

BEREC response to the public consultation from the EC on the update of the SMP Guidelines

BEREC's Preamble

BEREC welcomes the opportunity to provide input to the Review of the “Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (“SMP Guidelines”). A comprehensive and robust set of market analysis guidelines is imperative to enable NRA’s and the Commission to foster effective competition in the future.

The current Guidelines have remained unchanged since their publication in 2002, and the revised guidelines should reflect the growing complexity and multi-faceted nature of electronic communications markets. BEREC hopes that the review process will conclude with a set of Guidelines that will allow effective competition in the electronic communications sector to provide economic and social benefits to all European citizens over the coming years.

However, BEREC regrets that this review is conducted in parallel with the Framework Review, and not consecutively. Indeed, the current review of the Guidelines relies on the existing Framework, meaning that the possible evolution of the Framework will not necessarily be taken into account in this Guidelines Review. Therefore, the current exercise might need to be undertaken again depending on the results of the Framework Review. This response is in addition to BEREC’s opinion on the draft text proposal that the European Commission will make after the Public Consultation. Where appropriate, BEREC has provided detailed responses to the individual questions. However, BEREC would like to make a number of observations in relation to the review that are not explicitly referenced in the questionnaire.

Over the last few years, BEREC has published reports on critical issues concerning the shortcomings of the current Significant Market Power (‘SMP’) Guidelines and market failures (both actual and potential) that any revised Guidelines should take into account. These reports were motivated by the fact that as markets are evolving from single SMP market settings towards oligopolistic competition, the interactions of market participants at both a vertical and horizontal level have become more complex and this has led to a wider variety of potential market failures and competition problems.

Although such competition problems may not be found in all oligopolistic markets nor generally be as severe as those that pertained to single firm SMP scenarios in 2002, the assessment now needed to ascertain if markets are effectively competitive requires deeper analysis and a more dynamic regulatory tool kit.

As such, BEREC is of the view that the Guidelines should reflect these developments and take into account the fact that market structures and potential market failures that NRAs are required to assess and address are more multi-faceted than in 2002. In particular, BEREC has set forth in its Report on oligopoly analysis and regulation its view that, as markets evolve from those dominated by single firm SMP, the possibility that the market outcome may be ineffective as a result from a 'tight oligopoly' scenario through the existence of 'Unilateral Market Power' (UMP). As this is likely to be an important regulatory concern now and in the future, BEREC's view is that NRAs should be equipped with the relevant regulatory tools to robustly assess such market conditions and also remedy any market failures arising from a finding of UMP. In order to do so, this potential market failure should be explicitly addressed both in the new regulatory framework and in the revised Guidelines (see BEREC views on non-competitive oligopolies in the Electronic Communications Code, BoR (17) 84). Otherwise the Framework risks exposing a blind spot with a potentially negative economic impact.

Moreover, the revised Guidelines should be designed to maximise the efficacy of the market analysis process so as to not place any unnecessary regulatory burden on stakeholders or undue administrative burden on NRAs.

This contribution is not to be considered as an exhaustive list of issues as BEREC may raise additional issues when providing its opinion on the draft of the new guidelines, and does not pre-empt the orientation of the BEREC opinion that will be provided on the new text proposal that will later be made by the European Commission.

1 Objective of the public consultation

Article 15(2) of the Framework Directive on a common regulatory framework for electronic communications networks and services requires that the Commission publishes the SMP Guidelines, the contents of which is to be in accordance with the principles of competition law. The SMP Guidelines foresee that the Commission should amend the Guidelines when appropriate taking into account experience with applying the regulatory framework and the jurisprudence of the EU Courts.

In this context, the Commission will review the SMP guidelines - i.e. the Commission guidelines on market analysis and the assessment of the significant market power under the Community regulatory framework for electronic communications networks and services - which are addressed to the National Regulatory Authorities that have to take them into utmost account when defining relevant markets and assigning telecommunications operators with SMP in view of imposing on them appropriate regulatory obligations to redress competition problems identified on a forward looking basis.

More information on this Commission initiative can be found in the Roadmap published under the following link:

http://ec.europa.eu/smart-regulation/roadmaps/docs/2017_cnect_011_smp_guidelines_en.pdf

The questions are addressed mainly to the Member States, National Regulatory Authorities, National Competition Authorities, electronic communications providers, academics in law and economics as well as consumers.

The Commission is consulting in particular on the need to update individual sections of the SMP Guidelines:

1. Section 2 related to market definition
2. Section 3 on single and joint SMP
3. Section 4 on the relevance of the SMP Guidelines concerning regulatory obligations
4. Section 5 on powers of investigation and cooperation for the purpose of market analysis
5. Section 6 on procedures for consultation and publication of National Regulatory Authorities decisions.

The findings of this consultation and the ongoing Commission study will determine the scope of the review and feed into the Commission's review. Account will be taken of the experience in applying the regulatory framework and developments of EU law.

Please note: In order to ensure a fair and transparent consultation process **only responses received through our online questionnaire will be taken into account** and included in the report summarising the responses. Should you have a problem completing this questionnaire or if you require particular assistance, please contact:

CNECT-B3-CONSULTATION-SMP-GUIDELINES@ec.europa.eu

Contributions will be published on the website of the Directorate General for Communications Networks, Content and Technology. **The responses received will be available on the Commission website unless confidentiality is specifically requested.** To this end we would kindly ask you to clearly indicate for each of your responses if you would not like it to be publicly available. In case your response includes confidential data **please also provide a non-confidential version of your response.**

Please read the [Privacy Statement](#) on how we deal with your personal data and contribution.

2 General information

2.1 You answer as:

- Private individual
- Consumer association or user association
- Business (please specify sector)
- Electronic communications network or service provider
- Internet content provider
- Government authority
- National Regulatory Authority
- Other public bodies and institutions (please specify)**
- Other (please specify)

2.2 Please specify if applicable. *8000 character(s) maximum*

Body of European Regulators for Electronic Communications (BEREC)

2.3 Is your organisation registered in the Transparency Register of the European Commission and the European Parliament?

- Yes
- No
- Not applicable as I am replying as an individual in my personal capacity or I am a public authority, such as a National Regulatory Authority (NRA) or a National Competition Authority (NCA).**

2.4 If yes, please indicate your organisation's registration number in the Transparency Register.

If you are an entity not registered in the Transparency Register, please register in the Transparency Register before answering this questionnaire. If your entity responds without being registered, the Commission will consider its input as that of an individual.

2.5 Please enter the name of your institution/organisation/business. *8000 character(s) maximum*

2.6 If you object to publication of personal data on the grounds that such publication would harm your legitimate interests, please indicate this below and provide the reasons of such objection.

2.7 What is your country of residence? (In case of legal entities, please select the primary place of establishment of the entity you represent)

3 Topics for consultation

3.1 Market Definition (section 2 of the current Guidelines)

3.1.1 Point 38 of the Guidelines specifies the main criteria for defining the relevant product market:

- (i) demand-side substitutability
- (ii) supply-side substitutability and
- (iii) potential competition

Point 62 sets out the notion of "chain substitutability".

Is it necessary to give updated and/or additional guidance in applying those criteria to define the relevant markets in the electronic communications sector?

- Yes
- No

3.1.2 Please explain. *8000 character(s) maximum*

Demand-side and supply-side substitutability are well-known principles that NRAs have successfully applied for market definition purposes. There is no need for additional guidance on this issue.

Having said that, in BEREC's view, the review of the SMP Guidelines gives the EC the opportunity to provide stakeholders with more updated and recent examples of how the chain substitutability analysis has been applied.

3.1.3 Points 40-43 of the current Guidelines specify the "hypothetical monopolist test" as means to assess demand- and supply-side substitutability and set the boundaries of the relevant product markets.

Is it necessary to give updated and/or additional guidance on this test to define the relevant markets in the electronic communications sector?

- Yes
- No

3.1.4 Please explain. *8000 character(s) maximum*

BEREC suggests that the Commission leaves flexibility for NRAs to identify and assess demand- and supply-side substitutability and set the boundaries of the relevant product markets.

3.1.5 According to point 67 and the following points of the Guidelines wholesale access markets should generally comprise all types of infrastructure for the provision of a given service. Further segmentation of markets based on existing categories of network infrastructures would depend on the degree of substitutability between such infrastructures and would require evidence as to the class of users to which access to the network is provided. Is that approach relevant for the future?

- Yes
- No

3.1.6 Please explain. *8000 character(s) maximum*

BEREC still believes the approach taken under point 67 to be valid. However, it would also be useful if the Guidelines could reflect on factors such as different investment conditions, differences in entry and/or expansion barriers and any discernible differences between urban and rural areas (having regard to economies of density), which could affect the segmentation of the market. In this regard it could be useful if the Commission provided examples of market analysis done by NRAs and relevant case law that could help to clarify the assessment of such factors for defining the product relevant market.

3.1.7 For the purpose of a robust market analysis, in its Article 7 case practice the Commission considers it necessary to look into direct and indirect constraints. For indirect constraints, if there is sufficient competitive pressure from alternative networks arising through ultimate substitution at the retail level (also referred to as alternative retail platforms), then such networks could be included in the wholesale (relevant) markets subject to the following conditions:

- access seekers would be forced to pass a hypothetical wholesale price increase on to their consumers at the retail level based having regard to the wholesale/retail price ratio;
- demand substitution at the retail level based on indirect constraints would be sufficient to render the wholesale price increase unprofitable
- access seekers' customers would not significantly switch to the retail arm of the integrated hypothetical monopolist, especially if the latter does not raise its own retail prices.

When those criteria are satisfied, constraints should be deemed sufficiently strong to include the platform concerned in the relevant wholesale market.

When indirect constraints are not sufficiently effective and immediate to warrant their inclusion of the product in the market definition, they should be taken into account in the SMP assessment of the relevant wholesale market.

In light of the above, is it necessary to give updated and/or additional guidance on applying the direct and indirect constraints test when defining the relevant markets in the electronic communications sector?

- Yes
- No

3.1.8 Please explain. *8000 character(s) maximum*

BEREC has presented its analysis of the three-part-test to assess indirect constraints in its Report on self-supply (BoR (10) 09)). Although in BEREC's view the test has some limitations and drawbacks which can make it difficult to apply for NRAs, and there can be both theoretical and practical problems with its effective implementation in each market situation, the concept of the test can be useful.

BEREC considers that no additional guidance is needed and suggests that the Commission leaves flexibility for NRAs to identify and prove any effective direct/indirect constraints present on the relevant markets.

3.1.9 Should the Commission give updated and/or additional guidance on geographic market definition in addition to that in the Explanatory note to the 2014 Recommendation on relevant markets?

- Yes
- No

3.1.10 Please explain. *8000 character(s) maximum*

BEREC considers that the assessment of geographical differences in competition is, in principle, a task for the individual NRAs to carry out, as clearly stated by the Framework Directive. Indeed, the Framework Directive states that "National regulatory authorities shall, taking the utmost account of the recommendation and the guidelines, define relevant markets appropriate to national circumstances, in particular relevant geographic markets within their territory, in accordance with the principles of competition law".

Taking this into account, as well as the general guidance provided in the Explanatory note to the 2014 Recommendation on relevant markets, BEREC updated in 2014 its common position on geographical aspects of market analysis (BoR (14) 73), where all practical aspects on geographical delineation of markets were addressed.

BEREC considers that, for now, the general guidance provided in the explanatory note to the 2014 Recommendation on relevant markets is sufficient.

3.1.11 Should the Commission give any other guidance related to market definition that is not mentioned above?

- Yes
- No

3.1.12 Please explain. *8000 character(s) maximum*

Bundling has gained importance in most Member States in the past decade. While in many cases products continue to be sold on a standalone basis, the share of consumers buying different communications services as a bundle has increased significantly.

The increased take up of bundles raises the question of how bundling at the retail level might affect market definition at both the retail and wholesale levels. According to competition law principles, market definition where bundles are present should not differ from the traditional market definition process. However, applying the existing framework to bundled markets seems complex. For example, BEREC analysed in 2010 the limitations of applying the SSNIP test to market definition in the context of bundles, because the observed prices could be the result of the strategic behaviour of an operator with market power¹.

More guidance from the Commission with bundled offers when defining relevant markets would be welcome by BEREC.

¹ BEREC report on impact of bundled offers in retail and wholesale market definition, BoR (10) 64.

3.2 SMP assessment (section 3 of the current Guidelines)

3.2.1 Are the criteria for assessing SMP in points 78-79 of the Guidelines still effective for assessing the existence of SMP?

- Yes
- No, they should be expanded and/or modified.

3.2.2 Please explain. *8000 character(s) maximum*

In regard to the SMP assessment, it could be useful if the Commission provided examples of market analysis done by NRAs and relevant case law that could help to clarify the application of the criteria for assessing SMP in light of the recent market developments.

3.2.3 Should points 76-77 of the Guidelines related to measuring market presence (shares) of undertaking(s) depending on the characteristics of the relevant market be modified given the developments in the electronic communications sector?

- Yes
- No

3.2.4 Please explain and provide examples. *8000 character(s) maximum*

Points 76-77 reflect correctly what constitutes well-established administrative practice for measuring market presence (shares) in the electronic communications markets. As in other sectors, measurement of market presence in the telecommunications field may be calculated in terms of volume, sales, or number of bids won/lost (in the case of bidding markets).

Having said that, in BEREC's view, the review of the SMP Guidelines gives the EC the opportunity to provide stakeholders with more updated and recent examples of how the characteristics of a market may determine the type of criteria that should be used (point 77). In addition, BEREC suggests that this section contain some further discussion on the impact of bundling in measuring market presence, and in particular on the impact of bundling in calculating value sales.

Collective dominance

3.2.1.1 Are you aware of any decisions finding collective dominance by national competition authorities and/or national courts in the electronic telecommunications sector in the EU markets where you operate?

- Yes
- No

3.2.1.2 Please explain. *8000 character(s) maximum*

3.2.1.3 Do you consider that the conditions and market characteristics to be taken into account for demonstrating collective dominance are sufficiently clear and allow regulatory authorities to identify the presence or absence of all forms of significant market power on relevant wholesale markets likely to lead to harm to end users in the framework of *ex ante* regulation in the electronic communication sector?

- Yes
- No

3.2.1.4 Please explain. 8000 character(s) maximum

BEREC believes that there are different forms of market power that can arise in non-competitive oligopolistic markets. Non-competitive oligopolies are either characterized by collective dominance (where, according to Competition Law precedent, tacit coordination is taking place), or by other situations where, although no collusion can be found, the market structure might not result in effective competition. The latter situation corresponds to those oligopolistic markets characterized by unilateral market power ('tight oligopolies') arising in the absence of explicit collaboration or tacit collusion. Both situations can lead to dampened competition and translate into prices that are consistently and significantly above the competitive level, ultimately to the detriment of end-users.

BEREC indeed notes that unilateral market power has not been explicitly addressed under the proposed Electronic Communications Code, which we referred to in our recently published paper (see BEREC views on non-competitive oligopolies in the Electronic Communications Code, BoR (17) 84 ; see also BEREC high-level Opinion on the European Commission's proposals for a review of the electronic communications Framework). In light of this situation, BEREC is concerned that NRAs may find it difficult to ensure the development of effective and sustainable competition in a sector characterised, amongst other, by converging market shares, consolidation, deployment of NGN, and changing consumer preferences. Given the current lack of precedent case law, NRAs would find it difficult to establish a straightforward case for non-competitive oligopolistic markets, particularly markets characterised by a unilateral market power. For this purpose, the present SMP Guidelines need to be reviewed in line with the developments of EU law and given a wider scope to explicitly address unilateral market power. This change should be carried out with the aim of further clarifying the tools for the correct application of this concept in the electronic communications sector.

Regarding collective dominance stemming from tacit coordination, BEREC does not consider that the conditions and market characteristics to be taken into account for demonstrating collective dominance are sufficiently clear. There is not enough guidance or clarity regarding how to carry out a case of this kind or on the standard of proof required. We discuss this in more detail in the following questions.

3.2.1.5 Do you consider that the relative paucity of regulatory decisions establishing collective dominance in the framework of *ex ante* regulation in the electronic communication sector (four NRAs, i.e. the Irish in case IE/2004/0121, the Spanish in case ES/2005/0330, the Maltese in case MT/2006/0443, all as regards market 15 of the 2003 Recommendation on relevant markets, and Italy in case IT/2006/0424, as regards market 18 of the 2003 Recommendation on relevant markets, have adopted final measures based on a finding of collective dominance in the past) is attributable to the following factors:

- o the characteristics and/or developments of the markets in question do not support such findings
- o **difficulties in obtaining sufficiently probative evidence on one or more of the elements of the collective SMP test in the specific regulated environment of the electronic communications sector**
- o **Other?**

3.2.1.6 Please explain. 8000 character(s) maximum

The evolution of markets towards oligopolistic structures in a number of Member States supports the concerns about joint dominance.

BEREC acknowledges that only a handful of cases of joint dominance have been notified by NRAs to the Commission over the past decade. In fact, since 2002, less than ten cases proposing a joint SMP

finding have been notified to the Commission (out of more than 1,800 notifications in total). Furthermore, the majority of these notified cases were overturned or withdrawn. In BEREC's opinion, the hypothesis to explain this paucity, according to which markets would have simply not evolved towards collective dominance structure, is not correct. In BEREC's opinion, this paucity is rather explained by a variety of other reasons, including

a. Insufficient guidance, including with regard to the standard of proof to demonstrate joint dominance.

NRAs typically use both the SMP guidelines and the jurisprudence of the European General Court and the European Court of Justice when seeking to determine joint dominance, the latter mainly concerning the Airtours case. Indeed the current Annex II of the Framework Directive provides insufficient guidance to conduct such an analysis, and should first of all include the Airtours criteria. The Airtours criteria state that coordination is more likely when (i) there is a possibility of reaching terms of coordination, (ii) it is possible to monitor deviations, (iii) there is an effective deterrent mechanism in place and (iv) there are insufficient reactions of outsiders.

Past experience shows that NRAs generally presented joint dominance cases, using the Airtours Criteria, for wholesale market of access and call origination on public mobile telephone networks (market 15/2003); the wholesale local access provided at a fixed location and wholesale central access provided at a fixed location for mass-market products (markets 3a and 3b/2014); and the market for broadcasting transmission services (market 18/2003).

Of relevance is that the benchmark (i.e. the standard of proof) for proving collective dominance may not be consistent across markets. Indeed, considering all past joint dominance notifications, the overall picture that emerges is that NRAs were more likely to meet the required standard of proof to demonstrate the existence of joint dominance for the wholesale market for access and call origination on mobile networks than was in the case, for example, for wholesale broadband access. Another layer of difficulty faced by NRAs was that some Airtours criteria are much more difficult to prove than others. For example, NRAs found it relatively easier to identify market transparency as a factor supporting their finding of joint dominance whilst their empirical proof of retaliatory mechanisms was generally deemed as insufficient by the Commission. This further suggests a lack of guidance for NRAs as to the essential criteria to be proven when seeking to determine joint dominance in different markets.

Furthermore, the required standard of proof for collective dominance appears to be higher as compared to the standard of proof for individual SMP. An analysis of the structural characteristics of the market and the related economic assessment from a forward looking perspective are deemed to be sufficient to prove individual SMP. By contrast, showing that the risk for tacit collusion is high in light of the market characteristics is not sufficient to find joint SMP. In fact the EC has requested NRAs to provide factual evidence showing that the collusive strategy is actually occurring. For example, in the Spanish case (ES/2005/0330), where the common strategy consisted of access denial to third parties, evidence such as observed pent-up demand as well as excessive profitability on the retail level were requested.

In addition to a simple reorganization of the Annex II of the Framework Directive around the Airtours criteria, guidance is also required to clarify the type of evidence to be used for determining joint dominance in two distinct market scenarios:

- (i) Scenario A - the relevant market is unregulated, but concerns arise about the possibility of a position of joint dominance, such as following a change in the structure of the market;
- (ii) Scenario B – the market is currently regulated and the concern is that deregulation would

lead to joint dominance. This could be the case, for example, in a market where an incumbent broadband provider has historically been regulated, but now incorporates two similarly sized players – e.g. the incumbent and a cable company.

Under Scenario A, in BEREC's opinion, NRAs should directly evaluate the Airtours criteria in view of the existing market situation, and in the process establish whether a focal point exists and determine whether or not punishment mechanisms and / or external destabilising forces are effective. Also, in Scenario A, it may be the case that NRAs can rely more on factual evidence than in scenario B, because the analysis would be less hypothetical in nature and thus they would be in a better position to apply a robust economic reasoning to prove their case.

In case of a regulated market with a current single SMP firm (Scenario B)², the Airtours criteria remain an important tool with which to assess a joint dominance case. However, assessing joint dominance in a market that is still regulated may raise the level of proof required to determine a joint dominant position. Indeed, a regulated environment may not allow tacit collusion between firms, because the regulatory obligations that are in place could prevent these. However, if regulation is about to be lifted (for example because the incumbent will soon not have single SMP anymore), joint dominance concern may then arise. In such a situation, NRAs cannot draw upon factual market data of the hypothetical situation where regulation would have been absent as these are not available, yet they are required for a thorough assessment. By way of example, let us consider a market where regulatory intervention has led to a situation in which there are only two main operators competing on a relevant market: one incumbent operator currently being regulated as a single SMP firm, and one alternative operator, both enjoying similar market shares. The current economic reasoning would lead NRAs to seek to identify a credible coordination mechanism that is supposed to lead to the finding of joint dominance when the single SMP operator is deregulated. The question for regulators is to find out whether it would be better for the market to adopt a wait- and- see approach, i.e. wait to see whether joint dominance materialises following deregulation and then carry out a market review to determine the existence of joint dominance, based on factual and / or theoretical evidence and in full conformity with all the Airtours criteria. The other solution would be not to wait for the scenario B to turn into a scenario A, but instead to conduct an ex-ante analysis. Such an analysis in the case of Scenario B would be similar to the analysis made by Competition Authorities in the case of a merger when assessing significant impediments for effective competition. The Competition Authority also assesses a hypothetical situation, namely whether there is likelihood that the merger creates or enhances the possibility of coordinated effects. BEREC therefore calls for guidance on the type of evidence that NRAs can use in a regulated environment, particularly when these are seeking to address potential market failures emerging with joint dominance following deregulation. Since NRAs have been referring to the Airtours criteria in their market analysis, it would be useful to include them in the SMP Guidelines.

BEREC also expects that the revised SMP Guidelines will include the recent decisions adopted by the Courts on joint dominance.

b. Unilateral market power

BEREC reiterates that there may be instances where oligopolistic market settings lead to a non-competitive market outcome without tacit coordination, namely "tight oligopolies", that derive from

² Scenario B mainly concerns fixed markets which are currently regulated across Europe under single SMP regulation.

unilateral market power. The issue of unilateral market power is already outlined in our response to question 3.2.1.4., hence we refrain from setting out additional details here.

BEREC considers that given the increased occurrence of oligopolistic market structures the possibility of unilateral market power cannot be overlooked. Indeed, should a unilateral market power setting arise, NRAs can currently only resort to the Airtours criteria in order to prove joint dominance. Given that the coordination criterion is central to proving joint dominance on the basis of the Airtours criteria, and given that coordination is not an issue in the case of unilateral market power, using the Airtours criteria to prove joint dominance in a unilateral market power setting may not be possible.

3.2.1.7 Are market developments in the two forthcoming regulatory periods (i.e. 6 years in line with Article 16(6)(a) of the Framework Directive) likely to result in an oligopolistic market structure in one or more of the markets in the electronic communications sector which would require the application of the collective dominance test by the NRA in any geographic area of your concern?

- o **Yes.** Please specify which markets may develop such an oligopolistic structure in your country.
- o No

3.2.1.8 Please explain. *8000 character(s) maximum*

BEREC considers that not all oligopolies raise competition issues and therefore oligopolies are not necessarily always problematic. Oligopolistic market settings are only of concern when they result in significant consumer harm/welfare loss, thus requiring regulatory action to address evident or potential market failures. In this line, the markets identified below that may result in an oligopolistic market structure should not be systematically considered as requiring ex ante regulation.

In a number of Member States, markets which were previously characterised by single dominance (which could be adequately remedied by access obligations within the SMP framework) are evolving into duopolistic or oligopolistic structures.

Therefore, oligopolistic market structures in electronic communications markets are already today a reality in several EU Member States. In the next six years, the prevalence of oligopolistic markets is expected to intensify in European markets, given the sustained trend in convergence and consolidation, which contributes towards increasingly concentrated telecom markets. Of note at this point is that duopolistic / oligopolistic market structures are more prevalent where infrastructure-based competition remains limited. This may be the case in Markets 3a / 2014 and 3b / 2014, which concern the provision of wholesale local access and wholesale central access at a fixed location. Indeed, several EU countries have not more than a couple of alternative access networks in these markets. Alongside this, it is considered that the economics of NGA deployment may be such as to limit the possibility for more than two or three operators to roll-out high-speed access networks at a national level on a profitable basis. This is because NGA deployment involves high fixed and sunk costs and because the expected level of demand for new NGA products remains somewhat uncertain. The situation where the incumbent and a cable network are sharing the market in a duopolistic setting is a good illustration of such a development.

BEREC also notes that fixed-mobile convergent markets may have the potential to tend towards oligopolistic structures, especially where fixed-mobile integration of telecoms operators has materialised. Given the increased prevalence of duopolistic / oligopolistic markets, particularly as described above, BEREC recalls that NRAs, under the SMP regulation, can only intervene to address non-competitive oligopolies through a finding of joint dominance in the form of tacit collusion / tacit

coordination. In this regard BEREC recalls that NRAs have found it difficult to prove joint dominance when notifying their market reviews in past years due to the extensive evidence typically required to prove a joint dominant position. As for fixed-mobile convergent markets, these are a relatively recent development and most likely remain ‘untested’ when it comes to the application of the collective joint dominance case in such markets. Hence, further guidance as to how NRAs might approach fixed-mobile convergent markets when assessing joint dominance is recommended.

3.2.1.9 In paragraph 62 of its judgment of 6 June 2002, the General Court laid down 3 criteria to find collective dominance. The first criterion is a high degree of market transparency where members of the dominant oligopoly have *‘the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy’*. In this regard, the Court argues that it is not sufficient for each member of the dominant oligopoly to be aware that interdependent market conduct is profitable for the parties involved, but that each member must also have a means of knowing whether the other members are adopting the same strategy and whether they are maintaining it.

Is Commission guidance needed to explain how to apply this criterion in the framework of *ex ante* regulation in the electronic communications sector?

- o **Yes.** Please clarify how in your opinion this criterion can be sufficiently justified.
- o No

3.2.1.10 Please explain. *8000 character(s) maximum*

BEREC notes that the Airtours’ criteria are well grounded in economics and a relevant framework for assessing the risk of tacit co-ordination. We also note that these criteria have to be cumulatively fulfilled. In contrast to this, the criteria in the SMP guidelines (and in Annex II of the Framework Directive) suggest factors which facilitate joint dominance and that are not all required for joint dominance to be proven. Indeed, one of the main messages of the Airtours’ judgement is that what is required is a coherent explanation of how the coordination is maintained, and the difficulties in sustaining the coordination, rather than mechanically using a check list approach. The interplay between the Airtours criteria and other indicia and items of evidence is an issue that is further explored in BEREC’s response to questions 3.2.1.21 and 3.2.1.22. As noted therein, it would be helpful for guidance to be provided to clarify the relationship between the different sets of criteria that may be available for assessing joint dominance.

BEREC has previously discussed approaches to analyse the identification of focal points and monitoring of deviations in detail (see BEREC (2015) BoR (15) 195 Report on oligopoly analysis and regulation, sections 6.1.1 and 6.1.2). For example, common focal points may be the price or denial of wholesale access. However, focal points may also be much broader encompassing factors such as quality, market shares, business models, switching processes and network investments. Regarding monitoring, each specific type of common understanding – on price, denial of wholesale access, etc. – can require a specific type of monitoring. Monitoring will typically be easier in markets where there is greater market transparency, homogenous products or links between firms.

Likewise, the kind of information that may be necessary for the parties to observe each other’s actions, will depend on the kind of common understanding, as very different ways to observe or indirectly induce the involved parties’ actions might exist.

BEREC considers that Commission guidance could be useful to explain the types of focal points and monitoring that could commonly arise as part of a mechanism for tacit collusion in the electronic communication sector (a sector that is characterized in some Member States by a high degree of transparency, for instance at the residential retail level). Such guidance need not be exhaustive since there may be unforeseeable forms of tacit collusion.

3.2.1.11 According to the second criterion set out by the Court in its *Airtours* judgment, a tacit coordination must be sustainable over time: *'that is to say, there must be an incentive not to depart from the common policy on the market'* for the members of the dominant oligopoly.

The Court ruled that it is not necessary to prove that there is a specific retaliation mechanism, but it has to be established that deterrents exist to ensure that there is a long-term incentive for each member of the dominant oligopoly not to depart from the common policy, which means that each member of the dominant oligopoly must be aware that highly competitive action on its part designed to increase its market share would provoke identical action from others, so it would derive no benefit from its initiative.

Is it sufficient to meet this criterion that adherence to the common policy would be in any circumstances profit-maximising for each of the members of the oligopoly, i.e. that there are sufficiently strong incentives for adherence even in the absence of specific deterrent action by others?

- o **Yes.**
- o No

3.2.1.12 Please explain. *8000 character(s) maximum*

In general, if there is an action that is profit maximising for a firm that appears to lead to consumer detriment it is appropriate to address it. A demonstration that adherence to the common policy is profit maximising for each of the members of the oligopoly seems sufficient to demonstrate that the equilibrium (tacit coordination) is stable and is therefore the expected future outcome in the market in the absence of regulation. However, it should be clarified that the adherence to the common policy is profit maximising for each member of the oligopoly in the long-term. Deviations from the common policy may be profit maximising for individual members of the oligopoly in the short term.

3.2.1.13. Is Commission guidance necessary to explain how to apply the second criterion in the framework of *ex ante* regulation in the electronic communications sector?

- o **Yes.** Please clarify how in your opinion this criterion can be sufficiently justified.
- o No

3.2.1.14 Please explain. *8000 character(s) maximum*

BEREC discussed this in detail in its previous report on oligopolies (see BEREC (2015) BoR (15) 195 Report on oligopoly analysis and regulation, sections 6.1.3). BEREC in particular has stated that the presence of a credible threat is a key mechanism to keep coordination sustainable. Punishments often take the form of a change in the competitive conditions, such as a reduction in price or an increase in output, for a limited period of time or on a permanent basis.

In the “BEREC Report on Oligopoly analysis and regulation” (BoR (15) 195) BEREC points to a number of factors that may enable retaliation, such as:

- Symmetry in terms of for example capacity constraints, or level of vertical integration;
- Short term versus long term approach. The long term benefits from collusion must overcome the short term benefits of deviating from such common strategy. This outcome is favoured for instance by (i) larger discount factors and (ii) shorter time lag to effectively implement a retaliatory mechanism;

- Nature of the focal point. Punishment is more effective if the other parties can target the customers of the defecting party. This is for example most likely if co-ordination takes the form of customer sharing, rather than co-ordination on capacity or innovation where reversion to competition may have effects on the whole market.

BEREC considers that Commission guidance along the above lines could be useful to explain recommended approaches and the standard of proof that is required to demonstrate that there is not an incentive to deviate from the common policy. In fact, in BEREC's view, the way the second criterion can be satisfied in the context of the review of the electronic communications markets is an issue where additional guidance in the SMP Guidelines would be particularly welcome. While other evidence such as for instance the existence of market transparency, or the reaction of outsiders to the coordinated strategy, may form part of what can be considered a "normal" assessment of the market, the second criteria is premised upon more abstract grounds, that make it in some instances particularly difficult to apply in practice.

3.2.1.15 The third criterion of the Airtours judgment requires evidence that *'foreseeable reaction of current and future competitors, as well as consumers, would not jeopardise the results expected from the common policy'*.

Is Commission guidance necessary to explain how to apply this criterion in the framework of *ex ante* regulation in the electronic communications sector?

- **Yes.** Please clarify how in your opinion this criterion can be sufficiently justified.
- No

3.2.1.16 Please explain. *8000 character(s) maximum*

BEREC discussed this in detail in its previous report on oligopolies (see BEREC (2015) BoR (15) 195 Report on oligopoly analysis and regulation, section 6.1.4). In particular, BEREC has stressed that the reaction of outsiders should not be able to jeopardise the coordinated outcome, since this would affect the stability of coordination. Reactions of outsiders will be typically limited if entry barriers are high and if there is no countervailing buyer power. BEREC has also referred to the role of potential competitors and has stated that the ability of the fringe competition to exert pressure on the potentially colluding competitors may weaken collusion or prevent it all together. Therefore, any fringe competition present on the market has to be analysed and closely monitored.

BEREC considers that Commission guidance along the above lines could be useful to explain the likely approach and standard of proof to demonstrating that there is evidence that the reaction of current and future competitors and consumers would not jeopardise the results expected from the common policy.

3.2.1.17 In Article 7 case practice on collective dominance findings by individual NRAs (see for example case ES/2005/0330) the Commission considered that retail market conditions may inform an NRA of the structure of the wholesale market, but may and need not in themselves be conclusive as to the finding of SMP at the wholesale level.

To make credible the finding of collusion as regards the refusal, price or other conditions of access at the wholesale level, the Commission has considered that the NRA needs to demonstrate that the rents at the retail level are high enough to incentivise the collective refusal of access to third operators.

The incentive of operators not to grant access was considered difficult to demonstrate if at the retail level there were no rents to protect. In the Spanish case mentioned above the retail market showed some structural features - high prices, limited price evolution and high profitability for the operators concerned - which appear to have provided sufficient incentives to the three operators concerned to collectively refuse access at the wholesale level.

Should the Commission give updated and/or additional guidance on the structural characteristics of the retail market which may render a collective dominance finding at wholesale level more or less credible?

- o **Yes.** Please specify which structural characteristics of the retail markets should be in your opinion present in order to support a collective dominance finding at wholesale level.
- o No

3.2.1.18 Please explain. *8000 character(s) maximum*

Experiences of NRAs in regulating operators being jointly dominant show that joint dominance has been fairly difficult to prove due to the extensive evidence typically required for the adoption of the market reviews. The competitive situations on both the wholesale and the corresponding retail markets needed to be assessed, and the monitoring and retaliatory mechanisms have been considered very important arguments to support a positive joint dominance finding. Closely connected with the aforementioned point, the retaliatory mechanisms in the two markets worked together and the Commission took particular interest in the descriptive evidence of these connections.

Therefore more guidance on how to incorporate market circumstances on the retail level in wholesale collective dominance analyses would be welcomed by BEREC.

According to BEREC, the criteria of the particular Spanish case are not the only ones that may be analysed at the retail level. In addition, these criteria (high prices, limited price evolution and high profitability) will probably only be observed in a situation without regulation. Therefore they offer little relevance in the analysis of services in a market that is currently regulated and about to be deregulated.

In BEREC's view it is also important to clarify that in the retail analysis a finding of a risk of single or joint dominance is not necessary, but that it is sufficient to demonstrate (potential) consumer harm.

3.2.1.19 Are there any specific features of wholesale markets in the electronic communications sector which would have an impact on fulfilment of one or more of the criteria for establishing the existence of collective dominance, and which should be the subject of additional guidance regarding the satisfaction of the evidentiary burden, on a prospective basis for the purposes of ex ante market regulation?

- o **Yes.** Please specify which market features could tend to support either a positive or a negative conclusion regarding one or more of the criteria.
- o No

3.2.1.20 Please explain. *8000 character(s) maximum*

As BEREC has thoroughly elaborated in its report on oligopoly analysis and regulation (BoR [15] 195), a number of specific features of wholesale markets can be found that have an impact on the fulfilment of one or more of the criteria for establishing the existence of collective dominance.

For example, the market for access and call origination on public mobile telephone networks was considered as having a high potential for sustaining collusive outcomes by most of the NRAs notifying joint dominance, mainly due to its market structure. Indeed, in some cases there were two main mobile network operators in the market, while in other cases three of them were present, the number seeming to provide an upper bound, e.g. a significantly small number of market participants on the supply side vis-à-vis a very high number of market participants on the demand side.

For joint dominance to be sustainable it is necessary to reach a common understanding, which was highlighted in the BEREC report on oligopoly analysis and regulation. Factors that contribute to the ability to reach some terms of coordination in a market are for instance to have a clear focal point, symmetry between firms, the lack of destabilising developments and the degree to which firms focus in the short or long term. In the national cases reviewed by BEREC, denial of access was the most common focal point. Another common focal point NRAs identified is the price. Other focal points could also be quality, market shares and network investments (for example the quality of the RAN in mobile markets or using old technologies such as copper rather than fibre in fixed markets).

To reach a common understanding without explicitly agreeing on a common conduct, it is easier if undertakings are relatively symmetric, as possible asymmetries may incentivize deviating from the common understanding. Symmetry therefore makes it easier to reach a common understanding. There are several factors that contribute to the symmetry between the undertakings, such as: similar market shares, similar cost structures, a similar degree of capacity constraints and homogeneity of the products and vertical integration.

BEREC also highlighted that the cost structure of a firm is crucial for a firm's competitive strategy. Different cost structures make it harder to agree on a focal point. Fixed costs in telecommunications markets are in general extremely high as compared to the variable costs, which tend to be fairly low. Given the low share of variable costs to the total costs in the telecommunications markets, it seems less likely that differences in the variable costs could actually lure the undertakings to deviate from a common understanding.

BEREC has shown that the same market structure criteria at the wholesale level that can incentivize joint dominance may just as well point to a unilateral market power without having to establish dominance and sustaining retaliation mechanisms as defined so far in the Framework Directive and the collective-dominance jurisprudence. The changes in the telecommunications markets due to for instance market consolidation, deployment of NGN or mergers etc. can bring about market structures where the market outcome is not competitive, but lacking a dominant position by the undertakings. This is discussed in more detail in BEREC's answer to question 3.2.1.4.

3.2.1.21 Should the Commission give any other guidance related to the finding of SMP not mentioned above, such as to the relevance of "the overall economic mechanism of hypothetical tacit coordination" to the application of the *Airtours* criteria in the light of the *Impala* judgement of 10 July 2008?

- Yes
- No

3.2.1.22 Please explain. *8000 character(s) maximum*

In the *Impala* cases, the European Courts confirmed the relevance of the *Airtours* criteria for determining whether the creation or strengthening of a collective dominant position was feasible. However, in *Impala I* the General Court also suggested that, under appropriate circumstances, the

Airtours criteria may be established indirectly on the basis of indicia and items of evidence relating to the signs, manifestations and phenomena inherent in the presence of a collective dominant position. The General Court referred to a set of factors, such as close alignment of prices over a long period (especially if above the competitive level) that together with other factors typical of a collective dominant position may suffice to demonstrate (in the absence of an alternative reasonable explanation) the existence of collective dominance. In a similar line, in the Impala II judgment, the ECJ expressly precluded a checklist-based approach for a finding of collective dominance, by requiring that each of the factors indicative of collective dominance be tested and evaluated taking into account the precise theory of harm that is being invoked³.

Taking into account the Impala cases, in BEREC's view, the EC should clarify that there may be different means - beyond the conditions set in the Airtours case - to assess the competitive conditions that prevail at the wholesale and retail levels, and that may be conducive to a situation of collective dominance.

As noted, this may be particularly relevant in the context of markets that are already subject to ex ante regulation (in the context of a prospective greenfield analysis). In those instances, where NRAs have to abstract from the regulatory obligations that apply in the reference market, it may be helpful to verify whether other parameters different from those expressly set in the Airtours case may also be of relevance for proving the existence of an overall economic mechanism of a hypothetical tacit coordination, as referred to by the ECJ.

3.3 Remedies (section 4 of the current Guidelines)

3.3.1 Is section 4.1 of the SMP Guidelines dealing with the imposition, maintenance, amendment or withdrawal of regulatory obligations related to SMP operators still necessary given the experience of the NRAs since 2002 in the imposition of appropriate regulatory obligations?

- Yes
- No

3.3.2 Please explain. *8000 character(s) maximum*

BEREC is of the opinion that the relevant reference to remedies are already in the Framework and accompanying Commission guidance, and hence section 4.1 might not be required anymore. This is of course contingent upon any change that could occur in the Framework Review, as is every answer given in this questionnaire.

3.4 Procedural issues (sections 5 and 6 of the current Guidelines)

³ § 125 of the ECJ judgment: "In applying those criteria, it is necessary to avoid a mechanical approach involving the separate verification of each of those criteria taken in isolation, while taking no account of the overall economic mechanism of a hypothetical tacit coordination".

3.4.1 Is guidance related to procedures, i.e. powers of investigation and cooperation for market analysis, consultation and publication of proposed NRA decision, still necessary given the fact that it mostly summarizes the procedural provisions of the Framework Directive? Since the adoption of the SMP Guidelines in 2002 NRAs have developed extensive rules in this respect e.g. duration of a national consultation at national level.

- Yes
- No

3.4.2 Please explain. *8000 character(s) maximum*

BEREC is of the opinion that the necessary texts are already in the Framework/Code text and accompanying Commission guidance, and hence sections 5 and 6 might not be useful in the Guidelines.

This is of course contingent upon any change that could occur in the Framework Review, as is every answer given in this questionnaire.

3.5 Other

3.5.1 Are there other areas of the SMP Guidelines with a need for improvement, clarification and/or (further) guidance?

- Yes
- No

3.5.2 Please explain. *8000 character(s) maximum*

As already elaborated in the previous reports on oligopolies, the aspect of unilateral market power need to be further elaborated on and analysed on a case by case basis. The relationship between competition on the resale level and the one on the corresponding wholesale level could also be further elaborated upon.

3.5.3 How often should the future SMP Guidelines be reviewed?

- 10 years
- as appropriate, given the developments in the relevant jurisprudence
- other

3.5.4 Please explain. *8000 character(s) maximum*

Guidelines should be reviewed as appropriate to address relevant changes in the regulation as well as relevant jurisprudence. If the EC publishes the new guidelines before the framework review is completed, an update may be needed depending on the content and scope of the new framework. For example, if finally unilateral market power is to be addressed, there will be a need to update the guidelines in the short term.