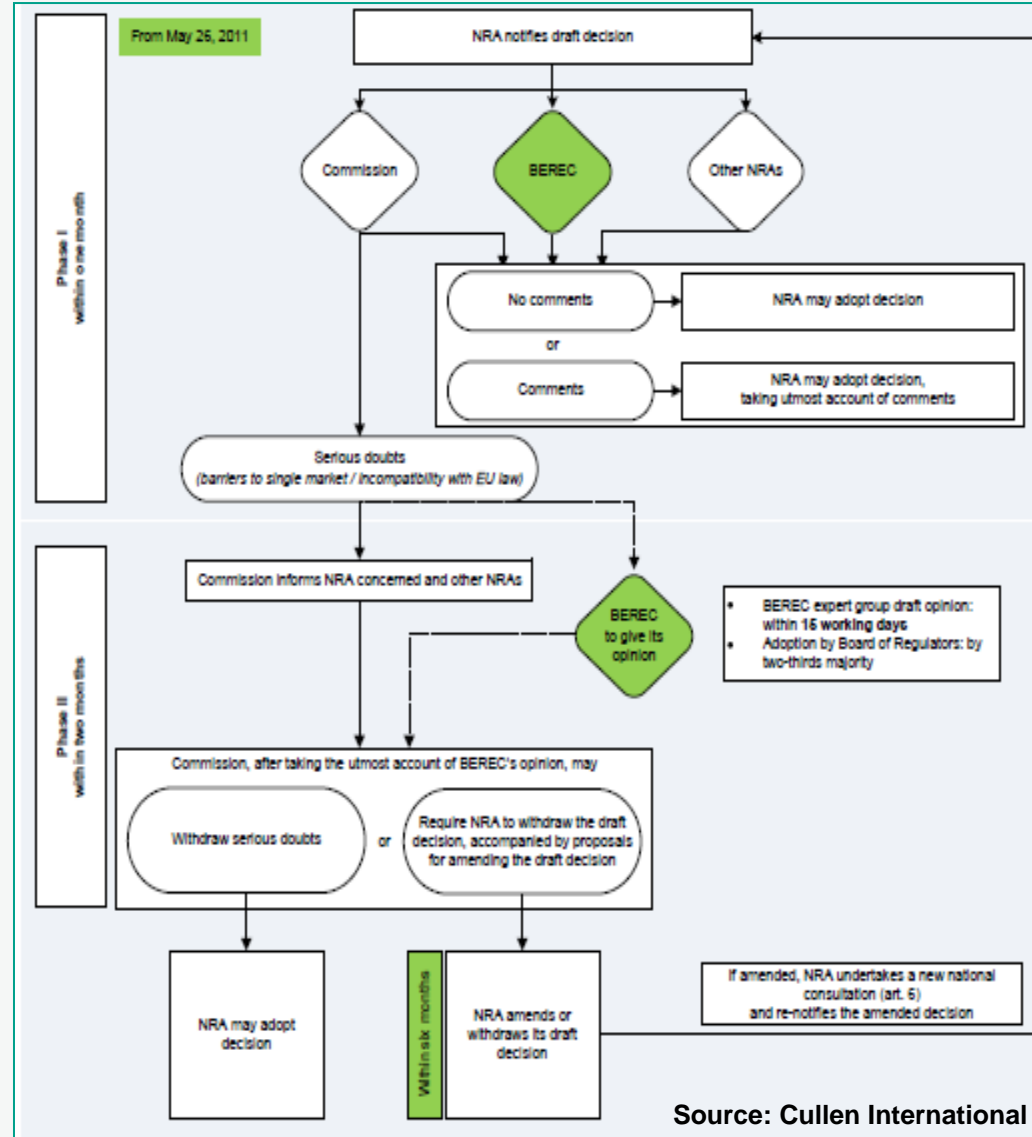
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# Market Analysis

## Community Consultation

### Framework Directive (2002/21/EC)

#### Article 7 Procedure for assessing market definitions or SMP findings proposed by NRAs



# Market Analysis

## Community Consultation

### Framework Directive (2002/21/EC)

#### Article 7a

#### Procedure for assessing regulatory obligations proposed by NRAs



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