

Oligopoly Analysis and Regulation

Comments to BEREC by Richard Feasey¹

Executive summary

1. ‘Tight oligopolies’ are better avoided than regulated. NRAs already have and should use extensive powers to avoid the formation of ‘tight oligopolies’ in telecoms. As I explained at length in my previous submission to BEREC, many NRAs are currently driving telecoms markets towards tight oligopoly as a result of their misguided pursuit of ‘symmetry’ (in market shares, in spectrum allocations etc). Rather than seek new powers, NRAs should change their current policies so as to avoid any need for further action.
2. BEREC has not made the case for why NRAs need new powers to tackle ‘tight oligopolies’. The effects of mobile mergers are already dealt with by DG Competition and there is no reason for NRAs to intervene as well. There is no evidence that tight oligopolies will develop in mobile absent mergers. Nor are there capacity constraints in fixed markets that would mean BEREC’s tight oligopoly theory applies there.
3. Competition law today does not contemplate intervention in the rest of the economy if tight oligopolies emerge ‘organically’. BEREC has yet to explain why the approach to telecoms markets should be different from the rest of the economy.
4. There is no sound basis to distinguish between a ‘tight oligopoly’ and a competitive market equilibrium, or to suppose that ‘loose oligopolies’ are sustainable in telecoms. What is the level of profits which would justify intervention by NRAs? Any threshold for intervention in ‘tight oligopolies’ will be subjective and arbitrary, undermining a key feature of the current SMP regime and its foundations in European competition law.
5. BEREC needs to explain how firms or NRAs would ever escape perpetual regulation if its proposals were accepted. What is the exit route from the regulation of ‘tight oligopoly’? Without this, BEREC is not so much playing a ‘regulatory joker’ as laying a ‘regulatory trap’ from which there is no escape.
6. Although both require barriers to entry and few firms, capacity constraints are a key issue in distinguishing between markets that might be susceptible to joint SMP and ‘tight oligopolies’. Joint SMP requires an absence of capacity constraints, whilst tight oligopoly requires them to be present. This means that NRAs cannot consider ‘tight oligopoly’ as something they can fall back on if joint SMP fails. Given the absence of capacity constraints in telecoms markets, NRAs are likely to have to pursue joint SMP if they want to intervene.

¹ As with my earlier submission to BEREC, the views expressed in this paper are entirely personal to me and have not been sought or provided to any third party (although they have benefited from comments from colleagues at Frontier Economics). I am an independent consultant who advises a number of European telecoms firms, including on matters addressed by this consultation and the current proposals by the ACM in the Netherlands. I was the Public Policy Director at Vodafone during the 2000s and played a leading role in the mobile joint dominance cases in Ireland, France, Spain and Malta, all of which are referred to in this report. My thoughts on these and other matters can be found at www.fronfraithltd.com.

7. BEREC fails to engage with (what in my view is) the core question in joint SMP analysis: Does a finding of SMP in the wholesale market require a finding of SMP in the retail market? BEREC assumes the Commission was right to say 'no' in 2006. In doing so, the Commission introduced another 'excess profits' test to justify intervention. Retail markets were said to be sufficiently uncompetitive to motivate tacit co-ordination in an upstream market, but sufficiently competitive to mean no SMP could be found by the NRA in the retail market. The Commission was wrong and it is unusual to find BEREC accepting what the Commission says so uncritically.
8. More thought is required on refusal to supply and proportionate remedies. For example, with joint SMP, is there a credible retaliation mechanism against firms who deviate by signing access agreements? How should NRA deal with voluntary access undertakings, such as that recently offered by KPN? Would EU law allow NRAs to discriminate in the application of remedies to firms who are all found to have SMP? Even if it did, on what basis would one firm be regulated and not another?

Introduction

1. BEREC's very interesting consultation document on oligopolies denies that they are trying to play a 'regulatory joker' by asking for powers to regulate 'tight oligopolies' as well as cases of joint SMP in telecoms markets (see p.52). You should only ever play your joker after having thought very carefully, or if you are truly desperate. I think that BEREC have not yet thought enough about what they propose, but that they should not despair either.
2. I have a number of points to make. The first refers to why and how we have got here and what that means. The second considers the relationship between competition law and ex ante regulation, which is a critical feature of the current European framework and a source of much of its strength. Third, I focus on some key areas which I think BEREC get wrong, particularly the issue of capacity and the relationship between retail and wholesale markets (where they compound an error made by the Commission in 2006). Finally, I identify a few other issues which I think would also benefit from further thought.
3. I responded to BEREC's initial request for comments in January 2015 and attach that submission as an annex to this one.

Why are we here?

4. Let's start by recognising that if European telecoms markets are becoming more tightly oligopolistic, it is for two very different reasons.
5. In mobile, the driver is mobile mergers. I make no comment on the merits of this trend, but one of the consequences is that NCAs, and DG Competition in particular, have already played a very significant role in assessing mobile markets and designing wholesale market access remedies². This is a role which would otherwise be undertaken by the NRAs who compose BEREC. As a result, I suspect more MVNO revenues in Europe now depend on access arrangements that have been devised by DG Competition than on any devised by NRAs under the telecoms regulatory framework.
6. This may be a problem for NRAs, but it does not justify changes to the powers of NRAs under the telecoms regulatory framework. This would only be the case if we thought existing merger control rules are inadequate to the task, or if they were not to apply to telecoms mergers for some reason. I find nothing in BEREC's position to suggest that they consider current European merger controls to be inadequate. On the contrary, BEREC want to mimic them and apply precisely the kind of SIEC 'gap case' which DG Competition has used in some of the recent mobile mergers.
7. BEREC might have a point if there were evidence that mobile markets in general were becoming more concentrated, or more profitable, as result of exits rather than mergers. If there are any cases of exit in Europe, they hardly represent a trend. One of the features of mobile markets is that

² I am not saying I think DG Competition has got it right on the mobile mergers it has considered. My view happens to be that some recent mergers ought to have been approved with fewer or no remedies, but that others might better have been blocked altogether.

operators incur sunk costs, which makes withdrawal difficult. Most struggling operators will find a buyer if the current owners are prepared to write off enough of the debt. There is no evidence that, absent mergers, mobile HHIs are on the rise in Europe. Mobile industry profits (the ability to sustain supernormal profits is regarded as a key characteristic of any ‘tight oligopoly’) have in fact been falling in Europe for more than a decade.

8. BEREC might argue that, even if mobile market HHIs were not changing absent mergers and profits have been falling, other characteristics mean that ‘tight oligopolies’ will emerge in the future. The Report does not attempt to show that demand is stabilising or that mobile operators are becoming capacity constrained, which are the key conditions for BEREC’s tight oligopoly theory to apply. I deal with the issue of capacity later, but I think it is hard to describe demand for mobile data services as being stable when traffic is growing by 60% a year, much of the population has yet to own a smartphone and 4G remains the preserve of a minority of users. I do not exclude the possibility that mobile markets could stabilise and assume the characteristics of, say, the cement industry, but I think BEREC will struggle to show that this is likely to occur anytime soon. The past 25 years have seen unrelenting dynamism in mobile markets, punctuated by a very brief period in the mid 2000s when 2G matured and 3G had yet to gain traction (which was the last time NRAs flirted with joint SMP). With 4G still in its infancy and 5G already on the horizon, it does not feel as if competition in mobile markets in Europe is going to tighten anytime soon.
9. The driver of oligopoly in fixed is quite different. It is the emergence of cable as a major competitive force in the broadband era. Although I think this has largely occurred in spite of the telecoms regulatory framework rather than because of it, it is wholly consistent with the framework’s liberalisation objectives. A core feature of that framework was that, as competition strengthened, the scope of ex ante regulation would reduce. Without this core principle, much of the current framework is incoherent and there is no end game for either NRAs or those participating in the market.
10. If the consequence of the advances in competition in fixed markets is to be a further extension of regulation, as BEREC proposes, then I am no longer sure what the end game becomes in European telecoms regulation. Should those competing with single SMP firms pull in their horns or massage their profits so as not to get caught in the regulatory net in the first place?³ If they fail, does BEREC have an exit plan which explains how we could then ever hope to move from ‘tight oligopoly’ to competition? If not, where does BEREC think we will end up?

What is tight oligopoly?

11. One reason to ask these questions is that the concept of a ‘tight oligopoly’ is a slippery one which too easily lends itself to a subjective judgement by the NRA or Commission⁴. Ticking boxes does not help, since high entry barriers and few firms are features of any oligopoly, and capacity

³ In which case we would be left with single firm SMP. Do we think this is a better outcome for consumers than a tight oligopoly?

⁴ Canol and Onderstal of the Dutch Bureau for Economic Policy Analysis found no proper definition of ‘tight oligopoly’ in the economic literature, see CBP *Tight Oligopolies*, Paper No 29, February 2003

constraints and differentiated products feature in many. That leaves evidence that firms are earning an excessive level of supernormal profits in the absence of tacit co-ordination.

12. If that is so, we have to ask when profits in telecoms might reach a level at which a 'tight oligopoly' can be declared and intervention is justified? BEREC does not say.
13. We all know that telecoms activities are characterised by high fixed costs and low marginal costs. Operators have to have some degree of unilateral pricing power and some capacity to differentiate their products in order to earn the profits necessary to recover their investments. In many similar network industries, it is accepted that firms need monopoly pricing power in order to be able to sustain network investment. Telecoms has tried to be different and does appear able to support 'sub-monopoly' market structures (and profits) without anyone seriously arguing that it can ever become as competitive as, say, an FMCG market (although some NRAs still appear to want to try!). But suppose telecoms cannot support even 'loose' oligopolies because firms would then be unable to recover their network investments and earn a sufficient return to reward the risks involved in the sector. As has been highlighted in recent years, the ability to earn an adequate risk adjusted return is crucial in this industry because network investments have driven most of the gains in quality and innovation, as well as unit price reductions and volume growth, which we have seen over the past 20 years.
14. If telecoms cannot support 'loose oligopolies' and still sustain network investment, then there is little point (and much damage to be done) BEREC or NRAs trying to force the market in that direction. BEREC's definition of a 'tight oligopoly' may turn out to be the long run competitive equilibrium for telecoms markets.
15. How would NRAs know whether the profits it observed (much less anticipated on the forward looking basis that is required for ex ante assessment) meant that a particular oligopoly was at its competitive equilibrium or that intervention could loosen it? Imagine, for example, that Stephen Howard of HSBC is right and that the optimal margin to maximise network investment (and welfare) in the European mobile sector is an EBITDA margin of 38%⁵. Should NRAs intervene if EBITDA margins creep to 39%? 40%? 45%?. When does a mobile oligopoly become 'tight'?
16. We are in unknown and highly subjective territory, without the support of any meaningful competition law precedent to guide us. That is not a good place to be.

Competition law and ex ante regulation

17. I have already posed the question as to why, in mobile, NRAs need ex ante powers to regulate tight oligopolies when DG Competition is already doing so through the application of the merger control. But the even more obvious question is why, outside of the merger content, telecoms should require intervention in tight oligopolies when ex post competition law does not? If Europe does not feel the need to amend competition law so as to tackle 'tight oligopolies' elsewhere in the economy, why in telecoms? Perhaps there is an answer, but BEREC has not provided it.

⁵ I should make clear that I have no idea whether he is right. Indeed, my point is that I am not sure anybody should think they can determine what the number should be with any confidence, which is why NRAs should not try to micromanage markets. See HSBC Research 'Supersonic', p.33, 13 April 2015

Telecoms is far from unique in having the kinds of tight oligopoly conditions which BEREC identify. If it is to be regulated more intrusively than other parts of the economy, capital is likely to flow out of the telecoms sector. It is hard to see why BEREC should want this, nor how it would align with the various efforts by the Commission and others to achieve precisely the opposite results and attract more investment into the sector.

18. The close alignment between competition law and ex ante regulation lies at the core of the current framework and is bound together in the SMP framework. If BEREC thinks current ex post competition law is inadequate then it should first make the case for changing competition law and then make the case for importing the resulting changes into the telecoms regulatory framework. Bypassing this stage breaks the alignment which is at the heart of the current framework. BEREC has (rightly) criticised the European Commission for doing exactly this in the past when, in 2006, the Commission first introduced a specific roaming regulation for markets which NRAs had earlier found to be competitive under the SMP framework. Those criticisms apply with no less force to BEREC's current proposals.
19. In my view, attempting to import changes from the Merger Control regime into ex ante regulation fails to recognise the fundamental differences between the two. Competition law is not an a la carte menu to pick and choose from. Mergers are a very specific situation in which the structure of the market will change and the parties seek to persuade the Commission or NCA of the merits of it doing so. If they fail, they are free to withdraw and to revert to the existing market circumstances (although I accept there are often commercial challenges in doing this). The merging parties, not the regulator, are in a position to determine the regulatory outcome.
20. The same is true of competition law. If parties want to avoid sanctions they know they have to exercise whatever market power they have in a certain way. Firms who might otherwise tacitly collude can take deliberate steps not to do so – as the French mobile operators did in concluding access agreements in order to pre-empt regulation from ARCEP. Singly dominant firms can always decline to abuse their market position and avoid being fined. The thresholds are well established and the consequences clear.
21. Now consider the position proposed by BEREC, in which firms can be regulated as 'tight oligopolists' outside of a merger context. Not only are the thresholds unclear, but intervention can be justified on a prospective, forward looking basis. The NRA would not have to show that a 'tight oligopoly' existed today or in the past, or that current profits were excessive, but would instead claim that these conditions could arise in the future and that pre-emptive, ex ante remedies were required to avoid them. In these circumstances, there is nothing a firm could do to avoid intervention.
22. It might be argued that firms with single SMP are in exactly this kind of trap today when it comes to the application of ex ante telecoms regulation to address prospective market failure. This might be so, but I think there is still a world of difference between regulating a former incumbent operator with clear market dominance and regulating every firm in the market (which it seems to me is the likely consequence of the 'tight oligopoly' theory). I think the standard of proof for such a potentially significant extension of regulation ought to be very high – higher than the standard of proof required for either a finding of SMP (single or joint) and higher than the standard of

proof required for the withdrawal of regulation⁶. The aim of the framework and the past 20 years is to see the scope of regulation reduce. BEREC should be required to overcome a high threshold before we contemplate moving in the opposite direction. BEREC then needs to explain how firms could ever hope to escape regulation under its tight oligopoly proposals, and what this would mean for the incentives of firms to compete, and of NRAs to regulate. Otherwise, BEREC's 'regulatory joker' risks being a 'regulatory trap' from which there's no escape.

Excess capacity in telecoms markets

23. BEREC recognises the importance of capacity and capacity constraints in both joint SMP and 'tight oligopoly' situations. Capacity constraints will tend to facilitate non-competitive prices in tight oligopolies (p. 16)⁷, but operators will need sufficient spare capacity to implement credible punishment mechanisms to sustain joint SMP (p.43)⁸. Both conditions obviously cannot apply at the same time⁹ and NRAs should not think tight oligopoly is a fall back if joint SMP fails.
24. Which is it to be? BEREC recognises that there are few capacity constraints in fixed markets (p.37), which means joint SMP is the more likely option. This might suggest that BEREC considers that capacity constraints will be more significant in mobile markets and that its tight oligopoly theory might apply there. But is there much evidence of this either? Although demand is growing in mobile markets and the industry constantly warns of a capacity crunch, the truth is that the industry has consistently been able to outpace demand with improvements in technology and by deploying more spectrum for the past 25 years.
25. Moreover, my understanding is that tight oligopolies are only likely to arise if all firms in the oligopoly face capacity constraints at the same time. As I argued in my earlier submission, NRAs ought to think about the implications of this for spectrum policy. In order to avoid tight oligopoly conditions (surely preferable to having to regulate them?), NRAs need to ensure that at least some operators have surplus capacity which they can use to capture share. This is most likely to be ensured through *asymmetric* spectrum allocations, which is the opposite of what many NRAs do today. Of course, it is also desirable if NRAs unlock more spectrum for all operators, but in my view spectrum asymmetry is the first line of defence against tight oligopoly.

SMP in retail and wholesale markets

26. The Report notes that the Commission has on several occasions said that a finding of joint SMP in the retail market is not necessary to find joint dominance at the wholesale level (p.30). This issue

⁶ I agree with BEREC that the standards here should be symmetric, although since regulation or no regulation are opposite sides of the same coin in a market review, I am not sure it could be otherwise.

⁷ The position presented here is surely too extreme. It is not necessary for a firm to be able to serve the entire market to break a tight oligopoly, just that they can expand their output sufficiently to accommodate a significant share from rivals.

⁸ Irrespective of whether punishment involves granting access to other MVNOs or the operator lowering its own retail prices, both require the operator to have sufficient capacity to accommodate the resulting share gains from the deviating firm. If the punishing firm is already capacity constrained, these deterrents are not credible (as BEREC recognise)

⁹ The same opposition applies to homogeneous and heterogeneous products. The former are conducive to joint SMP, the latter to tight oligopoly. Again, both cannot be present at the same time.

came to a head in 2006 when the Commission received two notifications (one from Spain in relation to mobile and one from Malta in relation to fixed), both of which sought to find joint SMP in the wholesale market whilst holding that the retail market was competitive (prior to that, the Irish and French regulators had found joint SMP in both wholesale and retail mobile markets). The Commission responded by stating that a finding of SMP in the retail market was ‘not indispensable’ to a finding of SMP in the wholesale market. I have explained elsewhere why I think this is wrong. It is a great shame that the Commission’s position has never been properly tested in the ECJ¹⁰.

27. Imagine, for example, that an NRA in one Member State finds a mobile retail market to be competitive and takes no further action (as the framework generally assumes) whilst another comes to the same conclusion, but in their case decides to find SMP in the wholesale market. How is the harmonised application of the framework then ensured? Is the Commission saying that, even if the downstream markets perform in an identical way, the upstream market should be regulated if there are no MVNO deals but not if there are? Why?
28. What the Commission did in 2006 - perhaps without realising it¹¹ - was to introduce another threshold for intervention short of SMP (just as BEREC now proposes to do with its ‘tight oligopoly’ theory). The threshold involves finding conditions under which a retail market is sufficiently competitive to mean no SMP finding can be made, but insufficiently competitive to mean enough ‘excess profits’ are being earned to justify a finding a joint SMP in the upstream market (if no excess profits were being made downstream then I think even the Commission would accept that joint SMP upstream makes no economic sense). Are these the same level of ‘excess profits’ that we would rely upon to justify intervention in ‘tight oligopolies’? Higher? Lower? 38%? Again, nobody is saying and I doubt anybody knows.
29. Just because the Commission got it wrong in 2006 and accepted that there was some unknown profits threshold for competition in retail markets which was not SMP but which was nonetheless supposed to provide sufficient incentive for firms to co-ordinate upstream, it does not mean that BEREC should uncritically make the same mistake now. BEREC should debate properly whether a finding of joint SMP is required in the retail market to find joint SMP in the wholesale market, whether it is coherent to find to joint SMP in a retail market but single SMP upstream (as the ACM recently proposed to do), and how NRAs will harmonise their approach to oligopoly if this is the line they wish to pursue (which I strongly advise against). BEREC does not regard the Commission as the fount of all wisdom on other matters, and it should not do so when it comes to the interaction between retail and wholesale markets in this case.

¹⁰ Two qualifications here: (a) I accept that in the absence of vertical integration, a firm may have SMP upstream but other firms may compete hard downstream. That is not the case in telecoms (b) I recognise that if the price of the wholesale input is a small enough component of the downstream price, competition in the retail market may be insufficient to indirectly constrain a price increase upstream. Here I would still argue there are no grounds for intervention upstream and that the EC should still have said that a finding of SMP was indispensable in order for NRAs to intervene.

¹¹ Although this was also the year it discarded SMP to regulate international roaming, so perhaps it did. Either way, 2006 was a low point in a rather mixed decade for European telecoms regulation.

Refusal to deal

30. I think BEREC are right to suggest that joint SMP is most likely to be pursued when firms in the market are withholding supply. The ARCEP mobile case showed that once firms supplied in a wholesale market, it was very unlikely that they would be able to establish another focal point (e.g. on price or on other terms of supply). Refusal to deal also looks to be the most promising avenue for NRAs to pursue in fixed broadband wholesale markets, since cable operators have generally not offered wholesale access to their networks in the past and it might be argued that incumbents would not do so either in the absence of existing regulation.
31. However, I think this is to underestimate the difficulties with a retaliation mechanism if the focal point is refusal to deal. If deviation means granting access (to MVNOs or to resellers of the fixed network) then deviation is very difficult to reverse. Any contract to offer wholesale access will be for an extended term (given the investments both sides have to make to establish it). If deviation cannot be reversed, then BEREC rightly note that it becomes hard to see how the retaliation mechanism can be credible.
32. The other interesting aspect of this, overlooked in the Report, is that KPN has recently become the first operator to offer to extend access arrangements in the event that regulatory obligations to supply were withdrawn. In this case, it is also hard to see how KPN could be punished or how KPN and Ziggo could sustain a tacit agreement with a focal point that is something other than a refusal to supply (which it clearly cannot be). It is not enough for the ACM (or BEREC) to simply ignore such commitments because they are inconvenient for the analysis. Serious thought will need to be given to them.
33. In mobile, we have also seen some operators seek to unilaterally withdraw MVNO access, at least on overly favourable terms, in recent years. But, I find no evidence to suggest that this has been prompted by any form of retaliation, nor any evidence to suggest that operators have been able to tacitly co-ordinate their behaviour so as to squeeze MVNOs out of the market. As a result, NRAs should face significant challenges with any refusal to deal joint SMP case, even if the focal point and detection mechanisms in such a case appear relatively straightforward¹².

Proportionate remedies

34. I am troubled by BEREC's ruminations over whether or not all firms subject to a joint SMP finding should be subject to the same remedies (p.58). I can understand why NRAs might want to find joint SMP but then argue that this is not a particularly big step or particularly onerous for some firms because the remedies would only or mainly be directed at one particular firm.
35. I recognise that there might be some theoretical basis for this, since the incentives of each firm to tacitly collude depend in part upon their perception of the incentives governing the conduct of the other firms. This means that if the incentives of one firm change (either through regulation or for some other reason), then the tacit equilibrium can break down even if the position of the other

¹² This is not to say there *are* straightforward. The NRA would have to show, for example, that an incumbent with existing wholesale customers would actually have unilateral incentives to withdraw supply rather than continuing to serve them (and that a cable company would never have an incentive to supply if regulation were withdrawn from the market). Neither of these points is at all obvious in my view..

parties otherwise remains unchanged. BEREC does not make this argument in the Report, but I think it has some merit.

36. But even if it does, it only prompts more questions. If the tacit equilibrium can be broken by using regulation to change the incentives of one of the parties to the agreement, which of the parties do you choose? Even if there were some basis for regulating one firm with SMP over another that was subject to the same SMP finding, would this conform with European Treaty requirements not to discriminate unlawfully between firms? The basis for regulating in this case is a finding of SMP and there is no concept that I know of that would allow NRAs to establish a hierarchy amongst firms who have been found jointly to exercise SMP. If the choice of who gets regulated is essentially arbitrary, then I am not sure the NRA would have any legal basis for treating similar things differently.
37. Again, I think BEREC might want to consider these issues further. I look forward to contributing to further debate as and when they do.

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BEREC study on Oligopoly Analysis and Regulation

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1. I welcome BEREC's study of oligopolistic market structures and the challenges they pose for regulation in telecoms. This is the exactly the sort of strategic question which BEREC should be turning its mind to. My comments are informed by 25 years' experience of representing telecoms firms operating in such oligopolistic markets, some of whom I continue to advise today as an independent consultant. However the views expressed in this note are entirely my own. I offer them in the expectation that they are unlikely to be shared by industry representatives on either side of the argument.
2. My view is that oligopolies are inevitable and not to be feared. The question is how to regulate to ensure that they perform well (but not perfectly). Those who say that nothing need be done are wrong. But so too are those who would regulate oligopoly as if it is monopoly and are seeking to rewrite the rules accordingly. Oligopolies can function well provided firms have differentiated assets and provided competition is about more than price. The problem today is that much of our current telecoms regulation seeks to do the opposite by reducing options for differentiation and reducing competition to price. Thus, today's regulation dampens competition rather than sharpening it. Unsurprisingly, many companies prefer this situation and would like it to continue. It reduces the risk that they will be overtaken by rivals or forced to exit.
3. If BEREC continues with this approach to regulation, then oligopolies will indeed be problematic for regulators. A better approach, in my view, is to try to make our oligopolies more competitive. This means dismantling any regulation which seeks to make competition more 'symmetric'. Instead, regulators should promote measures which force greater differentiation (and more robust competition) amongst the oligopolists.

Oligopolies are a natural economic state

4. Oligopolies are pervasive across the European economy and commonplace in the telecommunications sector. Telecoms regulation has sought to lower entry barriers or positively promote entry, as occurred in the early days of UK cable network development (when BT faced lines of business restrictions), through spectrum reservations for new mobile entrants (as in the Netherlands recently), and throughout the recent history in fixed retail markets in almost every Member State. But the underlying tendency in the sector has always been towards concentration rather than fragmentation. The industry exhibits a centripetal rather than a centrifugal force, against which regulators have always battled.
5. Two important trends are pushing the sector further towards oligopoly today. The first is continuous technological innovation and consequent demands for network investment in the industry. This is something BEREC should welcome. The investment cycle is nearer to its peak today than at any time in the past 10 years, although these forces ebb and flow. They are most acute in mobile, driven by the data revolution and 4G, but they are also important in the ongoing transition from DSL to NGA (and could be even more so in future). To invest in these technologies firms have to be confident of making a return. The best indication of whether they

will do so is what they have done in the current cycle. Those that have not been able to make a return from their existing investments will be prompted to reassess their future plans and either seek to exit now or acquire greater scale through consolidation. These are the trends driving the M&A we observe in the industry today.

6. The investment cycle should also help to shift the focus of competition away from simple price discounting towards other forms of differentiation. Again, this is something BEREC ought to welcome. The commoditisation of European telecoms – responsibility for which must be shared between the industry and its regulators – has caused enormous damage over the past 20 years and will be difficult to reverse. It was associated with ‘hit and run’ entry into retail markets by resellers, enabled by aggressive wholesale access regulation. This model did have some positive results, notably in driving greater efficiency into the retailing activities of incumbent operators and forcing them to learn how to market technology, and in driving the adoption of new technologies into hard to reach groups of users. But it can also badly distort markets. The greatest damage was done because the risks which investors could take and the returns they could hope to earn become badly misaligned. Markets cannot function well, or sustainably, when this happens.
7. The second trend driving the sector towards oligopoly is ‘convergence’. In practice this means the bundling of fixed and mobile services in the retail market (rather than being anything more innovative) and is prompting operators to acquire the fixed or mobile assets they need to do this. This will have a significant impact on the structure of telecoms markets in most Member States, with the most likely outcome being that the fixed industry will increasingly map onto the mobile industry. When the music stops we will find three or four ‘converged’ players in each national market at both retail and wholesale levels. Interestingly, this may be more than we might have seen absent ‘convergence’ (where some of the smaller standalone mobile or fixed operations might otherwise have exited the market altogether.)
8. The point in outlining these forces is that they are both inevitable and, in many respects, welcome. BEREC could not reverse them, even it wanted to. In many cases, BEREC’s members will have little or no say in reviewing the transactions which will drive the industry in the direction I have outlined. However BEREC still has an important role in dealing with the consequences.

Regulating oligopolies

9. The questions posed by BEREC and no doubt developed in the responses of others to this consultation suggest a basic concern that retail competition will be too weak. This is because, without regulation, it is feared that firms in oligopolies will be able to tacitly co-ordinate to limit competition, or simply that there will not be enough firms to deliver satisfactory performance. The standard regulatory response to address such concerns would be to impose wholesale access obligations on the parties in order to promote entry into retail markets. But here there are concerns about whether ‘joint dominance’ or ‘joint SMP’ is a tool that can achieve this. This prompts the proposal that national regulators be given a new tool which better enables them to regulate oligopolistic wholesale markets without having to rely on joint dominance.
10. In my view, this would be entirely the wrong path to follow. This is for several obvious reasons:
 - a. it involves seeking to reinstate the reseller, ‘hit and run’ model of retail competition from which the sector is beginning to escape and which looks increasingly unsustainable for

the reasons described earlier. It represents an attempt to resist and distort the centripetal forces that drive the industry, rather than working with them.

- b. it seeks to treat oligopolies as if they were monopolies, rather than recognising the profound differences between these two states of affairs. Effective competition is not possible with monopoly, but it might be with oligopoly, even if it is not observed today. Simply applying access regulation to oligopoly ignores the opportunity to take other measures which might produce more competitive outcomes
 - c. I can see no justification to apply weaker or lower evidential threshold when assessing market failure in telecoms markets than when assessing competition in other parts of the European economy (where oligopolies are commonplace). If joint dominance is the right test elsewhere in the economy, it ought to be good enough for BEREC. As far as I can see, nobody has yet proposed an alternative threshold test which would have any rigor or clear basis in competition economics
 - d. the evidential threshold for joint dominance has to be higher than for single firm dominance. This is because of (b) above – by imposing access regulation to oligopolies regulators risk closing down other, better, options which are not available in the case of single firm dominance. In other words, the opportunity costs of regulating oligopolies are necessarily higher than regulating monopoly. In my view they are often much higher
11. This is why the better approach in most cases is to accept the market structure but to sharpen the competition amongst the oligopolists. BEREC and its members could do a great deal here – indeed it is regulation that is generally responsible for blunting the competition between European telecoms firms today. This is really just another way of saying that the performance of markets, oligopolistic or otherwise, depends on the competitive interactions between the firms and not on the number of firms present. Understanding how regulation affects these competitive interactions is therefore the critical task which BEREC must undertake, and which the current study could assist with.
12. In my view, the biggest enemy of competition in European telecoms is the commitment to ensuring ‘symmetry’ and policies which attempt to promote this. Again, this was understandable when the market was 100-0 and asymmetry dominated. But in Europe today, telecoms markets generally involve one firm with 50% or less of the retail market, and two or three other firms with perhaps 10-20%. Under such conditions, it is my view that attempts to promote symmetry invariably make markets *less* competitive rather than more.
13. Policies to promote symmetry are everywhere. The most obvious is spectrum caps and other policies which seek to restore ‘balance’ in the spectrum holdings of firms (‘balance’ is another word which has no place amongst well functioning competitive oligopolies). In my view, BEREC should be actively promoting imbalances in spectrum, since this is what motivates mobile operators to invest proportionately more in their networks in order to build and sustain competitive advantage over rivals. Without spectrum asymmetry, history suggests that it is very difficult to establish such a sustainable network advantage in European mobile. This is because each national market is so small that simply spending more capital can always be matched by at least some rivals (and the smaller the market, the more problematic this is).

14. The European Commission's proposals on spectrum licensing in the Connected Continent package might have moved us in the right direction. The recent decisions by DG Competition in the Irish and German mobile mergers (which did not contemplate spectrum divestitures by the merging parties except under rather improbable conditions) were also a move in the right direction in my view. But BEREC's members have generally pushed for more divestitures and worried about the 'imbalances' in spectrum holdings which result from auctions or mergers. It is true that if spectrum were sufficiently asymmetric then one firm might come to dominate the entire market. It would be fun to see them try (and consumers would benefit greatly in the process). But what I propose does not preclude regulators from intervening in the unlikely event that it were ever to occur. In the meantime, my point is simply that BEREC should be much more concerned that our pursuit of spectrum 'symmetry' is blunting competition and using forthcoming auctions of spectrum to try to change, not perpetuate, this state of affairs.
15. The same arguments apply to many other policies. Obligations to offer national roaming or MVNO access also blunt the ability to differentiate and incentives to invest in network advantage. Network sharing should also be viewed with caution. Network sharing allows the industry to reduce costs in markets which have become commoditised, and so is more popular towards the end of the investment cycle rather than at the beginning. But it is still likely to blunt competition and reduce opportunities for network differentiation.
16. I take the same view when it comes to calls for greater industry 'co-operation' in order to compete with OTT services. 'Interoperability' always sounds beneficial and competing with American OTTs seems a worthy aspiration. But 'interoperability' also neutralises network effects and tends to limit opportunities for operators to differentiate on the retail market. It also tends to mean that the launch of new services has to be closely co-ordinated amongst competitors, removing any element of surprise or first mover advantage.
17. In fixed markets, some degree of asymmetry is provided at the moment by the very different architectures (and cost profiles) of cable and copper –based infrastructures. But, again, overly intrusive access regulation can blunt incentives to invest or differentiate these infrastructures. And in the longer term it appears that the cable and copper networks will look increasingly alike. BEREC should anticipate this and consider what might be done to preserve differentiation if and when this happens.
18. An important area of differentiation in fixed broadband retail competition may turn out to be exclusive content rights (although this may also differ by Member State). In a converged environment, firms with a strong position in content rights can inject new competitive pressures into oligopolistic broadband markets. If so, it is not at all obvious to me that competition would be helped by obliging the holders of such rights to share them with others (as, for example, Ofcom has required in the UK), or by introducing 'caps' to limit the number of games or other content assets that can be acquired by any individual firm. Vertical integration between content providers and network operators might also help to sharpen competition in oligopolistic markets.
19. Similar considerations would apply to other exclusive marketing or partnership arrangements, such as might arise between OTT service providers and individual network operators, or between handset manufacturers and mobile operators. All of these attempt to introduce a greater degree of differentiation into markets which can otherwise easily become commoditised and price-based.

They should generally be welcomed, if not actively encouraged, by BEREC as a way of sharpening competition in oligopolistic markets. An obvious concern here is that the ‘net neutrality’ rules being contemplated by Commission and Council under the Connected Continent package might reduce opportunities for differentiation in internet content. If regulation requires all oligopolists to offer the same internet services on exactly the same (regulated) terms, we should not be surprised if competition is diminished as a result. Again, the right response is not to accept a failure of competition and regulate further, but to take steps which allow the oligopoly to perform better.

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