

PosteMobile
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Berec
Body of European Regulators for Electronic Communications
Riga - Latvia

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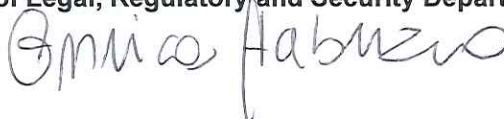
Subject: PosteMobile Response to BoR (5) 74 - BEREC Report on Oligopoly Analysis and Regulation

PosteMobile, the leading MVNO operator in Italy, is pleased to provide its response to the public consultation on above mentioned draft report.

You can find below PosteMobile contribution on the public consultation as Annex 1.

Best regards.

PosteMobile S.p.A
Enrica Fabrizio
Head of Legal, Regulatory and Security Department

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Annex 1

A. Executive summary and general remarks

PosteMobile welcomes the opportunity to respond to the consultation on the draft BEREC Report on Oligopoly Analysis and Regulation.

PosteMobile agrees with BEREC that the EU electronic communications markets have recently witnessed an increased occurrence of oligopolistic (and duopolistic) market structures, driven inter alia by a trend towards bundles, fixed-mobile integration, the consolidation of the industry via mergers and acquisitions **especially in the domestic mobile sector** (so-called 4 to 3 players reduction).

The trend towards oligopolistic market structures may in some instances contribute to a sub or non-competitive market outcome resulting in harm/welfare loss for users (consumers and businesses/public administrations), thus requiring regulatory action. Wholesale markets, in particular the mobile one, are particularly prone to the increased occurrence of oligopolistic market structures. This makes it absolutely crucial that NRAs who have traditionally been focused on regulating markets only on the basis of individual SMP have the right tools to address joint dominance.

While the regulatory framework provides NRAs with a tool box to assess and regulate non-competitive markets and foresees the concept of joint dominance, BEREC rightly identifies two fundamental problems – firstly, joint dominance has been almost impossible to prove, with the cases brought before the European Commission under the Article 7 consultation procedure mostly overturned or withdrawn; secondly the concept of joint dominance covers only tacit collusion, leaving ineffective tight oligopolies untouched (both under ex ante and ex post intervention).

If NRAs cannot effectively tackle 'harmful' oligopolies and duopolies because the burden of proof of joint dominance is too high and the exclusive reliance on the principle of dominance leaves certain non-competitive market structures untouched, there is a serious risk that the gains in welfare brought about by liberalisation and increased competition in the electronic communications markets will be lost in the medium to long-run.

In this setting, PosteMobile therefore vividly welcomes the work which BEREC is carrying out in this context and the conclusions reached in the draft report. PosteMobile believes that the regulatory framework must be adapted to ensure that market failures stemming from anti-competitive oligopolistic market settings – including ineffective tight oligopolies and duopolies – are properly tackled. A regulatory framework which relies merely on the principle of proven dominance by specific firm(s) is not fit for purpose.

PosteMobile supports adapting the principles and preconditions of the merger regulation SIEC-test to regulatory practice. In PosteMobile's view, **the principles underpinning the SIEC test should mutatis**

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mutandis be applied in ex ante regulation and the regulatory framework should be modified accordingly. Ex ante regulatory intervention in tight oligopolistic and duopolistic markets should NOT ONLY be dependent on a finding of joint dominance but could ALSO be triggered by the finding of a market structure which on a forward looking basis is likely to significantly impede the development of effective competition, notably in markets where permanent economic bottlenecks persist. A set of presumptions with regard to market structure could be established.

PosteMobile looks forward to further engaging with BEREC on this discussion.

We remain of course at your disposal to provide any further clarifications. To that effect, please contact Alberto De Luca (Head of Regulation at PosteMobile: Alberto.DeLuca@postemobile.it ; 06 96674 880).

Remarks on the context and objectives of the BEREC draft report¹

1. PosteMobile agrees with BEREC that **not all oligopolies raise competition issues and are harmful per se.**

The expression oligopoly identifies a situation in which a particular market is controlled by a small group of operators (oligopolists). Some oligopolies are 'benign' in terms of competition; others may be 'malign' where they are particularly conducive to uncompetitive outcomes.

From a competition law and regulatory perspective, the key issue is whether the few companies which control the market enjoy a position, if not to determine, at least to have an appreciable effect on the conditions under which competition will develop, and in any case to act in disregard of any such competitive constraint and raise prices by restricting output without incurring a significant loss of sales or revenues, to the detriment of wholesale and retail activities and ultimately the customers (consumers and businesses).

As BEREC notes, a market with an oligopolistic structure does not necessarily require regulatory intervention because competition in an oligopoly is not per se ineffective. Effective oligopolistic competition can indeed be observed in certain cases and lead to an optimal market outcome in the long-run².

2. PosteMobile concurs with BEREC that the **EU electronic communications markets have recently witnessed the increased occurrence of oligopolistic and duopolistic market structures**, driven inter alia by the increased trend towards bundles, fixed-mobile integration, increase in platform competition, convergence of market shares and the consolidation of the industry via mergers and acquisitions (and less

¹ BEREC draft report, chapter 3.

² E.g. when the benefits from increased innovation and investment incentives outweigh higher prices or actual and potential competition limits the oligopolist's power to raise prices.

stringent/more pro-consolidation merger control policy³⁾ especially in the mobile sector.

As BEREC recalls, the electronic communications markets have inherent oligopolistic characteristics, driven by very high legal, regulatory and/or structural barriers to entry⁴⁾, bottleneck issues, scarcity of resources and economies of scale and scope which limit market entry and the number of infrastructure-based competitors. Huge investments and sunk costs are required from operators aiming to deploy physical networks and start providing services. Efficient infrastructure competition is thus inherently limited, including in the transition to NGA.

With regard specifically to the mobile sector, spectrum scarcity and management, coupled with the absence of effective wholesale access in some Member States, have led to the creation of markets which are mostly oligopolistic, with two to three operators holding most of the market share. While pro-competitive policies – including on spectrum management, MTRs, ‘on-net-off-net’ discrimination – have injected more competition in the market, the role played by new entrants in increasing competition may not be relevant if entry into the market becomes unlikely due to the costly deployment of networks or lack of wholesale access.

Policy guidance and actions taken by the European Commission, competition authorities and NRAs will be key to determine the level of development of oligopolistic market structures e.g. whether the EC and competition authorities will adopt a more lenient or strict approach when assessing mergers, whether policy makers and NRAs will ensure that the regulatory framework is adapted to tackle all non-competitive oligopolistic market structures.

3. PosteMobile agrees that the wholesale market of access and call origination on public mobile telephone networks (market 15/2003) is particularly prone to the development of oligopolistic structures. As BEREC has recognised, these markets are witnessing a reduction in the number of MNOs, due to mergers and acquisitions, and may raise competition issues, particularly when new market entry is unlikely to materialise. Going forward, mobile data access will be the key service provided to retail customers in mobile markets. The risk of price squeeze and market eviction of MVNOs is particularly high in this regard given that in many countries retail prices are lower than wholesale charges (wholesale international roaming charges and/or negotiated national roaming prices).

4. While consideration of **OTT (Over-The-Top) services provided by content and application providers**

3 Examples of consolidation include: (i) fixed-fixed mergers with altnets acquiring each-other, altnets acquired by incumbents or cable in-country consolidation and international expansion. Cases include e.g. Altnets: 1&1/Versatel (Germany); Incumbent-Altnet: KPN-Reggefiber (Netherlands); Cable: Liberty Global/Ziggo (Netherlands), Liberty Global/Virgin Media (expansion to UK); (ii) fixed-mobile with mobile operators acquired by cable operators or vice-versa. Cases include e.g. Vodafone/Kabel Deutschland; Vodafone/Ono; Numericable/SFR and (iii) in-country mobile-mobile e.g. the recent 4-3 mobile mergers. Cases include H3G/Orange Austria, H3G/Telefonica Ireland, Telefonica Deutschland/E-Plus.

4 E.g. entry into the relevant market requiring large investments and the programming of capacities over a long time in order to be profitable; continuing control over legacy physical infrastructure that is impossible or difficult to duplicate; network externalities or economies of scale and scope; requirements which may entail spectrum scarcity.



(CAPs) may be relevant when assessing the evolution of telecommunications markets, PosteMobile agrees with BEREC that even if competitive pressure may be exerted at the retail level for certain media and voice services, OTTs are unlikely to increase competition at the telecommunication access infrastructure level or to distort a coordinated outcome at the wholesale level because OTT providers depend indirectly on the underlying infrastructure provided by telecoms operators. Their ability to affect joint dominance is thus limited⁵.

Experience to date has shown that despite technological advances and the development of new services at the retail level, the economics of fixed network deployment still determine that the duplication of the last mile is not economically feasible or sustainable in most areas. A plethora of services can be developed at the services layer, but the fixed network layer, which enables retail service provision, remains largely monopolised or duopolised. This has not changed with the transition to NGA, nor can it be expected to change in the long term.

B. Is a new framework to address oligopolistic/duopolistic market structures needed, and how should it be defined?

PosteMobile agrees with the economic theory and conceptualisation put forward by BEREC in Chapter 4 and welcomes the comprehensive analysis of relevant precedents on oligopoly analysis and regulation described in Chapter 5, the guidance on how NRAs should address joint dominance provided in Chapter 6, the assessment of the 'regulatory gap' in the treatment of 'tight oligopolies' in Chapter 7 and the assessment of the treatment of remedies in the context of oligopolies.

a. Why is a new test needed?

In PosteMobile's view, the tools provided by the regulatory framework to tackle oligopolistic market structures are ineffective. **Two fundamental problems identified by BEREC in the draft report are verified. Firstly, NRAs have rarely been able to apply the concept of joint dominance in the context of ex ante regulation** and this is particularly concerning when it comes to mobile markets. In PosteMobile's view, the rare application of this concept stems not only from NRAs lacking guidance on how to apply the joint dominance concept, but also from the extremely high burden attached to the proof of joint dominance. Indeed even though coordinated effects can effectively be observed in a relevant market, NRAs were in several instances unable to provide empirical evidence and argumentation which would appease the Commission's regulatory scrutiny. This leaves NRAs with their hands largely tied when trying to tackle

⁵ BEREC draft report, pages 10 and 44.

collusive oligopolistic markets. Furthermore, the experience of a few NRAs with the positions taken by the Commission and by national appeal bodies has dissuaded other NRAs from seeking to address problems effectively observed.

Secondly, **the reliance on market dominance to regulate oligopolistic markets leaves tight oligopolies and duopolies leading to non-competitive market outcomes untouched, thus creating a 'regulatory gap'**. As BEREC rightly states, these are market structures where although undertakings act independently and do not coordinate market conduct, the market characteristics are such that the outcome is non-competitive. If joint dominance cannot be proven, NRAs are not empowered to impose regulatory obligations.

In PosteMobile's view, **a shift in the way oligopolistic and duopolistic market structures are dealt with under the regulatory framework is urgently needed. NRAs must be given the power and regulatory tools to foster effective competition. The principle of dominance should therefore NOT constitute the ONLY applicable threshold to justify regulatory intervention.** This is essential to allow regulators to properly fulfil the goals of the regulatory framework, namely bearing in mind that ex post competition enforcement by relying on dominance is also not suited to deal with tight oligopolies. We also wish to emphasise that the ex ante regime is intended to enable intervention on a forward-looking basis in order to prevent abuse.

b. How should the new test be defined?

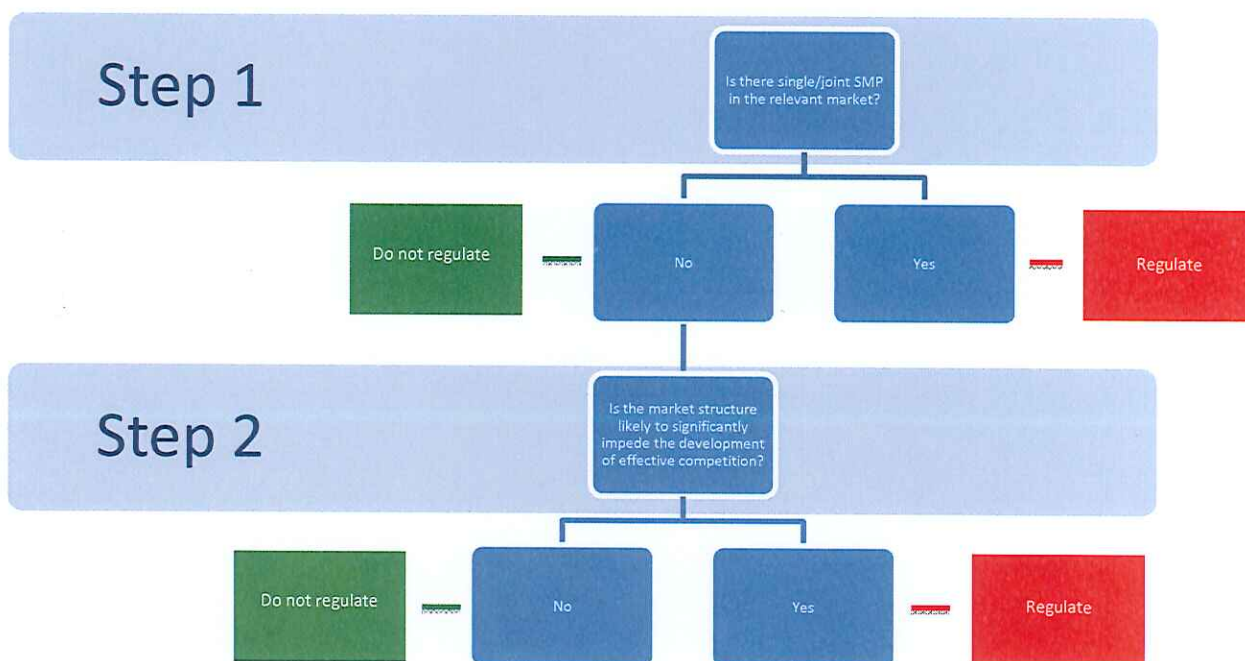
PosteMobile very much welcomes the parallelism established with gap cases in merger control and the 2004 reform of the substantive test. The SIEC⁶ test was introduced specifically to close the gap in the system of prevention which failed to prohibit mergers which did not result in the creation or strengthening of a dominant position but still resulted in non-competitive unilateral effects (e.g. the ability of post-merger firms to raise prices, lower output and reduce innovation due to the removal of competitive constraints.⁷)

⁶ Strong Impediment to Effective Competition.

⁷ Recital 25 of the Merger Regulation states in this regard that *"In view of the consequences that concentrations in oligopolistic market structures may have, it is all the more necessary to maintain effective competition in such markets. Many oligopolistic markets exhibit a healthy degree of competition. However, under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition. The Community courts have, however, not to date expressly interpreted Regulation (EEC) No 4064/89 as requiring concentrations giving rise to such non-coordinated effects to be declared incompatible with the common market. Therefore, in the interests of legal certainty, it should be made clear that this Regulation permits effective control of all such concentrations by providing that any concentration which would significantly impede effective competition, in the common market or in a substantial part of it, should be declared incompatible with the common market. The notion of 'significant impediment to effective competition' in Article 2(2) and (3) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned."* (bold added)

In PosteMobile's view, the principles underpinning the SIEC test should *mutatis mutandis* be applied in ex ante regulation and the regulatory framework should be modified accordingly. Ex ante regulatory intervention in tight oligopolies should NOT ONLY be dependent on a finding of joint dominance but could ALSO be triggered by a market structure which on a forward looking basis is likely to significantly impede the development of effective competition, notably in markets where permanent economic bottlenecks persist.

Borrowing on the principles underpinning the SIEC test, a tight oligopolistic/duopolistic market structure could on a forward looking basis be deemed to significantly impede the development of effective competition in those cases where the lack of competitive constraints and pressure on the few market players is found, in particular but not exclusively as a result of the finding of single or joint SMP. NRAs would therefore carry out a two-step approach – see below:



Several criteria/evidence could be looked into in order to determine whether a specific market structure is likely to significantly impede the development of effective competition, in particular the criteria put forward by BEREC to identify tight oligopolies leading to sub-competitive results⁸ e.g. high degree of market

⁸ BEREC draft report, chapter 7.1.1.

concentration, high barriers to entry and no significant potential new entrants, high switching costs, low growth of demand, low cross-price elasticity and low countervailing buyer power. Evidence to sustain such finding could include e.g. high and stable market shares, excessive prices, low service choice, poor customer experience, low speeds offered, low level of innovation and network investment, limited market entry, lack of wholesale access in the absence of regulation, margin-squeeze, non-customer-friendly contractual clauses.

A set of presumptions with regard to market structure could be established in addition to the existing regime. E.g. a retail and/or wholesale market where a single operator or where two or more market players jointly hold a significant share of the market could trigger a presumption to fulfil the significant impediment test (to be examined in-depth in the market analysis) and thus justify regulation.

PosteMobile strongly urges BEREC to explore options such as the ones presented above or others which would allow NRAs to tackle ineffective tight oligopolies/ duopolies.

C. BEREC's suggested framework for assessing joint dominance⁹

PosteMobile broadly agrees with BEREC's suggested framework for assessing joint dominance. With regard to the standard of proof, PosteMobile agrees that conceptually the same standard of proof should apply to markets with existing (single SMP) regulation in place and those without existing regulation. The prevention of a regulatory gap as described above should be tackled through a market structure presumption and significant impediment test (see chapter C supra) rather than through the definition of different standards of proof for joint dominance.

D. Remedies in the context of harmful tight oligopolies¹⁰

PosteMobile agrees with BEREC's assessment, namely that a case-by-case and proportionate analysis is needed when imposing remedies on harmful oligopolistic markets.

E. Recommendations to amend the Regulatory Framework

PosteMobile very much welcomes the clarification and guidance on joint dominance provided in the BEREC draft report and agrees with BEREC's proposals concerning the review of the SMP Guidelines. PosteMobile very much appreciates BEREC's openness to engage in a dialogue to ensure competition problems in tight oligopolies are tackled.

As mentioned, in PosteMobile's view, the Regulatory Framework should be adapted in order to ensure that ex ante regulatory intervention in oligopolies and duopolies is NOT ONLY made dependent on a

⁹ BEREC draft report, chapter 6.

¹⁰ BEREC draft report, chapter 6.

finding of joint dominance but ALSO triggered by the finding of a market structure which on a forward looking basis is likely to significantly impede the development of effective competition, notably in markets where permanent economic bottlenecks persist.

PosteMobile looks forward to further engaging with BEREC on this discussion.