

**Numericable-SFR comments on:  
BEREC draft report on Oligopoly Analysis and Regulation**

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**Public consultation of BEREC from 10 June to 1<sup>st</sup> August 2015**

Numericable-SFR welcomes this opportunity to contribute to the works of BEREC in the mark of the regulation of the Telecommunication sector.

In this document, we expressed our comments only on issues raised by the draft report that could have harmful consequences and hamper both investments and innovation. It is the case with the definition of tight oligopoly and the proposed review of the standard of proof.

We hope that our contribution will be useful to BEREC and that the Telecommunication sector does not become disadvantaged compared to other economic sectors.

**1- Regarding general principles on BEREC's draft report**

- **Ex ante regulation intervention should continue to be based on relevant markets with regard to the three criteria as defined by article 15 of the Framework Directive (and also included in recital 11) of European Commission Recommendation on relevant market of 2014.**

Existing regulation is based on the observance of several facts such as:

- Presence of high entry barriers,
- Reduction or absence of effective competition,
- Relative inefficiency of competition law to bring remedies to the competition problems which had been fully identified

Recommendation on relevant market of 2014, in its recital 17 states that "the application of the three criteria should limit the number of markets within the electronic communications sector where ex ante regulatory obligations are imposed and thereby contribute to the aim of the regulatory framework to reduce ex ante sector-specific rules progressively as competition develops in the markets.

Therefore Recommendation on relevant market of 2014 reduced again the list of relevant markets to four whereas in the Recommendation of 2007 seven relevant markets were in the list.

It would be particularly unjustified to engage on the path toward an increased burden and an extra layer of ex ante regulation whilst the recent Recommendation concluded to downsizing potential markets subject to ex ante regulation with regard to the competitive situation perceived in the different markets.

A step backwards with reinforcement of ex ante regulation would present serious regulation uncertainty and risks.

- **Intervention of ex ante regulation must be justified by competition problems on retail markets and forward-looking perspective, as stated by recital 8 of the Recommendation on relevant market of 2014.**

Examination of competition on retail market must continue to be the starting point of a market analysis. Therefore, identification of potential competition problems on retail markets (real ones or potential ones likely to happen) should be the “operative event” that justify ex ante regulatory intervention<sup>1</sup>.

Recital 8 of the Recommendation on relevant markets of 2014 states that the “the analysis should take into account the effects of other types of regulation applicable to the relevant retail and related wholesale market(s) throughout the relevant period.”

- **Perspective of tight Oligopolies situations does not need any change to existing Framework of ex ante regulation.**

In the future, some electronic communication markets could develop toward an oligopoly situation, even if the role of the different players, existing ones or potential newcomers it deserves a case by case thorough analysis (fringe competitors, small operators or niche operators, OTT, suppliers of services or applications). Recital 10 of the Recommendation on relevant markets of 2014 particularly emphasizes the increasing role OTTs are likely to play in the coming years in electronic communications networks operators.

However, existence of an oligopoly does not constitute itself a motive for ex ante regulation. As BEREC underlines, the electronic communication sector is having highly specific features - high fixed and sunk costs, significant technological evolutions, cyclical variations, and uncertainty on demand for innovative services – which explains that oligopoly situations may occur naturally and on this basis it does not present any competition problem<sup>2</sup>

Significant Investments and innovation are at stake behind this natural structure of market at the time when operators in Europe have to go on deploying fixed and mobile networks which are always more efficient in terms of capacity and bandwidth (NGA and LTE).

In such conditions, it would be particularly risky and hazardous to change the existing framework to bring ARNs to regulate ex ante operators which would not be in a single or joint dominance in a market. Indeed such a scenario could lead potentially to creating errors of type I (per se ban of competition measures) with harmful consequences on investment and innovation and no consumer’s interests at last.

Moreover, even if some operators could find themselves in a situation of tight oligopoly without having obligations applicable only to SMP operators, it does not mean that they exercise their activity without any regulatory constraint in the national framework in which they operate.

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<sup>1</sup> Such ex ante regulation must first apply to wholesale markets before to consider stronger measures on retail markets, as detailed in recital 18 of the Recommendation.

<sup>2</sup> « BEREC acknowledges that oligopolistic market structures may also arise in a natural way in the context of electronic communications markets: high fixed and sunk costs for deploying access infrastructure, economies of scale and scarcity of resources (as is the case for spectrum) may limit the number of players. »

- **The three cumulative criteria of Airtour's case are relevant to demonstrate existence of a joint dominance to justify ex ante regulatory intervention (market transparency, existence of a credible retaliation mechanism in respect of conduct deviating from the common policy, foreseeable reaction of current and future competitors as well as of consumers which would not jeopardize the results expected from the common policy).**

The fact that few precedents exist regarding ex ante regulatory obligations imposed to known joint dominance does not mean that the test of the three criteria of the Airtour's case is not adapted but means that the concrete implementation of the three criteria led to the conclusion of the absence of joint dominance.

- **The standard of proof to identifying a joint dominance should not be lowered.**

BEREC considers that the standard of proof in order to demonstrate a joint dominance must be the same i) in the case of a market previously regulated (through obligations imposed to a single SMP operator on the relevant market) and ii) in case of markets which were never regulated. Numericable-SFR agrees with this position.

The standard of proof should not be lowered in the first case than in the second case, under the pretext that regulation removal could have an incidence on competitors of the operator historically regulated. Indeed if regulation is withdrawn it is precisely due to competition developments into the relevant market.

Anyhow, BEREC is making a semantic shift when considering that the type of proof could be different in both cases. According to BEREC, NRA should rely more on forecasts and economic reasoning than on real facts in the case of previously regulated markets.

Numericable-SFR disagree with such position: demonstration of a joint dominance must be based only on factual evidence so as to ensure a prospective analysis without speculating on the most probable market situation in the absence of regulation (greenfield approach) and avoid type I errors (per se ban of pro-competition practices).

## **2- In practical terms**

BEREC assesses that some markets may in the future show more and more oligopolistic market structures and joint dominance situations or tight oligopolies requiring set up of ex ante regulation. The draft report of BEREC targets more particularly the markets for access and call origination on mobile networks and, broadband/ultra-high-speed markets on fixed networks. Numericable-SFR disagrees on all these points.

- **Analysis of the market for access and call origination on mobile networks does not need any modification of the existing regulatory framework under "pretext" of evolution in the mobile market structure.**

This market 15/2003 has no longer been listed amongst relevant markets defined by the European Commission since its 2007's Recommendation.

Reduction of the number of mobile operators due to a series of mergers and takeovers would bring justification of a new ex ante regulatory intervention according to BEREC. Nevertheless, such mergers and takeovers were necessarily subject to authorisation from the competent authorities (National Competition Authority or European Commission) and to appropriate remedies when necessary.

The dynamic competition of mobile retail markets in Europe, including statement of competitive retail prices, is indeed the cause of the absence of a wholesale market for mobile access and call origination networks in the list of relevant markets of 2014's Recommendation.

On retail mobile markets in Europe in general and in France in particular, no distortion problems affects or can affect future competition so as to justify a new ex ante regulatory intervention.

At last, no competition problem, potential or real, demonstrates any necessity for ex ante regulatory intervention on wholesale for access and call origination on mobile networks, all the more that in some cases like in France; mobile operators have commitments in the mark of their authorization for use of frequencies. French operators are already subject to regulatory constraints.

- **Analysis of broadband/ultra-high-speed markets on fixed networks does not need any modification of the existing regulatory framework under pretext of tight oligopoly perspectives.**

BEREC judges that the fixed broadband and ultra-high broadband markets may show situation of tight oligopoly in the future:

- « *The provision of electronic communication services may therefore be geared towards a scenario where historical fixed incumbents and some access-based alternative operators are deploying fibre-based NGA networks (either FTTH or FTTC) and cable operators upgrade their networks on the basis of the DOCSIS 3.X technology.* » (cf. p 9)
- « *a market situation where broadband products are offered on two different infrastructures, traditional copper and cable, might be susceptible to a tight oligopoly.* » (cf. p 50)

However, risks of type I errors would be particularly high in case of ex ante regulation without identifying significant market power. Then it would be very hazardous and too risky to implement a new regulatory regime binding upon operators in situation of tight oligopoly without joint or single dominance.

As already mentioned above in general principles, innovation and investments are at stake behind this natural structure of market at the time when operators in Europe have to go on deploying fixed and mobile networks which are always more efficient in terms of capacity and bandwidth; competition in infrastructure for broadband and ultra-high speed fixed networks explains and justifies that markets evolve towards oligopoly situations. The so-called problems rose by such situations and intended to justify an ex ante regulatory intervention would refer to speculative analysis not a prospective analysis.

Moreover, such an ex ante regulatory power does not finds any justification, all the more that operators in the absence of obligations related to their significant market power are still subject to certain regulatory constraints.

This is the case in France; the Arcep put in place a symmetrical regulation which applies to operators deploying ultra-high speed networks in optical fiber (FTTH). As stated by Arcep, in its report of activity in 2011, "This framework embodies a fundamental development in regulation, namely the gradual shift from asymmetrical regulation – symbolized by the tremendous success of unbundling – to symmetrical regulation that sets rules that are common to all operators wanting to invest in this new network.»

Such a mechanism of symmetrical regulation which was put into place partly because of the existence of a limited number of operators deploying FTTH networks invalidates any additional intervention on this market on the basis of a supposed tight oligopoly situation.

Furthermore, during examination of the concentration's operation between Numericable and SFR, the French competition authority conducted a competition review on the effects on the different wholesale and retail markets of electronic communication services.

The aim of this analysis was to identify competition problems that the operation was potentially carrying on these different markets based not only on a prospective view of the new entity but also on the one of its competitors and in particular Orange.

Numericable-SFR has taken a number of commitments to the French Competition Authority which aimed at preserving dynamic competition. More specifically, Numericable-SFR has to offer wholesale access to its network with contractual, technical and price conditions subject to ex ante monitoring by the French Competition Authority.

**Undertakings of Numericable-SFR were considered sufficient by the French Competition Authority to remedy to horizontal and vertical effects of the operation on the relevant markets.**

In Europe and, in France in particular, a system preventing distortions of competition resulting from concentration exists.

Decision from a Competition Authority should not be questioned by NRAs otherwise it could jeopardize its mission and the principle of legal certainty.

Therefore preexistence of commitments resulting from a decision of a Competition Authority aiming at preventing deterioration of existing competition dynamics from concentration operations in various markets of electronic communications is not compatible with additional ex ante regulatory intervention. A new ex ante intervention on these markets would necessarily hamper existing remedies.

- **Eventual Competition problems which are identified in a market, whatever the structure is, must be handled by a Competition Authority with cross-sectorial investigation powers.**

At the European level, the European Commission benefits from investigation powers which facilitates necessary investigations each time the Commission assesses that a specific market is presenting some competition problems.

In some countries and, in France in particular, when stakeholders infringe competition law in a specific market, the Competition Authority is referred to the case or may also take the initiative and refers the case to itself.

Tight oligopoly situations where eventual competition problems would be identified should then be analyzed by Competition Authorities.

### **3 – Transitional-consistency issues/proportionality/regulatory equity**

Transitional consistency issues, proportionality and equity issues can be raised when regulation takes the form of ex ante obligations for some actors (incumbent operators still notified as single SMP) and ex post obligations for others (commitments taken in the mark of concentration) by different authorities (NRA vs Competition Authority) and according to different modalities (multi-annual analysis vs compliance to commitments).

These considerations were not found into the BEREC's draft of report by Numericable-SFR.