

## **Deutsche Telekom's response to consultation on BEREC's draft Report on Oligopoly Analysis and Regulation**

Deutsche Telekom would like to take the opportunity to comment on BEREC's draft report on oligopoly analysis and regulation<sup>1</sup>.

### **General Remarks**

In the consultation document BEREC suggests the emergence of a specific market structure (i.e. tight oligopolies) that requires a reduction of the regulatory threshold for National Regulatory Authorities (NRAs) to intervene in the telecoms market. However, in our opinion the draft report does not describe the current level of competition in the telecoms sector properly and does not provide evidence for the need to add a new tool for regulatory intervention. BEREC's suggested approach is not consistent with the transitory nature of ex-ante regulation, where sector-specific regulation should be phased out when effective and sustainable competition is in place. The suggested approach threatens a much needed sustainable investment climate.

Deutsche Telekom does not see the need for a specific new approach to impose remedies on SMP operators and hence granting NRAs with more regulatory tools. We believe that the current regulatory framework, combined with general competition law, provides sufficient tools to tackle the situation described by BEREC in its draft report. In fact, the framework for intervention – either through general competition law (in joint dominance cases) or in the context of merger control (through the application of the Airtours criteria and the SIEC test) – is well established. It is important that NRAs understand their role as regulators, the importance of defining markets properly, taking into account all competitive constraints the telecoms industry is facing, and carry out appropriate market analysis.

In our opinion the Draft Report is based on outdated market definitions and does not correctly describe the current level of competition in the telecoms sector. In particular, the draft does not take into consideration the dynamic nature of the telecommunications market.

Finally, the proposed approach would lead to increased quantity of regulation as opposed to improved quality. The approach suggested by BEREC's in the consultation document would only lead to more regulatory complexity, more regulatory uncertainty and potential inefficient overregulation when a simplified and future-proof regulatory regime is needed. It will also carry the risk of further fragmentation of regulatory intervention to the detriment of a single market.

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<sup>1</sup> BEREC Report on Oligopoly analysis and regulation – BoR (15) 74

## **I. Regulation only in case of market failure**

It is important to note that ex-ante regulation should only be used as an “*ultimo ratio*” policy instrument, if there is no other means to ensure effective competition. The EU regulatory regime has already widened the scope of regulation towards all addressees which have significant market power (SMP). In order to limit regulatory interventions and to avoid regulatory errors the EU Commission advocates the three-criteria test: (i) the existence of high and non-transitory entry barriers, (ii) absence of dynamic competition behind entry barriers and (iii) insufficiency of EC competition law remedies alone to address the concerned market failure. Instead of having these criteria in mind and examine carefully which markets still need to be subject to ex-ante regulation, BEREC suggests the extension of NRAs’ competences to original functions of competition law (respectively Art. 102 of the Treaty on the Functioning of the European Union).

BEREC’s suggested approach is not consistent with the transitory nature of ex-ante regulation, where sector-specific regulation should be phased out when effective and sustainable competition is in place. The draft report shows in the opposite direction, i.e. need to increase the scope of regulation, while disregarding other policy objectives enshrined in the EU framework such as promotion of efficient investment and innovation in new and enhanced infrastructures. In fact, in the scenarios described in the consultation paper, regulation may apply even if no operator has been subject to SMP regulation or when SMP-regulation is about to be lifted. In the first scenario NRAs would have to decide whether to regulate so-called “tight oligopolists” outside the current system of SMP regulation. In the second scenario, the already complex process of lifting SMP-regulation would face an extra hurdle, namely that regulation could remain in place, or different regulation could be imposed on the “tight oligopolists” even if single SMP cannot be found in the market.

## **II. BEREC is working on the basis of misguided hypotheses**

In the consultation document BEREC makes two suggestions:

- 1) need for clarification of the conditions for finding collective Significant Market Power; and
- 2) probable need for new regulatory tools to be granted to telecoms regulators, allowing these to regulate what BEREC refers to as a “tight oligopoly”, i.e. a non-coordinated oligopoly.

We are of the opinion that there is no need to change the current regulatory framework for finding collective SMP nor to confer NRAs with new regulatory tools to tackle oligopolistic markets. In our opinion, the exercise BEREC is carrying out could be spared.

### **1. No need to clarify the conditions for finding collective market power**

The case law developed in the context of Art. 102 TFEU and merger decisions is considered

to be well established and capable of tackling situations of collective dominance<sup>2</sup>. Discussions in relation to Article 102 TFEU (Art. 82 old) can be traced back at least to the early 1970s. Later on - between 1998 and 2002 - the law and decisional practice on collective dominance developed considerably. Initially, the EU Commission applied the concept only to mergers likely to result in a duopoly<sup>3</sup>. In *Kali & Salz* (1998), the Court of Justice confirmed the applicability to cases where concentrations lead to the creation or strengthening of a collective dominant position “that is, a dominant position held by parties to the concentration together with an entity not a party thereto”<sup>4</sup>. On that occasion, the Court of Justice explained that the dominance test should be interpreted in a teleological manner so as to apply to all concentrations likely to prove incompatible with a system of undistorted competition. In *Gencor* (1999), the Court of First Instance made it clear that structural links between oligopolists are not a prerequisite for a finding of collective dominance<sup>5</sup>. After *Gencor* the Commission considered issues of collective dominance in a great number of cases but indicated that competition concerns are unlikely to be found when the oligopoly involves more than four companies<sup>6</sup>. Subsequently, in *Airtours* (2002), the Court of First Instance, while confirming that collective dominance is not restricted to duopolistic dominant positions<sup>7</sup>, annulled the Commission’s decision and set out detailed criteria for the finding of joint dominance.

Against this background, BEREC should demonstrate where there is room for further improvement when analyzing “tight oligopolies” and how NRA’s and national courts are better placed than the European Commission and the European Courts.

## **2. No need for new regulatory “tools”**

The suggested approach to regulate “tight oligopolies” would pave the way for potential regulation of virtually all situations on current telecommunications markets and the perpetuation of regulation even in absence of a dominant position. In the light of the transitory nature of sector-specific market regulation it is important that deregulation is not prevented by lowering the threshold for regulatory intervention and applying regulation on each market participant.

There are further sectors that have market conditions similar to the ones identified by BEREC in the draft report. If the telecoms sector should be regulated more intrusively in the future than other parts of the economy, capital is likely to flow out of the telecoms sector into other sectors subject to less stringent regulation. This is difficult to combine with the recognition that the sector requires huge investments in high-speed broadband infrastructure in the next years and

<sup>2</sup> The judgement of the ECJ in *Compagnie Maritime Belge Transports* (Case 395/96 P) has been of particular importance in this respect.

<sup>3</sup> Case M.190 Nestle/Perrier.

<sup>4</sup> Cf. Joined Cases C-68/94 and C-30/95 *France v Commission*, para. 166.

<sup>5</sup> Case T-102/96 *Gencor v. Commission*.

<sup>6</sup> Cf. Case M.1016 *Price Waterhouse/Coopers*, para. 103.

<sup>7</sup> Cf. Case T-342/99 *Airtours v. Commission*, para. 59.

the Commission's new policy orientation to attract more investment into the sector. It is crucial that regulators have in mind the impacts of regulatory interventions on investment incentives, when trying to combine sector specific regulation with investments.

Deutsche Telekom also has some concerns with BEREC's proposal that NRAs may consider applying different remedies on operators found to have joint SMP. Going ahead, this approach would confer NRAs the power to impose stricter remedies to one operator than another (found to have joint SMP), or even to the absurd situation where one operator is subject to regulation and the other is not subject to any regulatory obligation at all. BEREC's approach also raises concerns in terms of conformity with EU Law, as NRAs would be discriminating between operators in the exact same situation.

### **III. Inadequate market analysis and lack of evidence in BEREC's Report**

We have serious concerns about the approach proposed in the consultation paper, namely identifying potential new regulatory targets at a stage where telecommunications markets are becoming increasingly convergent and producing competitive outcomes<sup>8</sup>.

#### **1. Use of outdated market definitions**

Instead of finding a solution on how to properly measure competition realities on convergent markets and on how to reduce the scope of regulation, BEREC relies in the draft report on traditional market definitions. BEREC overlooks the fact that different types of (new) operators are able to provide similar communication services and that convergence facilitates competition amongst a greater range of technologies. BEREC's market definition focuses mainly on traditional telecommunication infrastructure and core telecommunication services, while the impact of OTT communication services (such as WhatsApp) in these markets is not properly addressed.

In our opinion the new competitive reality needs to be reflected in the assessment of market definitions, providing for wider product and geographic markets. Broader product and geographic markets will reduce the possibility for any specific firm or a combination of firms to enjoy market power. Another option to define markets would be to directly assess competitive effects without the need to engage in complex market definitions.

Deutsche Telekom does not agree with BEREC's discussion on market structure and "tight oligopolies". Many markets show oligopolistic market characteristics and in most of the situations these markets work well. In particular, in technology markets, oligopolies usually favour

<sup>8</sup> Technological convergence and the continued growth of cable networks are leading to increased infrastructure-based competition in the broadband market. In fact, the market share of alternative infrastructure providers increased from 19% in 2005 to 30% in 2014, and in some countries it even surpassed the incumbent's market share. See European Commission, "Digital Agenda Scoreboard Key indicators", available at: [https://digital-agenda-data.eu/datasets/digital\\_agenda\\_scoreboard\\_key\\_indicators/](https://digital-agenda-data.eu/datasets/digital_agenda_scoreboard_key_indicators/)

innovation<sup>9</sup>. Against this background, a cautious and a sound economic analysis of “a non-competitive outcome” is required before ringing alarm bells and triggering regulation as a self-fulfilling prophecy. In many cases, profits suggested to be the result of “tight oligopolies” or “tacit collusion” are only the result of economies of scale and scope needed to attain a high level of operational efficiency and invest in innovation, business cycle effects, or risk premiums for investments with sunk costs. In these cases regulatory intervention has clearly counterproductive effects. Therefore, in our opinion the question that BEREC should be assessing is if, despite an oligopolistic market structure, there is still vital competition or not.

Against this background, Deutsche Telekom urges BEREC to properly assess market realities and to abstain from given market definitions and consequently predisposed SMP and “tight oligopoly” findings. Deutsche Telekom believes that competition authorities are better placed to deal with sometimes temporary oligopolies, than NRAs. The former have effective instruments to prevent competition problems in oligopolistic markets, to lower entry barriers and to deal with potential uncompetitive symptoms that may arise. In our opinion, regulators including BEREC should focus their work on finding and regulating the remaining natural monopolies and deregulating those markets where general competition law is sufficient.

## **2. Lack of evidence supporting the need for BEREC’s new approach**

BEREC does not provide a clear picture of which should be the concrete trigger for regulatory intervention. We are of the opinion that there is no regulatory gap that needs to be filled. Actually, the discussion document does not provide for enough evidence for the problems that need to be tackled. Stakeholders would need a reasonable identification of the exact competition problem, which is clearly missing.

With respect to the overall objective of the proposed approach the report only contains rather general descriptions on potential criteria for regulatory intervention such as consumer harm, welfare loss, price levels reflecting effective competition from a dynamic perspective, very high profit level, etc. It remains unclear how these criteria should be assessed in terms of relevance, or if there is one or several criteria that should be regarded as the “critical threshold” for triggering regulation of “tight oligopolies”.

Before publishing the final report, we encourage BEREC to conduct a thorough impact analysis. This should be done from the perspective of fostering the creation of a true digital single market. Creating an EU digital single market, for which an EU single telecoms market is an essential component, is a top priority for the Juncker Commission. In fact, the Directorate General for Competition is conducting a study on “Competition and market outcomes in the

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<sup>9</sup> Philippe Aghion, Nick Bloom, Richard Blundell, Rachel Griffith & Peter Howitt, Competition and Innovation: an Inverted-U Relationship, 120 Q. J. ECON. 701 (2005).

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telecom sector”<sup>10</sup>. The purpose of the study is to analyze, on the basis of econometric techniques, the causal relation between the various factors of competition in these markets and the market outcomes which are relevant for consumers and businesses, such as the level of prices for communications and broadband services, the availability of infrastructure providing high-speed connections, the take-up of such connections by consumers and businesses, the level of investment in infrastructure in place and the quality of the services delivered. It is crucial that any conclusion proposed by BEREC does not run against these objectives.

#### **IV. Upcoming Framework Review should provide for a clear deregulatory agenda**

Deutsche Telekom believes that the EU telecoms sector needs a substantive debate on the future regulatory framework. In the last 15 years the telecoms sector has witnessed increasing competition, with increasing convergence of platforms and services, including Internet-based services, and substantial deployment of infrastructures providing intense network competition in many geographic areas of the European Union.

Despite increasing infrastructure- and service competition, European telecommunication providers remain subject to strict wholesale access obligations, mainly on a cost-oriented basis. This leads to a situation where strictly regulated and closely monitored telecommunication providers have to compete with unregulated OTTs, while providing strong substitutes. This unlevelled playing field leads to massive distortions in competition. Moreover it leads to economic inefficiencies and disadvantages for the European industry. This intrusive regulatory environment, decreasing revenues and profits in the past years put European telcos also under pressure with regards to investments in both fixed and mobile infrastructures. Recent data shows that telecommunications investment per capita in Europe is clearly lagging behind the United States (123 US\$ vs. 204 US\$ in 2013)<sup>11</sup>

At this stage of market development it is important not to over-regulate markets in order to avoid further inefficiencies, and to protect consumers through effective competition whenever possible. Therefore, Deutsche Telekom believes that the upcoming review should focus on modernising and reducing regulation in the sector to a minimum in light of increased competition. In the future, regulatory intervention should have a strong and precise focus on those markets where regulatory ex-ante intervention is really needed and not be extended to “tight oligopolies” through a reduction of the regulatory threshold. The priority of regulators in the telecommunication sector should be to foster innovation and investments in high-speed broadband networks and to provide for legal certainty through a stable and lean regulatory

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<sup>10</sup> COMP/2015/019

<sup>11</sup> OECD Digital Economy Outlook 2015

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framework, as recognized in the EU Commission's Digital Single Market Strategy<sup>12</sup>.

Confidence of investors and their ability to invest in modern broadband infrastructures in Europe would be fostered by regulatory restraint, making sure that at least from the regulatory side a reasonable return on capital invested will not be undermined. Investors need to get a reasonable return of investment instead of facing additional regulatory risks, e.g. by being put in a worse position compared to those seeking access. With BEREC's suggested approach this unbalanced system may become common practice.

The approach suggested by BEREC's in the consultation document would only lead to more regulatory complexity, more regulatory uncertainty and potential inefficient overregulation when a simplified and future-proof regulatory regime is needed. The suggested approach could bypass the system of SMP regulation which to date provides for some regulatory harmonisation across EU countries. In fact, this would lead to less harmonization as NRAs could further regulate along national lines or could even lead to a situation where new regulation emerges in some countries but not in others.

In conclusion, Deutsche Telekom supports an upcoming framework that has a strong focus on investments incentives, sustainability and innovation. This can only be achieved through an ambitious deregulatory agenda that provides for fewer and less complex rules and ultimately ensures legal certainty for investors.

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<sup>12</sup> Communication "A Digital Single Market Strategy for Europe" COM(2015) 192 final