



**BEREC Draft Report on Oligopoly analysis and regulation**

Dear Sir, Madam,

Liberty Global welcomes the opportunity to give its view on the BEREC draft report on Oligopoly analysis and regulation.

Liberty Global is the world's largest international cable company with market-leading operations across 14 countries. Liberty Global operates cable networks in Austria, Belgium, the Czech Republic, Germany, Hungary, Ireland, the Netherlands, Poland, Romania, Slovakia, Switzerland, the United Kingdom, as well as Chile and Puerto Rico. Worldwide, Liberty Global connected 27 million customers subscribing to 56 million television, broadband internet and fixed telephony services at March 31, 2015. In addition, Liberty Global serves five million mobile subscribers.

Should you have questions regarding our answers please do not hesitate to contact Anne-Claire Hoyng, Manager Competition Policy (tel: +31 (0)6 11 79 22 90, email: [ahoyng@libertyglobal.com](mailto:ahoyng@libertyglobal.com)).

Kind regards,

Manuel Kohnstamm  
Chief Corporate Affairs Officer  
Liberty Global

## Executive Summary

Liberty Global welcomes the opportunity to share its views on BEREC's draft report on Oligopoly analysis and regulation. With its response, Liberty Global would like to provide input to further the discussion:

- The first 20 years of European telecoms policy have been driven by the liberalisation of markets, with the aim to improve efficiency and increase innovation within the telecoms sector. Sector specific ex ante regulation was introduced to enable the transition to a competitive environment in which ex post competition law would take over. Indeed, state-owned monopolies have been replaced with competition, resulting in markets with an increased number of operators. BEREC however suggests in its draft report that the number of operators might form anti-competitive oligopolistic market structures in the electronic telecommunication sector. The consolidation and convergence trends would reinforce the emergence of such structures (the "oligopoly problem").
- Liberty Global questions whether the "oligopoly problem" is as important as the draft report would seem to suggest. The vast majority of European consumers today enjoy a real choice of providers, offering a wide variety of services, functionalities and quality at higher speeds and competitive prices. According to the European Commission's latest reports, the European telecommunications sector is performing well in terms of delivering consumer welfare. Hence, it is not clear how the current market structures have proven detrimental to the consumer, and thus why they would warrant ex ante regulation. BEREC should identify what the current market problems are before drawing conclusions on the need for further ex ante regulation of oligopolies.
- BEREC's draft report introduces two forms of oligopolies that can lead to an anti-competitive outcome, joint dominance and tight oligopolies. Liberty Global has serious concerns as regards to BEREC's proposal on the further need to investigate whether tight oligopolies warrant ex-ante intervention, for the following reasons:
  1. The imposition of ex-ante regulation on tight oligopolies is not related to the behaviour of market participants (unlike SMP and joint dominance), but merely on the structure of the market.
  2. Significant market power would no longer be a requirement for a finding of a tight oligopoly. This contrasts specifically with current regulation that seeks to curb the negative effects of significant market power: indeed, the presence of significant market power is the "market failure" forming the basis for regulatory intervention, and stands as a key principle enshrined in the New Regulatory Framework.
  3. The concept of 'tight oligopoly' would in essence introduce an unprecedented presumption of guilt and a burden of proof on the accused, which will have a severe impact on investor confidence in the industry. But it would also introduce a disincentive to grow market share in competition with traditional incumbents, which is arguably not in the consumer interest
  4. Considering ex ante regulation of tight oligopolies assures an infinite perpetuation of regulatory intervention, which goes against the fundamental premise of forbearance in EU telecom regulation.
  5. Tight oligopolies are virtually undiscussed in academic literature; the latter focuses almost exclusively on the effects of tacit collusion.
  6. Tight oligopolies are not a feature of existing competition law and so there is no case law or precedent either.

Consequently, in the absence of a more specific discussion of the regulatory harm beyond 'inefficient outcomes' or other source of market failure in the absence of significant market power ("SMP"), Liberty Global is convinced that any new regulation will by design become very unpredictable in its effects and will be more harmful than beneficial. Regulating tight oligopolies will have serious negative implications on the functioning of the market in general (i.e. chilling investment incentives, legal uncertainty) and could also set a precedent for intervention based on market structure in other concentrated markets (such as energy). While BEREC insists that the notion of tight oligopolies shall not serve as a "regulatory joker" to be applied by NRAs when a joint dominant assessment is unsuccessful<sup>1</sup>, Liberty Global has serious doubts.

- Liberty Global endorses BEREC's initiative to provide assistance to NRA's on findings of joint dominance and welcomes BEREC's recommendation to update Annex II of the Framework Directive to structure the criteria to be used to assess joint dominance around the criteria used in competition law.
- The chance of type 1 mistakes, namely intervention in an oligopolistic market that does not have an anti-competitive outcome (also called "false positives"), is much higher than type 2 mistakes (also called "false negatives") in the case of single SMP. The reason for this is that an oligopolistic market is very likely to have a competitive outcome, however this is much less likely to be the case for a single SMP. Furthermore, regulating a single SMP relates in most cases to regulating a former monopoly, while joint dominance involves the possibility to regulate a former monopoly and/or a privately financed operator which has never held a position of SMP. The extra burden of a type 1 mistake for such a privately financed operator will be substantial. In addition, from a consumer welfare perspective, it is likely that a type 1 error will be more costly given the likelihood that a oligopolistic market is actually competitive. Consequently, regulatory intervention will lead to a slowdown in innovation as the regulated companies are forced to adapt process to comply with regulation. In comparison a type 2 error, whereby a non-competitive oligopoly is not regulated in an ex-ante manner, is far less costly because these can still be treated under ex-post competition law. This distinction in impact between type 1 and type 2 errors should lead NRAs to be very cautious when contemplating regulating oligopolistic markets where it is difficult to ascertain whether or not there is a competitive outcome.
- Liberty Global finds merger regulation to be an effective ex ante competition law tool to prevent anti-competitive oligopolistic market outcomes. It is not clear for Liberty Global why ex ante static regulation would be preferable to a case-by-case merger control or is required in addition to it.

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<sup>1</sup> BEREC Report on Oligopoly analysis and regulation, p. 52.

## **1. Introduction**

Liberty Global welcomes the opportunity to share its views on BERECs draft report on Oligopoly analysis and regulation (“the draft report”).

Liberty Global agrees with BEREC that there is increased consolidation through M&A (“consolidation”) and technological convergence (“convergence”) going on in the European electronic communications markets. Liberty Global disagrees however that these two trends lead to more concentrated markets with an anti-competitive outcome. Over the last 20 years state-owned monopolies have been replaced with competition, resulting in markets with an increased number of operators

The draft report seeks to provide a better understanding of oligopolistic markets and their implications on the application of the regulatory framework. Indeed, BEREC explains very clearly the notion and economics of oligopolies in its draft.

BEREC is correct to point out that a market in the telecommunication sector with an oligopolistic structure can lead to a competitive market outcome in which regulatory ex ante intervention is not necessary. However, and maybe as would be expected, BEREC focuses in its draft report on oligopolistic markets structures that could lead to a non-competitive outcome. In this respect, it distinguishes two forms of oligopolistic market structures, joint dominance<sup>2</sup> and tight oligopolies.

BEREC acknowledges that competition law, unlike ex ante regulation, is able to capture a finding of joint dominance and therefore recommends updating Annex II of the Framework Directive to structure the criteria to be used to assess joint dominance around the criteria used in competition law (i.e. Airtours/Impala criteria). On these points BEREC’s proposed approach and objectives are sound according to us and will help national regulatory authorities (“NRAs”) in their assessment of such market circumstances.

BEREC also analyses the so called market structure of tight oligopolies and considers the case for potential new ex ante intervention in relation to this kind of market structure. It is in this area we have clear concerns, as will be explained below.

In its reaction on the draft report Liberty Global will first assess whether the concern expressed by BEREC regarding non-competitive oligopolistic market outcomes (the “oligopoly problem”) is warranted by current market indicators. Then, Liberty Global will express its concerns as regards to the notion of tight oligopolies and the suggested ex ante regulation of this market structure. Furthermore Liberty Global will evaluate BEREC’s analysis of the economic framework required for a finding of joint dominance. Finally Liberty Global will stress the importance of merger control in preventing non-competitive oligopolistic market outcomes.

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<sup>2</sup> In this response joint dominance is considered the same as joint significant market power and tacit coordination

## 2. European telecommunications markets: Is there a problem?

The draft report considers that, due to market trends such as consolidation and convergence, an increased occurrence of oligopolistic market structures can be witnessed in Europe. According to BEREC, oligopolistic markets seem notably to appear in the following wholesale markets:

- wholesale local access provided at fixed location
- wholesale central access provided at a fixed location for mass market products
- wholesale market of access and call origination on public mobile telephone networks.

BEREC seems to suggest in its draft report that a finding of joint dominance at the retail level is not necessarily required to find joint dominance at the related wholesale level.<sup>3</sup> Liberty Global does not agree with this. Consumer welfare is measured at the retail (downstream) level; the level of competition in the retail markets is therefore indicative of whether consumer welfare is maximised or not and should therefore be the impetus for the necessity of ex-ante regulation. For this reason, Liberty Global believes that one cannot analyse wholesale markets and their structures/outcomes without first considering the related retail markets.<sup>4</sup>

Considering that the outcome of retail markets in terms of consumer welfare would be indicative of whether or not one looks at related wholesale markets, Liberty Global consulted the latest European Commission Staff Working Document on the Implementation of the EU regulatory framework for electronic communications (19/06/2015), as well as the Commission's Digital Agenda Scoreboard. The purpose is to assess the current status of and identify problems in the functioning of retail telecommunications markets in Europe.

Liberty Global has observed the following:

- Telecommunications operators' revenues in Europe have been steadily declining since 2010, the main revenue segment hit being the fixed and mobile voice services;<sup>5</sup>
- Despite the declining revenues, investment levels and the deployment of Next Generation Access ("NGA"<sup>6</sup>) networks have been growing since 2010.<sup>7</sup>
- The EU average prices of telecommunications services have generally been falling. Significant decreases are reported for bundled services, which are used by almost half of all European households;<sup>8</sup>
- To conclude, the European Commission recognises that telecommunications operators *"need to respond to higher levels of competition, decreasing revenues from traditional sources and to the increasing need to invest in capacity"*.<sup>9</sup>

<sup>3</sup> BEREC Draft Report on Oligopoly Analysis and Regulation, p. 30.

<sup>4</sup> It is only when competition concerns arise in retail markets that have a negative impact on consumer welfare that one should assess whether these concerns might be related to the wholesale market.

<sup>5</sup> European Commission Digital Agenda Scoreboard 2015 – Connectivity-Broadband market developments in the EU, p. 4 & 5.

<sup>6</sup> Next Generation Access (NGA) networks are defined by the European Commission as *"wired access networks which consist wholly or in part of optical elements and which are capable of delivering broadband access services with enhanced characteristics (such as higher throughput) as compared to those provided over already existing copper networks. In most cases NGAs are the result of an upgrade of an already existing copper or co-axial access network"*. Source: 2010/572/EU: Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA)

<sup>7</sup> European Commission (2015) *Connectivity – Broadband market developments in the EU – Digital Agenda Scoreboard 2015*, pp. 11 & 12. The European Commission points out that total NGA coverage amounts to 68%, not reaching the Europe2020 targets yet.

<sup>8</sup> European Commission (2015) Digital Agenda Scoreboard, pp. 32, 33 & 35.

The findings by the European Commission show that the increase in consolidation and convergence has led to an increase in effective competition, translating into improved consumer welfare in the telecommunications markets. European consumers enjoy today a real choice of providers, offering a wide variety of services, functionalities and quality at higher speeds and competitive prices. As such, while BEREC seems to identify problems and gaps in the scope of the powers of NRAs regarding oligopolistic market structures (in wholesale markets), it is not clear from the draft report what the exact problem is as regards to consumer welfare.

Liberty Global therefore questions whether the “oligopoly problem” is as significant as the draft report would seem to suggest. Absent concrete examples and evidence of malfunctioning concentrated telecommunications markets, Liberty Global cautions against an assessment of the need to amend the Regulatory Framework by considering the application of new ex-ante regulation in the case of tight oligopolies.

Liberty Global would also like to stress once again that the very nature of network industries implies that there can only be a certain number of infrastructures deployed due to the high fixed/variable costs ratio, economies of scale and scarce resources. Even though BEREC acknowledges this fact in its draft report and admits that an oligopolistic market structure can lead to a competitive outcome, Liberty Global finds the draft report to largely overestimate the “oligopoly problem”.

### **3. Tight oligopolies: A “regulatory joker”**

Liberty Global is mindful that BEREC itself points out in its draft report that more work is needed to set a clear threshold to trigger regulatory action regarding tight oligopolies. Nevertheless, Liberty Global would like to express its real concerns in the following paragraphs.

#### *Market structure vs. Market behaviour*

BEREC highlights that tight oligopolies are prone to anti-competitive outcomes resulting from the market structure itself, without any element of explicit or tacit coordination of behaviour. What is more, the main characteristics of tight oligopolies are almost identical to the ones observed as a pre-requisite for a finding of tacit collusion.<sup>10</sup> In that case, what allegedly differentiates tight oligopolies from tacit collusion is the lack of coordination of behaviour. Liberty Global interprets BEREC’s perception of tight oligopolies as it being merely the market structure that generates anti-competitive concerns, and not the behaviour.

Although BEREC suggests that further research is needed. Liberty Global wishes to highlight that endorsing (even considering) ex ante regulation for tight oligopolies is an onerous burden imposed on market participants, due to variables that are determined by the nature of the industry (network industry, high fixed costs/low variable costs) and not attributed to their behaviour.

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<sup>9</sup> European Commission, Commission Staff Working Document, *Implementation of the EU regulatory framework for electronic communications – 2014*, accessed at: <<https://ec.europa.eu/digital-agenda/en/news/2014-report-implementation-eu-regulatory-framework-electronic-communications>>, p.11.

<sup>10</sup> With the exception of product differentiation, according to BEREC’s Draft Report.

Furthermore Liberty Global would like to stress that (even considering) ex ante regulation of tight oligopolies will lead to a fundamental inconsistency with legal principles such as the standard of proof, legal certainty and predictability. The concept of 'tight oligopoly' would in essence introduce an unprecedented presumption of guilt and a burden of proof on the accused, which will have a severe impact on investor confidence in the industry. But it would also introduce a disincentive to grow market share in competition with traditional incumbents, which is arguably not in the consumer interest..

BEREC itself acknowledges that *"it is difficult to assess whether a specific price level reflects effective competition from a dynamic perspective, or whether it should be considered non-competitive from a short term perspective"*.<sup>11</sup> This shows the risk involved in wanting to regulate tight oligopolies (see also below type 1 and type 2 mistakes).

#### *Overhaul of goals of ex ante regulation*

One of the goals of ex ante regulation is, as acknowledged by BEREC, *"the evolution from markets experiencing significant market power by the incumbent to markets where the incumbent is no longer dominant."*<sup>12</sup> Furthermore ex ante regulation is to be of a transitory nature, with a purpose to cease when market outcomes are deemed efficient. This is proven by the fact that the number of markets being susceptible to ex ante specific regulation has dropped and national regulatory authorities have been deregulating markets. Considering ex ante regulation of tight oligopolies goes against these goals since it foresees regulating market players that do not have a dominant position and introduces an infinite perpetuation of regulatory intervention, which goes against the fundamental premise of forbearance in EU telecom regulation.

#### *Inconsistency with competition law*

Tight oligopolies are not captured under competition law since this market structure is not related to the behaviour of firms. Liberty Global does not see why ex ante sector specific regulation should expand further than competition law as regards to regulating market structures like tight oligopolies. In addition BEREC seems to be inconsistent by on the one hand adhering to criteria set out in competition law in assessing joint dominance, but on the other deviating completely from competition law with regards to possible regulation of tight oligopolies. Besides, it is not clear why the telecommunications sector should be treated differently than other network industries, where similar market structures can be identified (for example the energy sector, the banking sector, or the airline industry). Indeed, an approach to ex ante regulation based on market structure alone – and not on conduct within the market – will set a negative precedent for the regulation of sectors beyond telecoms, which are prone to similar market structures.

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<sup>11</sup> BEREC Draft Report on Oligopoly Analysis and Regulation, p. 51.

<sup>12</sup> BEREC Draft Report on Oligopoly Analysis and Regulation, p. 54.



### *A vague economic concept*

Oligopolies that lead to effective competition or tacit coordination are clear economic concepts with a solid theoretical background, this however does not apply to the concept of tight oligopolies.<sup>13</sup> See following table

*Table 1 : Oligopolies with different market outcomes*

	Effective oligopolistic competition	Tacit Collusion/ Joint Dominance	Tight oligopolies
<b>Definition</b>	Few firms in the market, but the market outcomes are similar to those of a market in which there are a lot of competing players (low prices, high output, innovation).	The few firms in the market settle for a certain strategy to reach a higher joint profit (without explicit agreement).	The few firms in the market adopt a behavior which forms a self-sustaining reduction in competition.
<b>Firm behavior</b>	Firms act individually rational	Firms act jointly rational	Firms act individually rational
<b>Market outcome</b>	Competitive outcome	Non competitive outcome	Unclear
<b>Theoretical background</b>	Bertrand Competition	Cournot Competition.	N.A. <sup>14</sup>

Considering ex ante regulation as regards to an unclear economic concept such as tight oligopolies can only have harmful effects on the sector and market players according to Liberty Global.

<sup>13</sup> From Liberty Global's research on the concept and definition of tight oligopolies, only limited academic literature was found. In most literature found, the notion of tight oligopoly was predominantly discussed as the contrary to the term loose oligopoly; both terms referred to the amount of market players active in a market, and how this amount could or could not facilitate coordination of behaviour (joint dominance). This is in sharp contrast to how BEREC defines tight oligopolies. The literature that was consulted was: William G. Shepherd, Joanna M. Shepherd (2013), *The economics of industrial organization: Fifth edition*, Waveland Press, McAfee R. P. (2003), *Competitive Solutions: The Strategist's Toolkit*, Princeton University Press. Lianos I., Geradin D. (2013), *Handbook on European Competition Law, Substantive Aspects*, Edward Elgar Publishing; Hibner Don. T. Jr. (2012), "Oligopoly Under Attack: New Approaches to an Old Problem", *St. John's Law Review*, Vol. 44, Issue 5, Article 51; Stroux S. (2002), "Collective dominance under the Merger Regulation: a serious evidentiary reprimand for the Commission", *European Law Review*, Vol. 27, pp. 736-746; Craig C. (2011), "Considering the Oligopoly Problem", *European Competition Law Review*, Vol. 3, pp. 142-152.

<sup>14</sup> See the literature prescribed in the above footnote. To Liberty Global's knowledge, there is no economic model deployed to describe the notion of tight oligopolies. Similarly, BEREC provides for the Cournot and the Bertrand economic models to describe the outcomes of oligopolies, but not "tight oligopolies".



### *What market structure to aim for by NRA's?*

BEREC is sceptical about the competitive outcome of tight oligopolies, however it does not suggest what the counterfactual would be or the market structure to aim for fixed and/or mobile markets, i.e. how many players are enough? On the one hand, it seems that BEREC is not in favour of market concentration of 2-3 players. On the other hand it does not seem to consider arguments about the minimum efficient scale of such markets, namely how many operators the market can sustain in the long-term. Before even considering regulating tight oligopolistic market structures, Liberty Global invites BEREC to explain what its preferred market structure and competitive outcomes would be in the telecommunication sector, taking into consideration again the very nature of this sector as well as how access regulation improves overall competitive outcomes. It is for example very questionable whether applying access regulation is helpful when you already have two networks. As acknowledged by M. Cave: *"There is good evidence that benefits accrue to broadband customers from full end-to-end competition between a telecommunications operator and a cable company. Access-based competition seems to confer fewer benefits."*<sup>15</sup>

Regarding tight oligopolies and based on the above, in the absence of a more specific discussion of the regulatory harm beyond 'inefficient outcomes' or other source of market failure in the absence of significant market power ("SMP"), Liberty Global is convinced that any new regulation will by design become very unpredictable in its effects and will be more harmful than beneficial. While BEREC insists that the notion of tight oligopolies shall not serve as a "regulatory joker" to be applied by NRAs when a joint dominant assessment is unsuccessful<sup>16</sup>, Liberty Global has serious doubts. .

#### **4. BEREC's recommendation on how to assess tacit collusion/joint dominance**

Liberty Global believes that the existing ex-ante sector-specific regulation for electronic communications equips NRAs with sufficient powers to intervene in the case of joint dominance. The criteria in the Framework Directive, supported by the Airtours/Impala case law, give NRAs appropriate tools to make a robust, holistic economic assessment with a required standard of proof in order for *ex ante* intervention to be justified.

In this respect, Liberty Global agrees with BEREC's initiative to assist NRAs in their economic argumentation for a finding of joint dominance, as well as BEREC's interpretation of how such an argumentation should be presented. BEREC is correct to highlight the importance of finding a coherent collusive mechanism in the market before concluding that joint dominance is present.<sup>17</sup> Liberty Global also agrees with BEREC that a "checklist" approach of market criteria should be avoided but would like to stress that an analysis of joint dominance should always start by analysing the retail market.

<sup>15</sup> M. Cave (2014), *The ladder of investment in Europe, in retrospect and prospect*, Telecommunications Policy (38) pp. 674-683. See also Bouckaert, van Dijk and Verboven (2010). *Access regulation, competition and broadband penetration: an international study*, Telecommunications Policy, 34, 661-671; 2. Nardotto, Valletti and Verboven (2012). *Unbundling the incumbent: evidence from UK broadband*, Telecom; 3. Wallsten and Hausladen (2009), *Net Neutrality, Unbundling and their effects on international investment in next-generation networks*, Review of Network Economics, Vol. 8, Issue 1.

<sup>16</sup> BEREC Report on Oligopoly analysis and regulation, p. 52.

<sup>17</sup> namely reaching terms of coordination, monitor deviations, effective deterrent mechanism, insufficient reactions from outsiders

BEREC observes that only few cases of joint dominance have been conducted/found by NRAs. This is according to Liberty Global not indicative of a deficiency in the current regulatory framework. It is plausible that findings of joint dominance in telecommunications markets are very unlikely because of the inherent nature of the sector. Even with a sound economic analysis as suggested by BEREC, Liberty Global believes that findings of joint dominance in the electronic communications arena will be scarce because of the nature of the sector (excess capacity, dynamic nature, innovation etc.).

That the standard of proof might be perceived by NRAs as high, is understandable since determining the outcome of an oligopolistic market outcome is very difficult and not comparable to the finding of significant market power related to a former state monopoly. However, if this high standard of proof is lowered, this would compromise legal certainty, distort incentives to invest and inhibit market growth, to the detriment of consumers. The high standard of proof as established by law is not in place merely to preserve fundamental legal rights; it also serves the economic functioning of the market by setting the bar high for ex ante intervention. In this way, type I mistakes (“false positives”), namely intervention in an oligopolistic market that does not have an anti-competitive outcome, can be prevented.

The chance of type 1 mistakes, namely intervention in an oligopolistic market that does not have an anti-competitive outcome (“false positives”), is much higher than type 2 mistakes (“false negatives”) in the case of single SMP. The reason for this is that an oligopolistic market is very likely to have a competitive outcome, however this is much less likely to be the case for a single SMP. Furthermore, regulating a single SMP relates in most cases to regulating a former monopoly, while joint dominance involves the possibility to regulate a former monopoly and/or a privately financed operator which has never held a position of SMP. The extra burden of a type 1 mistake for such a privately financed operator will be substantial. In addition, from a consumer welfare perspective, a type 1 error will be more costly given the likelihood that a oligopolistic market is actually competitive. Consequently, regulatory intervention will lead to a slowdown in innovation as the regulated companies are forced to adapt process to comply with regulation. In comparison a type 2 error, whereby a non-competitive oligopoly is not regulated in an ex-ante manner, is far less costly because these can still be treated under ex-post competition law. This distinction in impact between type 1 and type 2 errors should lead NRAs to be very cautious when contemplating regulating oligopolistic markets where it is difficult to ascertain whether or not there is a competitive outcome.

## ***5. Underlying rationales for convergence and consolidation in telecommunications markets***

As mentioned, BEREC identifies convergence and consolidation as the main market trends leading to an increase in oligopolistic markets. Liberty Global submits that it is important to identify the key drivers that lead to convergence and consolidation and therefore more concentrated markets, before considering analysing oligopolistic market structures.

The key drivers are based on traditional economic theory – exploiting economies of scale and scope, cost efficiencies, enhanced quality, vertical integration to avoid double marginalisation to name just a few. Of equal importance are several industry-specific factors that fuel the convergence and consolidation trend between telecommunications operators, such as:

- the fragmentation of the European telecommunications landscape, that allows merging market participants to build up scale, use the returns on scale for investment and innovation,

and compete more effectively with other market participants. In that respect cross-border consolidation is generally endorsed by the European Commission as eliminating barriers between national markets.<sup>18</sup> Liberty Global believes that national consolidation is a natural way to better exploit scale and synergies, which allows for strong market players. These strong players will then be enabled to compete on a pan-European level. As such, national consolidation seems a necessary step towards cross-border consolidation.<sup>19</sup>

- the need to respond to the significant growth of data consumption (in line with the ever-rising use of smartphones, smart TVs etc.), that creates pressure on delivering high-capacity networks, high-speed and quality of service, to the benefit of consumers;
- the novel technological and market developments that pose new challenges for telecommunications operators, such as the emergence of over-the-top service providers and the fixed-mobile convergence.

These underlying industry-specific rationales, in addition to the very nature of network industries should be acknowledged, as they might very well explain the inherently concentrated nature of electronic communications markets. Furthermore, convergence and consolidation are driving telecommunications operators to gain competitive edge by investing in higher quality networks, introducing innovative services and meeting evolving consumer demand. Liberty Global would therefore suggest that BEREC acknowledges the pro-competitive and welfare-enhancing rationales of these market trends, which make the necessity of further regulation on oligopolies questionable.

## **6. Existing merger control is an adequate ex-ante filter of anti-competitive outcomes**

The most significant concentrations in the electronic telecommunications markets fall under a merger control regime (be at European or national level).

European merger regulation has an enlarged scope of application after the change of the test from a dominance test to a “Significant Impediment of Effective Competition” (hereinafter “SIEC”) test.<sup>20</sup> As BEREC points out<sup>21</sup>, the qualitative and quantitative factors considered under this new test allow the European Commission/National Competition Authorities to prevent anti-competitive outcomes even in the absence of single dominance. Therefore, competition authorities seem to have acquired sufficient ex ante powers to prevent anti-competitive outcomes resulting from a proposed merger/acquisition.

<sup>18</sup> See for instance the view stated in European Commission (02/07/2014), *Commission clears proposed merger between Telefónica Deutschland (Telefónica) E-Plus subject to conditions-frequently asked questions*: “...In the Commission's view, the answer lies with the elimination of the barriers to the internal market and allowing the telecoms companies to tap fully into its half a billion customer base.”

<sup>19</sup> The idea that a concentration of a few strong operators competing on a cross-border level stimulates investment and reinforces competition has also been endorsed by several Commissioners. See for instance, the quote by Commissioner Oettinger in his Parliamentary hearing of 29/09/2015, where he stated that Europe needs “two or three global players in technology industries” to live up to competition by the US and Asia and his view that the need to incentivise investment entails “allowing telcos to reap the benefit of their investments” (as stated in his Blog Post of November 2014 titled “*Connected Europe? Broadband for all is the answer*”). See also view of ex-Commissioner Neelie Kroes, who has stated that “*having a few pan-European operators that are strong in the cross-border market would not necessarily be bad for competition*”. Kroes N. (11/06/2012), Speech to the Reuters Technology and Media Summit, accessed at: <<http://uk.reuters.com/article/2012/06/11/us-media-tech-summit-kroes-idUKBRE85A12A20120611>>

<sup>20</sup> The Significant Impediment of Effective Competition (SIEC) test was introduced in 2004 as an amendment of the Merger Regulation, in order to take into account any significant impediment of effective competition (SIEC) likely to result from the proposed concentration, without being bound by a finding of dominance.

<sup>21</sup> BEREC Draft Report on Oligopoly Analysis and Regulation, p. 24.

Liberty Global is convinced that ex ante merger control stands as an effective preventive tool to tackle non-competitive oligopolistic market outcomes in electronic communications markets. In Liberty Global's view, there are a number of reasons why merger control is the preferred tool for combatting non-competitive oligopolistic market outcomes. First, merger control is less likely to result in harmful chilling effects on business conduct: as a remedial matter, it constitutes a less disruptive way of intervention than ex ante regulatory obligations. Second, prohibiting or modifying a proposed merger to address the risk of a non-competitive oligopoly is easier and more effective than imposing static ex ante regulation. Third, addressing non-competitive oligopolistic market outcomes under merger control implies a case by case analysis and captures any incremental change in the market structure; in contrast, regulation is a more rigid way of intervention, not easily adaptable to market change and dynamics.

Therefore, BEREC is welcome to elaborate on how ex ante merger control is perceived as insufficient to address anti-competitive market outcomes, and why it considers ex ante (static) regulation to be more timely a response than ex ante merger control.

## **7. Conclusion**

Liberty Global welcomes the discussion opened up by BEREC on Oligopoly analysis and its regulatory implications. The draft report adds value to the existing analysis of joint dominance cases, by clarifying the coherent economic framework needed to conclude such a finding on robust grounds. However, Liberty Global observes currently no consumer harm in the European telecommunications sector that cannot be addressed by existing SMP regulation and/or competition law. This is why it invites BEREC to first identify a tangible problem arising in specific markets, resulting in proven consumer harm. This must take place before considering an amendment of the existing framework or considering new ex-ante regulation, as the implications of intervention in well-functioning markets are well understood by BEREC. This distinction in impact between type 1 and type 2 errors should lead NRAs to be more cautious when regulating oligopolistic markets where it is difficult to ascertain whether or not there is a competitive outcome. Moreover, Liberty Global invites BEREC to reconsider investigating whether tight oligopolies need regulation, as tight oligopolies are an elusive economic concept and furthermore regulating such a market structure would have severe chilling effects on the market. Liberty Global calls BEREC also to consider the value of ex ante merger control and substantiate its opinion on why ex ante sector-specific regulation is preferable.

Finally, Liberty Global would once again like to stress that it acknowledges the increased consolidation and convergence going on in the European electronic communications markets; however, it wonders whether a discussion on a market structure with a limited number of market players merits specific regulatory attention at this time.