

**ECTA Response to BoR (15) 74**

**BEREC draft Report on Oligopoly Analysis and Regulation**

**7 August 2015**

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## A. Introduction and Executive Summary

ECTA, the European Competitive Telecommunications Association, welcomes the opportunity to respond to the consultation on the draft BEREC Report on Oligopoly Analysis and Regulation.

ECTA agrees with BEREC that the EU electronic communications markets have recently witnessed an increased occurrence of oligopolistic (and quasi-duopolistic) market structures. Such increased occurrence is driven *inter alia* by a trend towards bundles, fixed-mobile integration, the consolidation of the industry via mergers and acquisitions and in ECTA's view, the lack of effective wholesale access in fixed access markets leading to a trend towards re-monopolisation in the transition to NGA.

The development of oligopolistic market structures may in some cases contribute to a sub or non-competitive market outcome resulting in harm/welfare loss for users (consumers and businesses/public administrations) and thus require regulatory action. In particular, wholesale markets addressing the key inputs for fixed access network connectivity<sup>1</sup> are prone to the increased occurrence of duopolistic market structures. NRAs who have traditionally been focused on regulating markets characterised by individual SMP must have the proper tools to address joint dominance.

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with the cases brought before the European Commission under the Article 7 consultation procedure mostly overturned or withdrawn; secondly, the concept of joint dominance covers only tacit collusion, leaving ineffective tight oligopolies untouched (both under *ex ante* and *ex post*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

If NRAs cannot effectively tackle 'harmful' oligopolies and duopolies because the burden of proof of joint dominance is too high and the exclusive reliance on the principle of dominance leaves certain non-competitive market structures untouched, there is a serious risk that the gains in welfare brought about by liberalisation and increased competition in the electronic communications markets will be lost, especially in a fixed environment, where effective wholesale access has been key to foster competition, and bring about affordable prices and innovative products.

Building on the market analysis case law of NRAs, ECTA believes that effectively addressing enduring fixed access bottlenecks predominantly controlled by a single dominant operator

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<sup>1</sup> In particular Markets 3a, 3b and 4 of the Commission Recommendation of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 295, 11.10.2014, p. 79, available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2014.295.01.0079.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.295.01.0079.01.ENG).

continues to be the most important challenge for NRAs, in particular in the transition to NGA. However, NRAs must also be able to tackle 'harmful' fixed oligopolies/duopolies.

In this setting, ECTA therefore welcomes and appreciates the work which BEREC is carrying out and the conclusions reached in the draft report, which are a good starting point for further discussion.

**ECTA welcomes the guidance and suggested framework for assessing joint dominance, which can be a key contribution to making the concept of joint dominance operational.**

**ECTA is particularly concerned with fixed oligopolistic/duopolistic market structures and considers that the application *mutatis mutandis* of the principles underpinning the SIEC test to *ex ante* regulation of such type of market structures should be explored and thoroughly tested in the context of the upcoming Framework Review. While the finding of single/joint SMP must remain the first and foremost threshold to regulate fixed network oligopolies/duopolies, an option worth exploring is to ALSO allow for regulatory intervention in the absence of a single/joint SMP finding IF remaining enduring economic bottlenecks or the market structure are on a forward looking basis likely to significantly impede the development of effective competition and thus evidence enduring market failure.**

BEREC, the European Commission, and the co-legislators must ensure, in the context of the review of the Regulatory Framework, that NRAs have the necessary tools to remedy uncompetitive outcomes of oligopolistic/duopolistic market structures. Options such as the one presented above should therefore be explored.

ECTA welcomes BEREC's cautious approach *vis-à-vis* the regulatory treatment of tight oligopolies. A predictable regulatory framework is of utmost importance for all industry players and therefore an *ex ante* application of a variant to the SIEC test should be thoroughly explored, tested, based on a clear framework and not lead to arbitrary outcomes. Whilst BEREC has already carried out a very thorough investigation, an issue such as the one at hand requires additional consultation and ECTA looks forward to further engaging with BEREC on this discussion.

We remain of course at your disposal to provide any further clarifications. To that effect, please contact Inês Nolasco (Senior Regulatory Affairs Manager at ECTA, [inolasco@ectaportal.com](mailto:inolasco@ectaportal.com)).

## B. Remarks on the context and objectives of the BEREC draft report<sup>2</sup>

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

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

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

As Whish and Bailey<sup>3</sup> have put it:

*The expression of oligopoly is not entirely helpful in describing the situation of concern for competition policy, since there are many markets in which there are only a few sellers and yet which are highly competitive; and there are others in which there may be many firms and yet a failure for the competitive process.*

(...)

*The expression oligopoly means 'sale by a few sellers', but it is not the fact of 'few-ness', in itself, that is the problem. To depict the problem as a matter of numbers does not do full justice to economists' concept of 'market power'; it is market power, whether individual or collective, that confers the ability to suppress output and to raise price to detriment of consumers. It is true that the fewer the number of players in a market, the more likely it is that market power will exist; however, the identification of market power is not simply a matter of counting heads.*

As BEREC notes, a market with an oligopolistic structure does not necessarily require regulatory intervention because **competition in an oligopoly is not *per se* ineffective**. Effective oligopolistic competition can indeed be observed in certain cases and lead to an optimal market outcome in the long run.<sup>4</sup>

2. ECTA concurs with BEREC that the **EU electronic communications markets have recently witnessed the increased occurrence of oligopolistic and quasi-duopolistic market structures**, driven *inter alia* by the increased trend towards bundles, fixed-mobile integration, increased platform competition, convergence of market shares and the consolidation of the

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<sup>2</sup> BEREC draft report, chapter 3.

<sup>3</sup> *Competition Law*, by Richard Whish and David Bailey, Oxford University Press, 2012, 7<sup>th</sup> edition.

<sup>4</sup> E.g. when the benefits from increased innovation and investment incentives outweigh higher prices or actual and potential competition limits the oligopolists' power to raise prices.

industry via mergers and acquisitions<sup>5</sup>. In ECTA's view, the lack of effective wholesale access to fixed networks leading to re-monopolisation in the transition to NGA also contributes to the rise of such market structures.

As BEREC recalls, electronic communications markets have inherent oligopolistic characteristics driven by very high legal, regulatory and/or structural barriers to entry<sup>6</sup>, bottleneck issues, scarcity of resources and economies of scale and scope, which limit market entry and the number of infrastructure-based competitors. Huge investments and sunk costs are required from operators aiming to deploy physical networks and start providing services. Efficient infrastructure competition is thus inherently limited, including in the transition to NGA.

As BEREC has put it:

*In most of the scenarios the economies of NGA deployment do not allow for more than two or three operators rolling-out high-speed access networks at a national level on a profitable basis because of the high fixed and sunk costs and the uncertainty as to the expected level of demand for new NGA products.*

In recent years, alternative operators have been investing heavily in local loop unbundling and in fibre networks whenever economically sustainable and efficient.<sup>7</sup> This was enabled by wholesale access regulation and pro-competitive policies, which tackle markets whose characteristics would restrict entry. However, the economics of service provision and deployment are such that the duplication of the last mile by means of entirely newly built infrastructure is not economically feasible or desirable in most areas<sup>8</sup>. The last mile constitutes an enduring economic bottleneck, whether in a legacy or in an NGA setting.<sup>9</sup>

Fixed incumbents and cable operators have been upgrading their legacy copper and coaxial networks to NGA, with an increased preponderance of cable operators in fixed markets. This preponderance, which favours the development of duopolistic market structures, reinforces

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<sup>5</sup> Examples of consolidation include: (i) *fixed-fixed* mergers, with altnets acquiring each-other, altnets acquired by incumbents or cable in-country consolidation and international expansion. Cases include e.g. *Altnets*: 1&1/Versatel (Germany); *Incumbent-Altnet*: KPN-Reggefiber (Netherlands); *Cable*: Liberty Global/Ziggo (Netherlands), Liberty Global/Virgin Media (expansion to UK); (ii) *fixed-mobile*, with mobile operators acquired by cable operators or vice-versa. Cases include e.g. Vodafone/Kabel Deutschland; Vodafone/Ono; Numericable/SFR and (iii) in-country *mobile-mobile* e.g. the recent 4-3 mobile mergers. Cases include H3G/Orange Austria, H3G/Telefonica Ireland, Telefonica Deutschland/E-Plus.

<sup>6</sup> E.g. entry into the relevant market requiring large investments and the programming of capacities over a long time in order to be profitable; continuing control over legacy physical infrastructure that is impossible or difficult to duplicate; network externalities or economies of scale and scope; requirements which may entail spectrum scarcity.

<sup>7</sup> Local loop unbundling and shared access account for 81% of new entrants DSL subscriptions. New entrants (including cable) today hold 71% of NGA lines at EU level (EC Electronic communications market indicators July 2014).

<sup>8</sup> Note that network duplication may in some cases be sustainable, notably when it comes to the roll-out of networks for business customers (e.g. FttO networks) and provision of services on demand, in specific geographic areas.

<sup>9</sup> The decision of whether to replicate the last mile or a part of it depends on many factors including the original network architecture. E.g. in Italy the number of concentration points at the street cabinet level, the average short length of the sub-loops and the absence of a second legacy infrastructure (coaxial cable) have created incentives for Altnets to progressively invest and start replicating the last mile.

the need to ensure not only that the concept of joint dominance is made operational but also that new ideas on how to tackle non-collusive ineffective oligopolistic/duopolistic market structures are discussed and reflected upon in the context of the upcoming review of the EU regulatory framework.

Policy guidance and actions taken by the European Commission, competition authorities and NRAs will be key to determine the level of development of oligopolistic market structures. E.g. whether the European Commission and competition authorities adopt a more lenient or strict approach when assessing mergers, whether policy makers and NRAs ensure that the regulatory framework is adapted to tackle all non-competitive oligopolistic/duopolistic market structures, and whether effective wholesale access is ensured in an NGA setting.

3. ECTA agrees that **Markets 3a, 3b and 4** of the 2014 EC Recommendation on Relevant Markets Susceptible to *Ex Ante* Regulation (2014Rec) **generally show an increased occurrence of oligopolistic market structures**.

Note that Market 3a is inevitably a quasi-monopoly or tight oligopoly across an overwhelming majority of the EU's territory and this is reflected by SMP findings in all EU Member States.

Market 3b and Market 4 are also prone to oligopolistic situations. In particular, altnets using physical access to unbundled loops (Market 3a) have not been able to become effective competitors for wholesale central access (Market 3b) and wholesale high quality access (Market 4), on account of not having a national footprint which is required by most access seekers and due to the pricing margins being inadequate to support wholesale-wholesale provision which is competitive with provision by the incumbent(s) (although limited wholesale-wholesale supply of WBA and leased lines does exist).

4. Whilst consideration of OTT (Over-The-Top) services provided by content and application providers (CAPs) may be relevant when assessing the evolution of telecommunications markets, ECTA believes **OTTs are unlikely to increase competition at the fixed access infrastructure level or to distort a coordinated outcome at the wholesale level due to the fact that OTT providers depend indirectly on the underlying infrastructure provided by telecoms operators. OTTs' ability to affect single or joint dominance at the infrastructure access level is thus limited<sup>10</sup>**.

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

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<sup>10</sup> See BEREC draft report, pages 10 and 44.

term. Note that the fact that cable and copper networks co-exist in some Member States/geographical areas constitutes a historical legacy (i.e. cable was not originally conceived/deployed to provide voice or broadband services, but it does now).

### **C. Is a new framework to address oligopolistic/duopolistic market structures needed and how could it be defined?**

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

#### ***a. Why a new test should be considered?***

In ECTA’s view the tools provided by the regulatory framework to tackle oligopolistic market structures could prove ineffective. **Two fundamental problems** identified by BEREC in the draft report arise.

Firstly, **NRAs have seldom been able to apply the concept of joint dominance in the context of *ex ante* regulation and this is particularly concerning when it comes to the fixed wholesale broadband markets, which are endowed with persistent economic bottlenecks<sup>11</sup>**. In ECTA’s view, the rare application of this concept stems not only from NRAs lacking guidance on how to apply this concept, but also from the extremely high burden attached to the proof of joint dominance. In addition, the experience of a few NRAs with the positions taken by the Commission and by national appeal bodies *vis-à-vis* joint dominance cases has also dissuaded other NRAs from seeking to address problems effectively observed.

Secondly, **the reliance on the principle of market dominance to regulate oligopolistic markets leaves tight oligopolies/duopolies leading to non-competitive market outcomes untouched, especially in the wholesale broadband markets which are endowed with persistent bottlenecks, thus creating a ‘regulatory gap’**. As BEREC rightly states, these are market structures where although undertakings act independently and do not coordinate market conduct, the market characteristics are such that the outcome is non-competitive. If joint dominance cannot be proved, NRAs are not empowered to impose regulatory obligations. **This is particularly concerning with regard to fixed markets where economic bottlenecks are persistent, namely market 3a (and also markets 3b and 4).**

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<sup>11</sup> E.g. only one NRA - the Malta Communications Authority – has formally proposed to find joint dominance in the wholesale broadband access market but then withdrew its notification due to the Commission serious doubts. It later notified an analysis where it found no SMP.

BEREC provides a good example of how an ineffective tight oligopoly (*in casu* duopoly) may occur, leaving NRAs unable to tackle sub-competitive market outcomes:

*For example, a market situation where broadband products are offered on two different infrastructures, traditional copper and cable, might be susceptible to lead to a tight oligopoly. In this scenario the firms would not need to behave collusively to impede effective competition by refusing wholesale access to competitors. Instead, such behaviour could simply be a profit maximising response to the market conditions, i.e. a rational answer to the given circumstances without expecting to influence the other firm. The operators simply have no incentive to offer wholesale access when they do not expect to gain a higher profit by allowing alternative operators the entrance to the market. Therefore this type of oligopolistic behaviour has to be differentiated from collusive behaviour, where the operators act with the intention of influencing the actions of their competitors.*

*In consequence, only two operators would offer broadband products on the retail level, which might increase the risk of welfare losses for the end consumer and hinder effective competition. The lack of competitive constraint could e.g. lead to an incentive for both firms to increase prices on the retail level.*

*This example of tight oligopoly might fail since basic characteristics of collusive behaviour are missing, and the NRA would not be allowed to intervene since no dominance is proven.<sup>12</sup>*

BEREC further addresses the oligopolies/duopolies 'regulatory gap':

*BEREC notes that tight oligopolies have not been addressed directly under the European framework for electronic communications. In light of that position, NRAs may find it difficult to ensure the development of effective and sustainable competition in the electronic communications sector in the presence of tight oligopolies. Changes in the market (converging market shares, mergers, consolidation, deployment of NGN and so on) may give rise to market structures that do not lead to effective competition and yet, given the current lack of precedent, it may be difficult to establish dominance (and thereby significant market power) which would justify regulatory intervention.<sup>13</sup>*

And:

*Difficulties and uncertainties remain in finding a solid benchmark when assessing the effectiveness of competition in tight oligopolies. Nevertheless, it remains doubtful whether a European regulatory framework that relies on the principle of dominance only will be effective in ensuring that the regulatory goals are met. BEREC cannot exclude the possibility that ineffective tight oligopolies or even tight duopolies might develop and that once markets have developed in a stable yet ineffective manner it would not be feasible any longer to foster effective competition by regulatory means. Preventing such a regulatory gap arising might be the key answer.<sup>14</sup>*

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<sup>12</sup> BEREC draft report, page 50.

<sup>13</sup> BEREC draft report, page 54.

<sup>14</sup> BEREC draft report, page 56.



In ECTA's view, a **shift in the way fixed oligopolistic/ duopolistic market structures are dealt with under the regulatory framework deserves very careful consideration.** Whereas ECTA considers that the principle of dominance must remain the first and foremost trigger for regulatory intervention, BEREC, the European Commission and the co-legislators should give due consideration to setting an additional threshold for intervention in those cases where remaining economic bottlenecks or the market structure, on a forward looking basis, are likely to significantly impede the development of effective competition and thus evidence market failure. This would allow regulators to properly fulfil the goals of the regulatory framework, in particular bearing in mind that *ex post* competition enforcement, by also relying on a finding of dominance, is equally not suited to deal with tight oligopolies. We also wish to emphasise that the *ex ante* regime is intended to enable intervention on a forward-looking basis in order to *prevent* abuse.

Rethinking the threshold for regulatory intervention is all the more relevant in the current context where policy makers are looking at ways to add more ambition to broadband roll-out. As already recognised by BEREC, effective and sustainable competition “*is what drives efficient investment*” and “*serves the interests of European end-users, as it helps to fuel innovation and provides for maximum benefit in terms of choice, price, and quality.*”<sup>15</sup> Evidence has shown that very highly concentrated markets, characterised by monopolistic or quasi-duopolistic market structures, do not yield higher levels of network investments. As BEREC rightly states:

*Moreover, very little competition in a market can also lead to decreasing incentives to invest and productive inefficiencies (X-inefficiencies) may increase while the incentive to compete is reduced.*<sup>16</sup>

#### **b. How could the new test be defined?**

ECTA welcomes the parallelism established with gap cases in merger control and the 2004 reform of the substantive test. The SIEC<sup>17</sup> test was introduced specifically to close the gap in the system of prevention, which failed to prohibit mergers not leading to the creation or strengthening of a dominant position but which still resulted in non-competitive unilateral effects (e.g. the ability of post-merger firms to raise prices, lower output and reduce innovation due to the removal of competitive constraints.)<sup>18</sup>

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<sup>15</sup> BEREC Strategy 2015-2017, Section 3, Strategic Pillar 1.

<sup>16</sup> BEREC draft report, page 12.

<sup>17</sup> *Significant Impediment to Effective Competition.*

<sup>18</sup> Recital 25 of the Merger Regulation states in this regard: “*In view of the consequences that concentrations in oligopolistic market structures may have, it is all the more necessary to maintain effective competition in such markets. Many oligopolistic markets exhibit a healthy degree of competition. However, under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition. The Community courts have, however, not to date expressly interpreted*

As BEREC states:

*The parallelism of the problematic issue of gap cases in the current context is obvious: just as the criterion of significant market power at some point was not adequate any longer to handle unilateral, i.e. uncoordinated effects in tight oligopolies concerning merger cases, the regulatory evolution of telecommunication markets may lead to in the presence of market structures and economic outcomes that are not explicitly covered by the concept of significant market power even though unfortunate results are to be expected. As told previously, 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 & acquisitions regulation must be done to the ex ante regulatory framework.<sup>19</sup>*

As BEREC rightly concluded in its Work Programme for 2014, experience has taught NRAs that “*the hypothesis that ‘2 is not enough for competition’ continues to hold*” which implies that “*in many cases fixed infrastructure will continue to require regulation*”. ECTA is particularly concerned with duopolistic structures in fixed markets endowed with persistent economic or technical bottlenecks, which are naturally prone to uncompetitive outcomes and where access regulation remains key. In ECTA’s view, **the application *mutatis mutandis* of the principles underpinning the SIEC test to ex ante regulation of fixed oligopolistic/duopolistic market structures should therefore be carefully explored and thoroughly tested in the context of the upcoming Framework Review.**

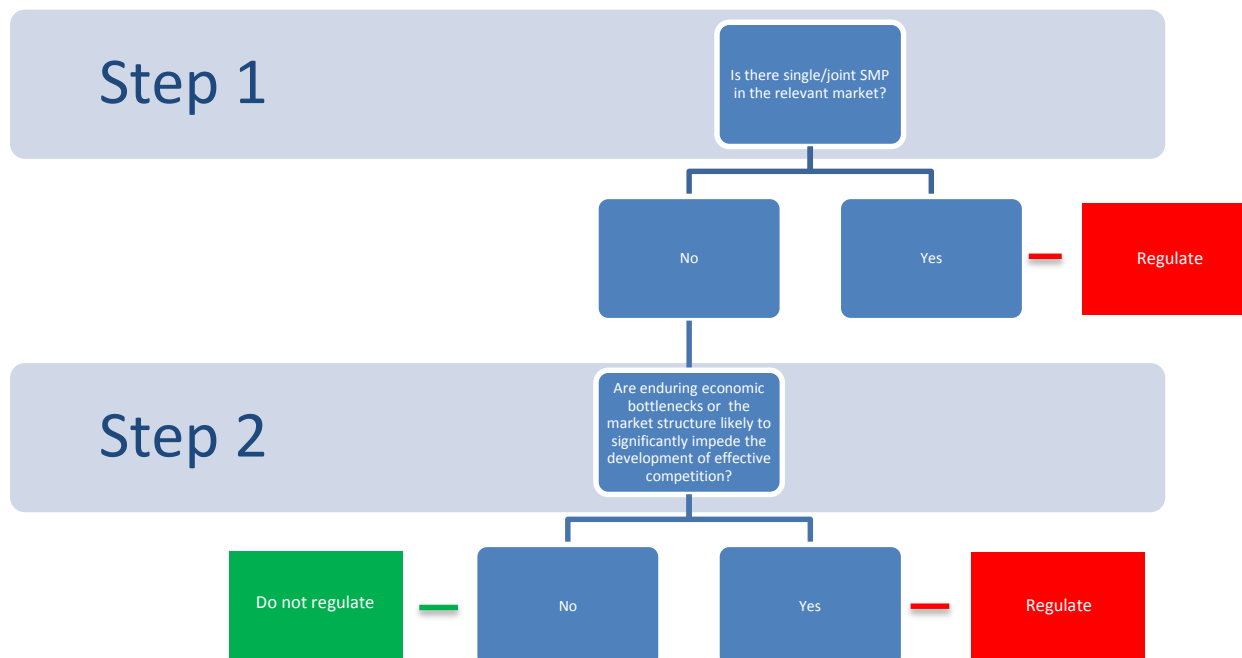
The following two-step test exemplified below could be explored:

- the **finding of SMP would remain the first and foremost threshold to justify regulatory intervention**;
- in those cases where serious concerns remain regarding a fixed oligopoly/duopoly, NRAs would run a **second test** to assess whether remaining economic bottlenecks or the market structure, on a forward looking basis, are likely to significantly impede the development of effective competition (e.g. due to the lack of competitive constraints and pressure on the few/two market players) and thus evidence enduring market failure, and if so, warrant regulatory intervention (notably to preserve and enhance the regulatory remedies that have enabled competition in fixed markets and which would otherwise fall away).

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Regulation (EEC) No 4064/89 as requiring concentrations giving rise to such non-coordinated effects to be declared incompatible with the common market. **Therefore, in the interests of legal certainty, it should be made clear that this Regulation permits effective control of all such concentrations by providing that any concentration which would significantly impede effective competition, in the common market or in a substantial part of it, should be declared incompatible with the common market. The notion of ‘significant impediment to effective competition’ in Article 2(2) and (3) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned.”** (bold added)

<sup>19</sup> BEREC draft report, page 55.



Several criteria/evidence could be looked into in order to determine whether remaining economic bottlenecks are present or a specific market structure is likely to significantly impede the development of effective competition in the absence of *ex ante* wholesale regulation, in particular the criteria put forward by BEREC to identify tight oligopolies leading to sub-competitive results<sup>20</sup> (e.g. high degree of market concentration, high barriers to entry and no significant potential new entrants, high switching costs, low growth of demand, low cross-price elasticity and low countervailing buyer power). Evidence to sustain such finding could include e.g. high and stable market shares, excessive prices, low service choice, poor customer experience, low speeds offered, low level of innovation and network investment, limited market entry, lack of wholesale access in the absence of regulation, margin-squeeze, non-customer-friendly contractual clauses.

**ECTA urges BEREC to explore options such as the one presented above which would allow NRAs to tackle ineffective fixed network tight oligopolies/duopolies.**

A predictable regulatory framework is of utmost importance for all industry players and therefore any *ex ante* application of a variant to the SIEC test should be thoroughly explored, tested, based on a clear framework and not lead to arbitrary outcomes.

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<sup>20</sup> BEREC draft report, chapter 7.1.1.

#### **D. BEREC's suggested framework for assessing joint dominance<sup>21</sup>**

ECTA broadly agrees with BEREC's guidance and suggested framework for assessing joint dominance, which can be a key contribution to making the concept of joint dominance operational.

With regard to the standard of proof, ECTA agrees that conceptually the same standard of proof should apply to markets with existing (single SMP) regulation in place and those without existing regulation. The prevention of a regulatory gap as described above should primarily be tackled through the consideration of an additional threshold for regulatory intervention in fixed tight oligopolies/duopolies (see chapter C *supra*) rather than through the definition of different standards of proof for joint dominance.

ECTA also agrees that the assessment done by an NRA in a regulated environment is more hypothetical/'greenfield' i.e. the NRA must assess whether there is joint dominance in the absence of (single SMP) regulation. Again, the standard of proof should not necessarily be different although the type of evidence is likely to be because, as BEREC states, NRAs in a regulated environment cannot depend on actual market outcomes (i.e. empirical evidence, factual data), and must therefore make predictions on how the market may look in the absence of regulation (like in the case of single SMP).<sup>22</sup> This should be acknowledged by the European Commission when assessing joint dominance findings.

ECTA agrees with BEREC's conclusion that:

*(...) it seems likely that not so much the standard of proof that is being applied is or should be different but that the type of proof may be different. In a regulated environment NRAs will have to rely more on expectations and economic reasoning than on actual facts (as in merger control).*

#### **E. Remedies in the context of harmful tight oligopolies<sup>23</sup>**

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

With regard to markets where joint dominance is proved, ECTA agrees that the obligations imposed on each operator found to be jointly dominant may be different. E.g. in case joint dominance is found in the wholesale local access market between a telco and a cable operator, the nature of the networks controlled by each of the jointly dominant undertakings may justify the imposition of differentiated and complementary remedies. Given that the

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<sup>21</sup> BEREC draft report, chapter 6.

<sup>22</sup> BEREC draft report, page 47.

<sup>23</sup> BEREC draft report, chapter 6.

unbundling of the cable network should currently prove unfeasible, different access remedies at different points in the value chain would need to be imposed on each operator.

Finally, ECTA welcomes BEREC's proposal to address the *ex ante* regulatory gap i.e. to ground NRAs' intervention *vis-à-vis* harmful tight oligopolies/duopolies on the fulfilment of the regulatory framework goals:

*Therefore, in case of tight oligopolies, it may be consistent with the regulatory goals set out in the provisions of Article 8 of the regulatory framework to impose remedies on all undertakings that may contribute to existing or potential sub-competitive outcomes<sup>74</sup> to "[ensure] that there is no distortion or restriction of competition in the electronic communications sector [and to encourage] efficient investment in infrastructure".<sup>75</sup>*

*Imposing the same obligations on all members of the tight oligopoly simply because they are part of a sub-competitive oligopoly therefore may be an option to consider. However, NRAs should carefully look at the market conditions, especially to distinguish among situations where operators can be deemed to be in equivalent circumstances or not. NRAs may consider, depending on the actual circumstances they face, to promote remedies which are less burdensome than in actual SMP situations. Moreover, lighter remedies may in certain situations be a possible means of encouraging alternative operators to enter the market. Tackling entry barriers could be a starting point if high entry barriers lead to sub-competitive market outcomes in a tight oligopoly. One of the aims of regulating tight oligopolies should therefore be to ensure access for new entrants at the retail level based on wholesale level remedies. In this regard, NRAs may consider, for example, imposing an obligation to grant access at reasonable request at the wholesale level. Yet, other remedies may still be proportionate depending on the actual circumstances faced by the NRA. Imposing light remedies on undertakings in a tight oligopoly, may be a good means to move a market characterized by a tight oligopoly towards effective competition.<sup>24</sup>*

Nevertheless, as stated in chapter C *supra*, options to adapt the regulatory framework to ensure that NRAs are fully empowered to address harmful fixed network tight oligopolies/duopolies should be primarily explored.

In any case, remedies imposed in tight oligopolistic markets should be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of Directive 2002/21/EC (Framework Directive).<sup>25</sup>

## **F. Recommendations to amend the Regulatory Framework**

ECTA welcomes the clarification and guidance on joint dominance provided in the BEREC draft report and agrees with BEREC's proposals concerning the review of the SMP Guidelines (amendment of section 3.1.2).

ECTA also very much appreciates BEREC's willingness to engage in a dialogue with the European Commission and stakeholders. As mentioned in chapter C *supra*, in ECTA's view **the application *mutatis mutandis* of the principles underpinning the SIEC test to *ex ante* regulation of fixed oligopolistic/duopolistic market structures should be further**

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<sup>24</sup> BEREC draft report, pages 58 and 59.

<sup>25</sup> See in this regard article 8 (4) of Directive 2002/19/EC (Access Directive).

**explored and thoroughly tested in the context of the upcoming Framework Review.** An option worth exploring would be to maintain, first and foremost, the finding of single/joint SMP as the key threshold to regulate fixed network oligopolies/duopolies but to ALSO allow for regulatory intervention in the absence of a single/joint SMP finding IF remaining economic bottlenecks or the market structure, on a forward looking basis, are likely to significantly impede the development of effective competition and thus evidence market failure. This hypothesis requires thorough consideration.

BEREC, the European Commission, and the co-legislators must ensure, in the context of the review of the Regulatory Framework, that NRAs have the necessary tools to remedy uncompetitive outcomes of oligopolistic/duopolistic market structures. Options such as the one presented above should therefore be explored.

ECTA welcomes BEREC's cautious approach to the regulatory treatment of tight oligopolies, highlighted in the statements below:

*Whether the solution lies in adopting and transferring and/or adapting at least part of the principles and preconditions of the SIEC-test to regulatory practice or whether new methods and instruments have to be designed remains open to discussion.<sup>26</sup>*

And:

*Regulatory intervention in tight oligopoly scenarios may be limited under the existing framework, and any remedy that may have been imposed for a previous single SMP position cannot be maintained where the single SMP position no longer holds.*

*The solution to fill this gap in ex ante regulation is not as straightforward as to directly transpose the M&A legislation to the ex ante regulatory framework. As stated in the previous chapter, the focus of the prospective analysis for ex ante regulation is different. Due to the fact that ex ante remedies were previously imposed and a ("modified") greenfield approach must be applied.*

*More work is needed to set a clear threshold to trigger regulatory action. So, any extension of the ex ante regulatory framework is challenging and a careful analysis should be done to ensure regulatory certainty, providing, at the same time, enough room for NRAs to address issues of non-effective competition.*

*Thus, further analysis should be done to adapt the regulatory framework in an adequate way, taking into account regulatory certainty, while at the same time providing an adequate standard of proof for a trigger in case of tight oligopolies where no SMP can be found and enabling ex ante regulatory action. BEREC does not currently have a definitive solution to address this gap in the regulatory framework, which has wider effects on other policy objectives. However, BEREC is open to engage in a constructive dialogue with the EU institutions as well as with stakeholders to evaluate how potential competition problems arising in tight oligopolies may be tackled.<sup>27</sup>*

Indeed a predictable regulatory framework is of utmost importance for all industry players and therefore an ex ante application of a variant to the SIEC test should be thoroughly explored,

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<sup>26</sup> BEREC draft report, page 56.

<sup>27</sup> BEREC draft report, page 61.

tested, based on a clear framework and not lead to arbitrary outcomes. Whilst BEREC has already carried out a very thorough investigation, an issue such as the one at hand requires additional consultation and ECTA looks forward to further engaging with BEREC on this discussion.

Yours sincerely,

A handwritten signature in black ink, reading 'Erzsébet Fitori'. The script is cursive and fluid, with the first name 'Erzsébet' and the last name 'Fitori' clearly distinguishable.

**Erzsébet Fitori**

Director

ECTA, Brussels Office

Encl. Annex I

## Annex I

### Additional comments supported only by some ECTA members with MVNO or late entrant MNO interests

- The wholesale market of access and call origination on public mobile telephone networks (market 15/2003), or an evolution thereof to encompass the clustered wholesale supply of voice/sms/data, may lead to the development of oligopolistic structures.
- Spectrum scarcity and management, coupled with the lack of effective wholesale access, have in some Member States led to the creation of markets which are mostly oligopolistic, with two to three operators holding most of the market share. While pro-competitive policies – including on spectrum management, MTRs, ‘on-net-off-net’ discrimination – have injected more competition in the market, the role played by new entrants in increasing competition may not be relevant if entry into the market becomes unlikely due to the obstacles to network deployment or lack of wholesale access.
- As BEREC has recognised, mobile markets are witnessing a reduction in the number of MNOs, notably due to mergers and acquisitions, and may raise competition issues notably for access seekers, particularly when new market entry is unlikely to materialise in the absence of regulatory intervention.
- The development of oligopolistic market structures may be particularly detrimental to MVNOs. In this regard, NRAs should look not only into the outright denial of MVNO access, but also to the conditions attached to MVNO access, including contractual arrangements such as exclusivity clauses, contract duration, migration, unnecessary technical clauses and fees.
- Going forward, mobile data access will be the key service provided to retail customers in mobile markets. There may be a risk of price squeeze and market eviction of MVNOs since in some Member States retail prices are lower than wholesale charges (wholesale international roaming charges and/or negotiated national roaming prices).
- Adopting pro-competitive spectrum policies - and considering mobile access remedies including national roaming and MVNO access - are key elements of any strategy aimed at tackling anti-competitive oligopolistic situations in mobile markets.