

## ETNO comments on the Draft BEREC Report on Oligopoly Analysis and Regulation – BoR (15)

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### Introduction

ETNO welcomes the opportunity to respond to the consultation on the draft BEREC Report on Oligopoly Analysis and Regulation (the “draft report”).

ETNO’s views can be summarized along the following lines:

- The current European regulatory framework for electronic communications should not be re-interpreted with a different notion of “collective dominance”;
- The forthcoming review of the framework should be driven by the aim of substantially simplifying regulation, and should not be accompanied by a new tool to perpetuate regulation;
- The electronic communications services sector shows high levels of competition and dynamism.

With this contribution, ETNO aims at outlining its main concerns with regard to the draft report. The Association remains at BEREC’s disposal to discuss other aspects of the document, and to provide further clarifications.

## 1. Executive Summary

In ETNO's view, the proposals outlined in the draft report fail to adapt to the economic reality of the electronic communications sector, and are aimed to facilitate the extension of ex-ante regulation beyond its original reach, instead of setting the path for a progressive removal of ex-ante supervision and the handover to competition law, as foreseen by the current framework.

BEREC's approach calls for new triggers for regulatory intervention, with lower thresholds. In doing so, it runs the risk of opening the door to a substantial increase of regulation within the scope of the regulatory framework.

The concept of "tight oligopoly" paves the way to impose regulation in virtually all situations, even in absence of real competition problems. This approach would entail a substantial shift in the implementation of the current rules and a great increase of market uncertainty.

ETNO believes that broadening the scope of regulatory intervention, in addition to enhancing complexity, would be both ineffective and inefficient and would send a wrong message to investors.

In light of the above, ETNO considers that:

- **Under the current framework** – The current standard of proof for joint dominance should not be questioned.
- **For the future framework** – The reasons outlined in the draft report to support the necessity of regulatory intervention in the case of "tight oligopoly" is flawed. The new concept of "tight oligopoly" rests on loose and discretionary criteria and does not reflect the reality of our sector.

In the electronic communications sector, ex-ante regulation – where needed – should be focused on the provision of access to the indispensable network input in order for competitors to be able to compete at retail level<sup>1</sup>. Once this has been addressed, it should be up to the market forces to determine the proper structure in each market.

**A specific market structure should not constitute *per se* the trigger for ex-ante regulation.** It should only be the result of the work of competitive forces. In the hypothetical case that this outcome raised competitive concerns, these should be addressed by the available general competition law tools, as is the case for any other sector.

In this context, **ETNO warns against calls for an extension of the scope of regulatory intervention to situations characterized by the absence of single/joint significant market power (SMP).** Instead, BEREC should clearly acknowledge that, in such situations, the spirit and foundation of the EU

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<sup>1</sup> Along with other symmetric measures related to consumer protection (such as to facilitate switching and choice).

regulatory framework require the lifting of the relevant market's ex-ante regulation. We refer herewith to the SMP guidelines where they emphasize that "a finding that effective competition exists on a relevant market is equivalent to a finding that no operator enjoys a single or joint dominant position on that market."<sup>2</sup>.

It should also be considered that, in the absence of SMP, other provisions of the regulatory framework remain applicable and can answer many of the hypothetical concerns raised in the draft report (such as symmetric access to some inputs, general obligations of access and interconnection, switching and transparency obligations, etc.).

Policy-makers are increasingly reflecting on how to encourage significant additional investments in the deployment of Next Generation Access networks (NGA). In this context, **ETNO calls upon BEREC to consider how to better assist in achieving this objective, namely through simplifying and ultimately lifting unwarranted regulation.**

## **2. The current framework should not be re-interpreted with a different notion of "collective dominance"**

As regards joint dominance, the draft report ultimately does not suggest to depart from the standard of proof and list of criteria mandated by the current framework. However, in some parts, the document seems to suggest that the required standard of proof represents an obstacle to regulatory intervention.

**In ETNO's opinion, the current standard of proof has proven adequate for developments in competitive markets (see section 4 below) and should not be questioned.**

In this respect, **the proposal that the proof of joint dominance should be exempted from the provision of adequate empirical data appears inappropriate and not in line with the need for a fact-based application of the rules<sup>3</sup>.** In fact, in the cases where dominance could actually occur after the removal of SMP regulation, the mechanisms supposed to lead to tacit collusion should already be present in the market, and so they could be adequately observed<sup>4</sup>.

On a separate note, it should also be underlined that **tacit collusion is very unlikely to occur in both mobile and fixed telecom markets.**

- **In mobile markets**, because there are no less than three mobile network operators (MNOs) in nearly all European countries and tacit collusion can hardly be maintained in the presence of three or more

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<sup>2</sup> EC 2002/C 165/03, rec. 19.

<sup>3</sup> We refer herewith to section 6.2.2, page 47 of the draft report.

<sup>4</sup> In fact, they could be observed *even before* the lifting of SMP regulation.

players. In fact, in a market with more than two players there is no certainty about who deviates, which makes tacit collusion unsustainable.

- **In fixed markets**, because even where competition is limited to one incumbent telecom operator and one cable operator, the technical and economic characteristics of the respective infrastructures, including geographic scope and network topologies, are very different and do not exhibit the level of symmetry required for tacit collusion. Furthermore, fixed telecom markets have heterogeneous structures, since different geographies attract a different number of operators deploying their own infrastructures. Even in markets characterized by the presence of the incumbent operator and a cable player there will be relevant areas (typically urban) where a third (and even more) operator is present.

For a number of reasons<sup>5</sup>, operators tend not to discriminate between customers living in different areas of the country, on the basis of different levels of competition. Even customers living in areas where there are fewer competing networks benefit from the positive effects of competition (price, quality, innovation) in the areas where more operators are present. Hence, the tacit collusion equilibrium is effectively hindered by the presence of more operators in the most profitable areas.

### **3. The future framework requires substantial simplification of regulation, not a new standard to justify more regulation**

Herewith we provide an assessment of the “tight oligopoly” concept proposed in the draft report, taking into account the context, opportunity and merits of BEREC’s proposal.

#### **3.1. Context and opportunity of BEREC’s proposal**

ETNO believes that the draft report points to the wrong direction at a moment in which the European Commission is about to launch the review of the European regulatory framework for electronic communications. **The concept of “tight oligopoly” runs the risk of paving the way for continued regulation in virtually all situations characterizing electronic communication service markets, on the basis of unclear and discretionary criteria.**

The rationale for public intervention in competitive markets, as suggested by the draft report, seems very weak. Private property and freedom of contracting are key tenets of market economies. The merit of overcoming them with ex-ante regulatory intervention should be justified only in exceptional and well-defined situations.

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<sup>5</sup> For instance: the cultural homogeneity of the country, reputational costs and/or the optimization of billing, marketing and advertising costs.

**It is highly questionable that a company without dominance in the market, and not involved in collusive action, could become a regulatory target uniquely because it acts in an imperfectly competitive market** which apparently produces a “sub-optimal” (whatever the definition of this term) outcome. This would hold true even in the hypothetical case that regulation could lead to a better outcome.

**Moreover, BEREC should carefully consider how difficult it would be in practice to make such an assessment. The concept of “tight oligopoly” rests on loose and discretionary criteria.** In fact, the draft report mentions several vague terms, such as “sub-competitive outcome”, “non-effective market outcome”, “profits above competitive levels”, which involve a very high degree of discretion. This issue will be addressed more in detail in the next section.

The draft report expresses concerns for a possible growth in market power in European telecom markets as a result of trends towards more oligopolistic market structures. This theoretical concern does not take into account the fall in revenues and profits occurred in the European telecom sector over the past years<sup>6</sup>, despite continuous growth of traffic volumes. Such trends are incompatible with a growth in market power which implies either growing profits, or decreasing outputs, or both.

The trends observed by BEREC have very clear causes, which are actually associated with more, not with less competition: emergence of strong alternative infrastructures in fixed markets, fixed-mobile convergence as a consequence of the complementarity of fixed and mobile services, and mobile-mobile mergers which aim to overcome artificially fragmented and unsustainable market structures.<sup>7</sup>

The Digital Single Market Strategy of the European Commission has clearly identified investment as a primary objective of European telecom policy in the coming years<sup>8</sup>. In this respect, the balance of regulatory choices should switch from promoting static efficiency, which has been the priority in the past years, to promoting dynamic efficiencies based on investment in technologies.

BEREC has always emphasized the importance of market competition and the subsequent need for deregulation. Moreover, the emphasis on market deregulation and competition was already stressed in the 2009 “Better Regulation” Directive<sup>9</sup>. This Directive set the basic principles of the reformed regulatory framework and explained that the reform aimed to “complete the internal market for electronic communications” and to push all national

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<sup>6</sup> See the 2014 ETNO Annual Economic Report, with data elaborated by IDATE, available at this [link](#).

<sup>7</sup> Which, in some cases, have resulted from excessive regulatory intervention.

<sup>8</sup> European Commission, COM (2015) 192, “A Digital Single Market Strategy for Europe”. According to it, “incentivising investment in high speed broadband networks” will be a key focus of the forthcoming review of the electronic communications framework (page 10 of the DSM Strategy).

<sup>9</sup> Directive 2009/140/EC

regulators towards stronger market competition through lifting regulation in markets where competition operated well.

**Contrary to these principles, the draft report opens the door for a substantial increase of the scope of the current regulatory framework. Indeed, the introduction of the new concept of “tight oligopoly” paves the way for continued regulation in virtually any situations characterizing telecommunications markets<sup>10</sup>.**

### **3.2.The concept of “effective competition”**

In several points, the draft report stresses that the model to be pursued is not a perfect competition one, whereas “effective competition” happens when there is an optimal outcome in terms of total welfare, at least in the long term.

An interesting sentence in the draft report reads as follows: “We can conclude that effective oligopolistic competition delivers an optimal outcome in terms of total welfare, at least in the long term. It can be observed when benefits from increased innovation and investment incentives outweigh higher prices, or actual or potential competition limits the oligopolist’s power to raise prices above a competitive level”<sup>11</sup>.

ETNO welcomes the recognition of dynamic efficiencies as a positive reference. This was also highlighted in ETNO’s contribution to BEREC’s initial questionnaire<sup>12</sup>.

However, despite this recognition, the indicators used in section 7.1.1 of the draft report to decide when a “tight oligopoly” is in place are basically of static nature. Furthermore, there is no indication whatsoever on the need to take into account dynamic efficiencies in the analysis. Only at the end of section 7.1.1 BEREC engages in a reflection about prices and profits above competitive levels, but with no clear conclusion of when a price or a profit level can be considered “effectively competitive”. The only conclusion seems to be as follows: “In any case, the identification of competition problems cannot be made based on fixed criteria, but only case-by-case under consideration of the specific market situation”<sup>13</sup>.

This does not constitute a good basis for establishing a new trigger for ex-ante regulation, which would have substantial impact on the market. It is necessary to point out that any new threshold for ex-ante regulation, in order

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<sup>10</sup> Footnote 47 at p. 33 is a clear example of this:

“For example, BEREC could envisage future revisions of the market for wholesale access and call origination on public mobile telephone networks in situations in which the number of players is reduced due to mergers and acquisitions or when the evolution of the market shows specific competition problems”.

This seems to point to the reintroduction of relevant markets already de-regulated almost a decade ago.

<sup>11</sup> Section 4.2.1.1, page 15.

<sup>12</sup> ETNO’s contribution can be found at this [link](#).

<sup>13</sup> P. 51 of the draft report.



to be proportionate, would in fact have to be stricter than the joint dominance test under competition law. Ex-ante regulation places higher regulatory burdens on undertakings than scrutiny under ex-post competition law (notably by not requiring a proof of anti-competitive behavior before regulation applies).

**Furthermore, BEREC's approach goes against the transitory nature of ex-ante regulation, according to which sector-specific regulation should be lifted when effective and sustainable competition is in place. The draft report goes exactly in the opposite direction, i.e. increasing the scope of regulation.** This would ultimately lead to undermining expectations and creating regulatory uncertainty for network operators.

### **3.3. The rationale to support the necessity of regulatory intervention in the case of "tight oligopoly" is flawed**

The rationale of the draft report to support the necessity of regulatory intervention in the case of "tight oligopoly" is flawed. It assumes that, under certain circumstances considered as given<sup>14</sup>, due to potential unilateral effects and absent dominance, an oligopoly does not lead to effective competition<sup>15</sup>.

BEREC assumes that such circumstances are exogenously given to the market, and that NRAs should intervene when they occur. In this context, we strongly believe that **any intervention focused on the consequences – i.e. the existence of an oligopolistic market – rather than on the cause of the problem, if any, is likely to do more harm than good.**

According to the draft report, regulatory intervention would be aimed at bridging a gap which is not covered either by intervention in case of single SMP or intervention in case of joint SMP. This is, if not completely copied, at least inspired by the so-called "gap cases" of the EU Guidelines on horizontal mergers, which are supposed to tackle the effects generated by a merger in the absence of coordination or either leading to a dominant position<sup>16</sup>.

The trigger event for the intervention, in these "gap cases", is the existence of a merger and therefore the generation of a change in the market structure. BEREC, however, does not identify any trigger event which could justify the application of a similar analysis. Moreover, taking into account the elements described in the Guidelines, they are difficult, if not impossible, to be applied outside a merger scenario. Possible examples include the elimination of an important competitive force or a merger between two close competitors.

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<sup>14</sup>High concentration, high entry barriers, capacity limits, high switching costs, high differentiation, low growth, low innovation, low demand elasticity which *de facto* have to be cumulative for the predicted outcome to occur.

<sup>15</sup> In the sense given by BEREC to this expression.

<sup>16</sup> European Commission, "Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings", 2004/C31/03.

This is mainly due to the quite different functions that the two instruments at hand have in the overall regulatory context. While merger control deals with permanent or long-lasting changes in the market structure, ex-ante regulation deals with the existing market structure. This explains quite well the reason why the test for merger control is stricter than that in the case of ex-ante regulation and/or ex-post competition law enforcement. **Applying the same test to substantially different regulatory issues and scenarios might therefore result in a violation of the proportionality principle.**

In this regard, in one point of the draft report BEREC seems to acknowledge the substantial difference between the two instruments. Paragraph 7.3 of the document states that:

“....the above mentioned SIEC-Test (described in section 4) is an adequate starting point to define the test to be applied when identifying tight oligopolies in the context of ex ante regulation. However, this does not mean that a direct transposition of the SIEC-Test applied in mergers and acquisitions regulation must be done to the ex-ante regulatory framework. Assessing existing market structures using a prospective view (as it is done in ex-ante market analysis) and assessing the impact on competition of a proposed merger or acquisition are different tasks, and criteria and tools used in each of these contexts may differ. An in-depth analysis of these differences and adaptation of criteria and evidence to be used in the ex-ante regulatory framework must be done.”<sup>17</sup>

In light of this reasoning, BEREC should therefore acknowledge that such a gap does not need to be addressed outside merger control.

Moreover, in the case of regulatory intervention after one or more merger procedures have taken place (as BEREC seems to have been advocating for with regards to mobile markets across Europe) another problem would arise: the structural outcome of a market having become an oligopoly would be analyzed twice, by the competent competition authorities and by the regulatory bodies afterwards.

According to this view, the role of ex-ante regulation would be to intervene on the root causes of the problem, in order to achieve effective competition. However, contrary to what the draft report affirms, current competition rules and other regulatory instruments are adequate enough to solve these problems. In particular, the current regulatory framework provides NRAs with all the necessary levers to act.

Apart from the wholesale access obligations derived from market analysis/SMP-based regulation, the current regulatory framework offers the following instruments:

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<sup>17</sup> See pp. 55-56 of the draft report.



- The provisions of the Universal Service Directive<sup>18</sup> on portability, on contract transparency, and on the limits of contractual commitments are efficient tools to reduce switching costs.
- Entry barriers and capacity limits depend on regulatory decisions concerning spectrum allocations between operators (pursuant the Authorisation Directive<sup>19</sup>) or the sharing of infrastructure costs (sector-specific obligations detailed in Art. 12 of the Framework Directive<sup>20</sup> or in the Directive on measures to reduce the cost of deploying high-speed electronic communications networks<sup>21</sup>).
- General access and interconnection obligations (Art. 5 of the Access Directive<sup>22</sup>) and net neutrality provisions included in the current framework provide proper safeguards to prevent non-competitive distortions and grant the freedom to provide competitive services on the Internet.
- Excessive differentiation via access to exclusive contents may be addressed through content regulation or competition law.

Therefore, and **contrary to what the draft report suggests, the current regulatory framework provides NRAs with all the necessary instruments to intervene upstream in order to guarantee effective competition.** These instruments are already available in the framework, however not within the market analysis process to which BEREC has limited its analysis. These instruments provide the right levers for regulatory intervention also in oligopolistic markets susceptible to raise concerns, as they would help tackle the original causes of possible inefficiencies and lead to efficient outcomes.

### **3.4. Introducing new regulatory provisions based on the “tight oligopoly” concept would be highly inappropriate**

ETNO believes that the most efficient way to solve competition concerns is to stimulate network investments. By contrast, the prospect of a new cycle of regulatory intervention based on the “tight oligopoly” concept would have a very negative impact on investment prospects.

**Indeed, introducing new provisions in the market analysis process to impose ex-ante regulatory remedies inspired by SMP regulation, based on the so-called “tight oligopoly” concept, would be highly inappropriate, for the following reasons:**

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<sup>18</sup> Directive 2009/136/EC.

<sup>19</sup> Directive 2009/140/EC.

<sup>20</sup> Directive 2002/21/EC.

<sup>21</sup> Directive 2014/61/EU.

<sup>22</sup> Directive 2002/19/EC.

- Firstly, **it would lead to an inefficient outcome**, as the primary causes of inefficiency<sup>23</sup>, if any, would not be addressed. Furthermore, there is no sufficiently robust economic foundation to support regulatory intervention in such an unclearly defined case.
- Secondly, it would entail a **biased interpretation of the “Significant Impediment of Effective Competition” (SIEC) criterion applied in merger control**:
  - This criterion does not justify intervention against any competition concerns, contrary to what suggested in the draft report. Merger control concerns are strictly limited to the consequences generated by the merger itself.
  - In the context of application of the SIEC criterion, the market situation before the merger is assumed to be viable. On the contrary, there is no guarantee nor presumption that the market situation generated by ex-ante intervention on a so-called “tight oligopoly” would be viable, neither that it would lead to a more efficient situation than the existing one.
- Thirdly, as BEREC also suggests in the draft report, telecoms regulation is not anymore linked to its original objective, the opening to competition of former public monopolies, but to the structural characteristics of the industry.

**Therefore, if BEREC’s suggestions concerning tight oligopolies were to be followed, many other economic sectors exhibiting tendencies towards oligopolistic competition should *a priori* be subject to ex-ante economic regulation** by dedicated National Regulatory Authorities. The electronic communications sector competes with others in the capital markets. A tougher regulation compared with other sectors could result in increased difficulty in attracting the high levels of investments required to build NGA networks.

Additionally, it is worth mentioning that the “tight oligopoly” market structure as defined in the draft report does not seem to find enough support neither in competition and case law nor in economic theory. For instance, the Guidelines on horizontal mergers<sup>24</sup> state that oligopolistic firms are interdependent and the Court of First Instance, in the Gencor/ Lonrho judgment, provided a definition of “tight oligopoly” in the same sense of a collusive oligopoly.<sup>25</sup>

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<sup>23</sup> See the previous section.

<sup>24</sup> Footnote 29: “An oligopolistic market refers to a market structure with a limited number of sizeable firms. Because the behaviour of one firm has an appreciable impact on the overall market conditions, and thus indirectly on the situation of each of the other firms, oligopolistic firms are interdependent.”

<sup>25</sup> “there is no reason [...] in legal or economic terms to exclude from the notion of economic links the relationship of interdependence existing between the parties to a “tight oligopoly” within which, in a market with the appropriate characteristics, [...] those parties are in a position to anticipate one another’s behaviour and are therefore strongly encouraged to align their conduct in the market, in particular in such a way as to maximize their joint profits by restricting production with a view to increasing prices.”

By contrast, BEREC characterizes a “tight oligopoly” as a market structure in which firms operate in the absence of tacit collusion, with the aim of maximizing their individual profit, taking their competitor’s behavior as given and not influenced by their own actions.

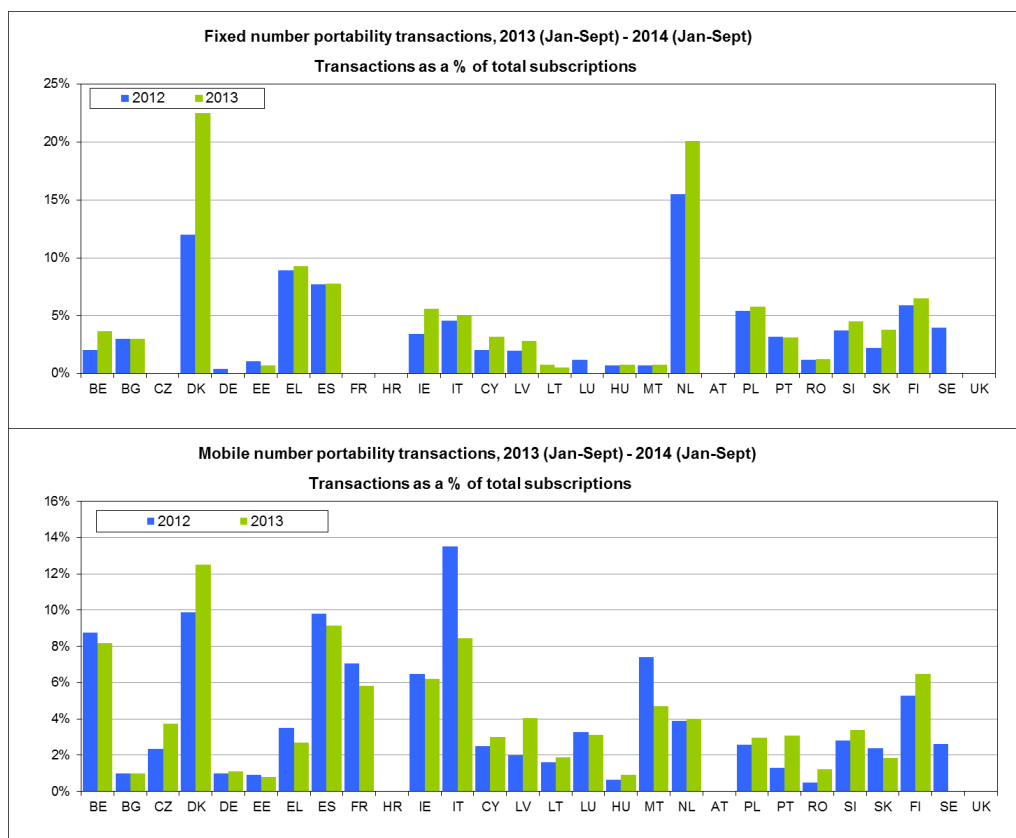
It follows from the draft report’s definition of “tight oligopoly” that each oligopolistic player is independent from each other, and has the power to increase prices profitably because it does not suffer from competitive constraints neither on the demand side (it offers a differentiated product compared to other oligopolists and switching costs are high), nor on the supply side (there are capacity constraints and high barriers to entry). This is inconsistent because it matches with the behavior of the hypothetical monopolist, i.e. with the existence of several relevant markets in which each firm is monopolist (therefore the SSNIP test would not be verified for the “oligopolistic market”).

#### **4. The electronic communications services sector shows high levels of competition and dynamism**

The criteria for defining a “tight oligopoly”, outlined in section 7.1.1 of the draft report, reflect a negative view of the competitive reality of our sector, and of the benefits that final users are getting from the evolution of networks and services.

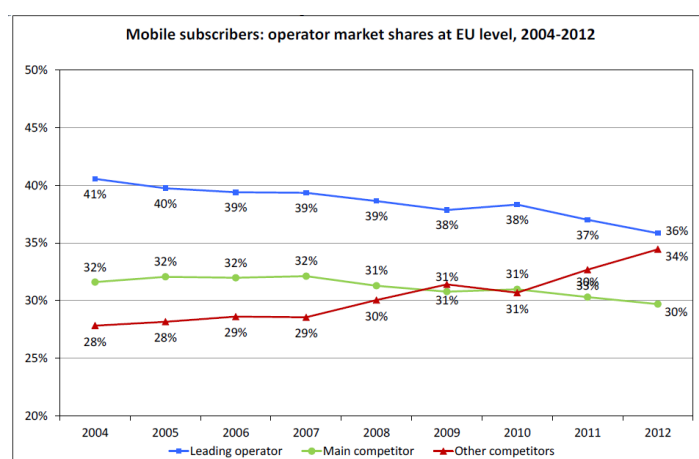
The draft report indicates the following criteria in order to assess “tight oligopolies”:

- **High level of product differentiation:** differentiation is a positive feature, showing the degree of innovation and competitiveness of the market. Companies look for differentiation strategies in order to be able to compete, and this is positive for innovation. However, technical progress seems to be perceived as something negative. It should instead be assessed in the capacity of enabling service innovation, providing additional capacity, and generating dynamic effects on innovation and prices. In any case, if the high level of product differentiation creates a competition concern, NRAs can address it by defining separate product markets where an operator can be found having single SMP.
- **High switching costs and no countervailing buyer power:** switching costs can easily be avoided through adequate rules on commercial contracts (e.g. by forbidding the application of unjustified costs for contract termination) and other specific rules (e.g. number portability obligations). Indeed, switching costs are not a problem, as shown by the figures of portability within the EU region. An example is provided by the following figures from the Digital Agenda Scoreboard:



Source: EU Digital Agenda Scoreboard 2015

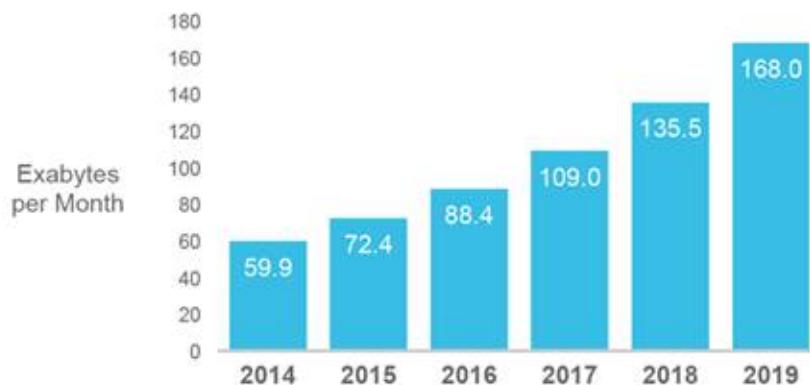
The role of portability as a key competition enabler has been widely stressed by policy-makers. As an example, the recent “draft ECC Report 238 on 3rd Party access to Number Portability Data (NP Data)”<sup>26</sup>, includes the following graph, from the Digital Agenda Scorecard 2013, to illustrate the positive impact that number portability has had on the mobile market over the last 8-10 years.



Mobile subscribers: operator market shares at EU level, 2004-2012 (Source: COCOM, taken from DAE Scorecard Report 2013)

<sup>26</sup> Launched for public consultation by CEPT until the 23<sup>rd</sup> of June 2015.

- **Low demand growth:** demand has continually grown in the electronic communication services sector in the past years, and all forecasts of traffic growth point to substantial increases in the coming years. As an example of this, see below Cisco forecasts for the evolution of IP traffic (globally and in Europe):



Source: Cisco VNI Global IP Traffic Forecast, 2014–2019

IP Traffic, 2014–2019							
	2014	2015	2016	2017	2018	2019	CAGR (2014–2019)
<b>By Type (Petabytes [PB] per Month)</b>							
Fixed Internet	39,909	47,803	58,304	72,251	90,085	111,899	23%
Managed IP	17,424	20,460	23,371	26,087	29,274	31,858	13%
Mobile data	2,514	4,163	6,751	10,650	16,124	24,221	57%
<b>By Segment (PB per Month)</b>							
Consumer	47,740	58,137	71,453	88,730	111,015	138,415	24%
Business	12,108	14,289	16,973	20,258	24,469	29,563	20%
<b>By Geography (PB per Month)</b>							
Asia Pacific	20,729	24,819	29,965	36,608	44,223	54,434	21%
North America	19,628	23,552	28,219	33,641	41,458	49,720	20%
Western Europe	9,601	11,231	13,506	16,396	20,046	24,680	21%
Central and Eastern Europe	4,087	5,270	6,896	9,385	12,601	16,863	33%
Latin America	4,297	5,373	6,663	8,299	10,356	12,870	25%
Middle East and Africa	1,505	2,180	3,178	4,659	6,800	9,412	44%
<b>Total (PB per Month)</b>							
Total IP traffic	59,848	72,426	88,427	108,988	135,484	167,978	23%

Source: Cisco VNI 2015

- **High entry barriers and no significant potential new entrants:** it is not accurate to say that there are no significant entrants in the market. According to European Commission's data from the latest Digital Agenda Scoreboard, new entrants hold 59% of the retail fixed broadband market<sup>27</sup>. For NGAs this figure raises to 71%. On the

<sup>27</sup> The relevant data can be downloaded at this [link](#).

services side, there are significant providers, like MVNOs and OTTs, which are generating strong competitive pressure on voice, messaging and video.

- **Capacity constraints:** the draft report admits that capacity constraints may likely exist for the mobile market (spectrum scarcity) and not for the fixed market. The mobile market's capacity constraints can be overcome by releasing adequate frequency bandwidth to all operators. These issues can be addressed in the forthcoming review of the regulatory framework<sup>28</sup>.
- **High degree of concentration:** Finally, high degree of market concentration and entry barriers are common characteristics of electronic communications markets and do not raise any concern when other criteria are not met (the mobile market is the example of a concentrated market with high level of competition).

The criteria listed by BEREC are a subset of SMP criteria and plus do not include the most important criterion which is market share. It is therefore not justified to use these secondary criteria to demonstrate the existence of a market failure in an oligopolistic market.

Additionally, BEREC's approach also leaves a lot of uncertainty about how these criteria would be applied, as it does not propose a consistent application procedure, thereby further increasing regulatory uncertainty. In this regard, at pages 15-16, the draft report states that:

"In contrast to an effectively competitive oligopoly, this leads to an inefficient market outcome, both from a static, as well as dynamic point of view. **Ineffective oligopolistic competition in the absence of tacit collusion may occur when the market presents one or more of the following characteristics:** (1) market concentration is high, (2) high entry barriers and no significant new entrants, (3) no countervailing buyer power, (4) mature technologies, i.e. little incentive to innovate, (5) capacity constraints; and on the demand side: (6) low price-elasticity and low cross-price elasticities due to e.g. switching costs and (7) low growth of demand/a mature market." (emphasis in bold added).

## Conclusions

The draft report points to a set of competition concerns which are associated, in BEREC's view, with the tendency to more concentrated markets and bundling. These trends, however, are strongly related to the high level of competition and dynamism to which electronic communications markets have been evolving. The evolution of electronic communications markets is more and more characterized by strong development of alternative infrastructures in fixed markets, fixed-mobile convergence as a consequence

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<sup>28</sup> Indeed, the Commission has published a call for tenders for a study on substantive issues for review in the areas of (i) market entry, (ii) management of scarce resources and (iii) general end-user issues.



of the complementarity of fixed and mobile services, and mobile-mobile mergers which aim to overcome artificially fragmented and unsustainable market structures.

At the same time, over the past years we have witnessed a clear trend of decrease in revenues and profits, while network capacity and traffic volumes have continued to grow. In the forthcoming review of the regulatory framework, policy-makers should carefully look at these trends, and particularly at the challenges in terms of network investment that the sector is facing, and find adequate regulatory solutions.

In ETNO's view, BEREC should assist policy-makers in achieving the key goal of encouraging significant additional investments in the deployment of NGA, by simplifying and ultimately lifting unwarranted regulation. The forthcoming framework review should boldly aim at achieving these objectives.

In the context of this draft report, BEREC's proposals should incorporate the objective of a progressive removal of ex-ante supervision and a handover to competition law to monitor and address possible competitive concerns, as already foreseen in the current regulatory framework.

However, the draft report points to the opposite direction, introducing a new concept of "tight oligopoly" which would pave the way to impose regulation in virtually all situations of current and future telecom markets. The document focuses on a particularly difficult and discretionary concept of "effective competition" to distinguish between "good" or "bad" oligopolies.

This approach would run the risk of increasing the overall regulatory burden of the sector, even in the absence of real competition issues characterized by the presence of single or joint significant market power in a given market. Moreover, introducing a new and vague trigger for ex-ante regulation would go against the principle of regulatory certainty and would send a negative signal to investors.

The existing high levels of competition in European electronic communications markets and the challenge to foster the investments needed to deploy the new high-speed network infrastructure that Europe requires point to the need of rethinking the current regulatory framework, with a substantial reduction of the regulatory burden of the sector, and a better recognition of the value of investments.



### **About ETNO**

ETNO (the European Telecommunications Network Operators' Association - [www.etno.eu](http://www.etno.eu), @ETNOAssociation) represents Europe's telecommunications network operators and is the principal policy group for European e-communications network operators. ETNO's primary purpose is to promote a positive policy environment allowing the EU telecommunications sector to deliver best quality services to consumers and businesses.

For questions and clarifications regarding this Reflection Document, please contact Francesco Versace, Public and Regulatory Affairs Manager – email: [versace@etno.eu](mailto:versace@etno.eu)