

BEREC Opinion on Draft SMP Guidelines

16 March, 2018

Contents

1.	Executive summary.....	2
2.	Introduction	3
3.	Comments on Market Definition.....	4
3.1.	Criteria for defining the relevant Market.....	4
3.2.	Product Market Definition	5
4.	Assessing SMP.....	10
4.1.	Single SMP.....	10
4.2.	Joint SMP.....	12

1. Executive summary

At the outset, BEREC thanks the European Commission for maintaining a constructive dialogue in the process prior to the preparation of the Draft SMP Guidelines, as well as for the opportunity to provide its Opinion on them.

Nevertheless, BEREC recalls its response to the Commission's Public Consultation on the Review of the SMP Guidelines, where BEREC expressed its view that the review of the SMP Guidelines should have ideally been conducted after the Framework review, and not in parallel to it. Indeed, the current Draft SMP Guidelines relies on the existing Framework, meaning that the possible evolution of the Framework will necessitate some further adjustment in these new SMP Guidelines. For this reason, BEREC considers it essential to plan a new review of the text, to be carried out in no more than a couple of years, once the new European Electronic Communications Code has been approved and once experience has been gathered on its application. This is also necessary given the short timeframe available for the drafting of this BEREC opinion. BEREC also notes that this sequencing may raise operational concerns and regulatory uncertainty, and therefore requests further guidance regarding the interim period during which the new SMP Guidelines will be adopted while the new Code will not yet be nationally transposed.

Regarding the content of the Draft SMP Guidelines themselves, BEREC is generally satisfied with the current draft. Notably, the changes made with respect to the assessment of joint dominance are a positive development in line with BEREC thinking on this topic. BEREC is of the view that some elements should however be further improved in the Draft SMP Guidelines, namely, but not exhaustively:

- The application of the SSNIP test should be clarified, to make it clear that when no empirical evidence is available, or when the burden to acquire the relevant data is too high, the SSNIP test mainly serves as a conceptual framework.
- Regarding OTTs, it should be clarified that the indirect constraints they exert on the wholesale markets are to be analysed only when relevant. Moreover, it should be explicitly recalled that OTTs, according to the current definition, require access supported on infrastructure provided by ECS providers, and are not a substitute to Internet access.
- On interplatform competition, BEREC considers it necessary for the Draft SMP Guidelines to explicitly state that potential entry of new players should be assessed, and not taken for granted. Regarding technological impediments for switching platforms, it is unclear how to assess whether these are "artificially inflated" by the network operator or if they "naturally" arise. Therefore BEREC would welcome additional elements on this issue. Moreover, BEREC proposes to specify that "*objectively justifiable*" switching costs should be taken into account at the stage of the wholesale product market definition, as they can constitute real impediments for access seekers.
- Regarding "chain of substitution" in the context of shrinking markets, BEREC considers that market definition should be primarily driven by economic evidence and not by regulatory objectives. Instead, those objectives should be considered when applying remedies. Moreover, any migration incentives for captive users should be weighed

against the needs of vulnerable citizens and consumers, along with other considerations such as efficiency and practicality.

- On single SMP, BEREC does not see the justification for the deletion of the 25% and 40% thresholds for market shares.
- On the general approach to joint dominance, BEREC considers the methodological guidance based on the relevant cases, namely Impala and Airtours, to be appropriate. However, BEREC is of the opinion that the SMP Guidelines should be more cognisant of the likelihood that the nature of proof may differ depending on whether the market under investigation is regulated or not. Specifically, in markets already regulated, BEREC considers that the NRA should use indicators on prices, profitability, ARPU-levels, etc. with caution as they would not necessarily provide useful information in a joint SMP case requiring a modified Greenfield approach.
- Regarding the sustainability of the coordination mechanism under joint dominance, BEREC considers that the EC has an excessively symmetric view on the deterrent mechanism. Moreover, contrary to what the EC states, BEREC considers that potential for retaliation by an oligopolist by concluding an access agreement with other competitors may be a credible deterrent against other oligopolists deviating from the tacit collusion.

Finally, BEREC reiterates its view that NRAs still do not have adequate means to tackle tight oligopolies, i.e. situations where an oligopoly leads to a non-competitive equilibrium without any tacit collusion on either market level, ultimately to the detriment of retail customers.

2. Introduction

BEREC welcomes the opportunity to provide its opinion on the Draft SMP Guidelines. A comprehensive and robust set of guidelines is imperative to enable NRAs to effectively analyse electronic communications markets to assess the need for ex-ante regulation. This, in turn, supports the overall objectives of promoting sustainable competition and efficient investment to the ultimate benefit of consumers. BEREC also appreciated being involved early on in the process prior to the drafting of the new SMP Guidelines, and considers the collaboration with the Commission services to have been particularly fruitful; BEREC notes that many of the concerns expressed during this prior process have been taken into account. It would be beneficial to replicate the same type of collaboration in the future.

Nevertheless, BEREC recalls that the current SMP Guidelines have remained unchanged since their publication in 2002. As such, and as already stated in its response to the Public Consultation, BEREC regrets that this review is conducted in parallel with the Framework review, and not after its completion. Indeed, the current review of the SMP Guidelines relies on the existing Framework, meaning that the possible evolution of the Framework will not necessarily be taken into account in the new SMP Guidelines. Therefore, the current exercise might need to be reviewed depending on the results of the Framework review. This sequencing notably raises operational concerns. Indeed, the European Electronic Communications Code, explicitly referred to in the Guidelines, is unlikely to be transposed into Member States National law until sometime in 2020. BEREC therefore would appreciate additional elements on how to handle the two sets of regulations in the interim period. For

example, the Draft SMP Guidelines refers to the need to gather data on undertakings not yet included in the Framework and Directive, while NRAs will have no legal power to do so in the interim period. For the specific case of market analyses that are close to Consultation or Final Decision, it is also unclear how and when to take account of the revised SMP Guidelines without an explicit transitional arrangement.

Moreover, whilst BEREC commends the way the dialogue on the review of the SMP Guidelines was approached in the initial phases at the working level, the final stages of the dialogue have been far from ideal. Indeed, BEREC has only been afforded a matter of a few weeks to provide its Opinion on the Draft SMP Guidelines, which is not a satisfactory timeframe to carry out the required in-depth analysis of such a pivotal text. In addition, the benefit of the change in the structure of the Draft SMP Guidelines, now split into two distinct documents (designated here as the “Draft SMP Guidelines” and the “Staff working document”), is unclear to BEREC, as the two documents are partly redundant, making the reviewing exercise more difficult in such a short timeframe. As a result, the expedited analysis that BEREC has managed to conduct in such conditions could not be exhaustive; it is therefore likely that other issues will be raised later on by BEREC.

BEREC also considers that the SMP Guidelines should be updated in no more than a couple of years, to take account not only of the changes made in the Code, but also to take stock of the experience to be gained by both NRAs and the EC when applying them in market analyses, in particular regarding the implementation of the new provisions in relation to joint dominance.

Finally, although BEREC welcomes the more detailed and operational treatment of joint dominance in both of the documents, BEREC regrets that NRAs still do not have adequate means to tackle tight oligopolies (i.e. situations where an oligopoly leads to a non-competitive equilibrium without any tacit collusion on either market level). This issue was raised by BEREC in its work on oligopolies and is still under discussion in the new Electronic Communications Code.

The structure of this opinion follows that of the Draft SMP Guidelines; the remarks made are equally valid for the corresponding sections in the Staff working document.

3. Comments on Market Definition

3.1. Criteria for defining the relevant Market

SSNIP Test

Paragraph 32 of the draft SMP begins: “*The SSNIP test can only be applied to a readily available product and price*”. This seems to envisage the SSNIP test only being applied as an empirical tool (e.g. that one needs pricing and demand data in order to apply it). However, footnote 30, which we consider important to retain, makes it clear that the primary importance of the SSNIP test is as a conceptual tool. The rest of paragraph 32 discusses defining a notional market based on self-supply, but BEREC expects that market definition would be conducted in a manner that was consistent with the SSNIP test (as a conceptual tool). In addition, it may be useful to rephrase the sentence to make clear that it is intended

as a factual observation, rather than an instruction. BEREC recommends changing the first sentence of paragraph 32 to: “~~The SSNIP test can only be applied to a~~ It is likely to be difficult to apply the SSNIP test empirically where there is not a readily available product and price”.

3.2. Product Market Definition

Convergence and OTTs

BEREC welcomes the increased attention towards OTT services and technological convergence in the Draft SMP Guidelines. In this respect, BEREC notes that the impact of OTT services on electronic communications markets is typically scrutinised carefully by NRAs in order to analyse the real competitive impact of OTT services on the market.

However, as long as OTT service providers are outside the scope of the current Regulatory Framework, the legal instruments that NRAs have to gather data from such service providers are likely to be inadequate.

Furthermore, BEREC invites the Commission to distinguish the potential impact of OTT services depending on the market being considered. OTT providers (when they act only as an OTT player, according to the current definition of OTTs) use existing Internet connections to provide their services to the customer. The services they provide might be in competition with existing ECS, like SMS or voice services. They can also act as complements with existing products.

However, they do not provide Internet access services themselves and therefore do not generally exercise ‘direct’ competitive pressure on access markets. Access markets can be found at the retail level (e.g. broadband internet access or fixed/mobile voice telephony access) and at the wholesale level (e.g. the current markets 3a, 3b and 4).

BEREC also notes that the Commission, in footnote 36 and paragraph 63 of the Draft SMP Guidelines, invites NRAs to still consider competitive pressure from OTT services when assessing SMP, even if those were not deemed substitutable enough to be included in the retail market. BEREC remarks that this is a new requirement, not included in the 2014 Explanatory Note of the Recommendation on the relevant product and service markets. BEREC considers that such an assessment is not always relevant, notably when the product is clearly not included in the retail market¹.

BEREC also considers the views expressed in paragraph 35 regarding technological convergence to be too definitive, and considers that a case-by-case approach should be conducted.

In view of the above, BEREC proposes the following modifications to the text:

Paragraph 35 Draft SMP Guidelines

¹ In particular, the reference to the French case in this context is not appropriate. Indeed it is directly an inclusion of OTTs in the retail market that was requested by the Commission; the Commission did not ask to conduct an analysis of their competitive pressure despite them not being included in the retail market.

Product substitutability between different services ~~is likely to may~~ arise through the increasing convergence of various technologies, which often allows operators to offer similar retail product bundles. The use of digital transmission systems, for example, ~~is increasingly leading can lead~~ to similarities in the performance and characteristics of network services using distinct technologies. ~~However, even in the case of increasing convergence, the product market should only comprise of products or services that are sufficiently substitutable, according to the principles set out in paragraph 33 and in line with the SSNIP test. Increasing technological convergence between products and services by itself does not necessary imply an increased level of substitutability between products and services.~~

Paragraph 36 of the Draft SMP Guidelines

In addition, the so called 'over-the-top' (OTT) services and/or other internet-related communications paths have emerged as a potential competing force to some established retail communications services. As a result, NRAs should assess whether such services may provide, on a forward-looking basis, partial or full substitutes.

Paragraph 63 of the Draft SMP Guidelines

NRAs ~~should may~~ also consider whether the market power of an incumbent operator can be (price) constrained by products or services from outside the relevant market and underlying retail market(s), such as OTT players operating on the basis of providing online communications services. Thus, even where an NRA has not considered that constraints coming from these products and services at retail level are sufficiently strong for the retail market to be effectively competitive, or are not sufficiently strong to act as indirect constraint for the provision of wholesale services (for the purpose of the wholesale market definition), potential constraints may still be assessed at the SMP assessment stage. ~~Since, currently, OTT providers do not provide access services themselves, they do not generally exercise competitive pressure on access markets.~~

Footnote 36:

Where no sufficient substitutability patterns can be established to warrant including such OTT-based services in the relevant product market, NRAs ~~should could~~, nevertheless, consider the potential competitive constraints exercised by these services at the stage of the SMP assessment ~~(see also FR/2014/1670 and further below).~~

Interplatform Competition

Concerning product market definition on a wholesale level, BEREC agrees that potential substitution between different platforms should be investigated by NRAs. In this respect, the Commission emphasises the role of new potential access seekers not facing switching costs.

BEREC believes the Commission should clarify how to take account of the impact of potential new access seekers on the product market definition of the relevant wholesale markets. More precisely, if existing access seekers and potential access seekers may differently assess the degree of substitutability between products (for example due to switching costs), NRAs have to weigh those different assessments to be able to draw a global conclusion regarding the degree of substitutability. In BEREC's view, NRAs should thoroughly investigate and demonstrate whether new entry is likely or not on the market. This assessment should be based on realistic assumptions when analysing substitution between different platforms and market maturity. Moreover, the significance of potential new entrants should be taken into account in order to assess their expected impact on market dynamics. Where significant entry is unlikely, the role of potential new entrants could be negligible, while the role of existing access players would be more significant. The likelihood of a new entry should therefore be thoroughly investigated by the NRAs.

BEREC also notes that the proposal of the Commission that NRAs “*should assume a hypothetical competitive access regime facilitated by regulation, disregarding impediments to switch which may have been artificially inflated by the network operators to prevent switching away from, or to a given platform*” bears significant risks. First of all, this proposal is not consistent with paragraph 33, where the Commission states that “According to settled case law, the relevant product market comprises all products or services that are sufficiently interchangeable or substitutable, not only in terms of their objective characteristics, their prices or their intended use, but also in terms of the conditions of competition and/or the structure of supply and demand in the market in question”, while the current proposal in paragraph 40 is to disregard conditions of competition when defining the market. Moreover, it is unclear what the Commission means by “artificially inflated impediments” and how to assess accordingly whether impediments are “artificially inflated” by the network operator or if they “naturally” arise. BEREC would welcome additional guidance on this issue. BEREC proposes to at least specify that “objectively justifiable” switching costs should be taken into account at the stage of the wholesale product market definition, as they can constitute real impediments for access seekers.

In this respect, BEREC proposes the following adaptations in the text:

Paragraph 40 Draft SMP Guidelines

At retail level, technological developments have generally led to inter-platform competition, with different products offered over different technology platforms found to be equivalent and increasingly interchangeable. In order to determine whether different wholesale technology platforms such as copper, fibre and cable should be included in the same wholesale market, the SSNIP test should could be applied. Given the forward-looking character of the analysis, unless they are unlikely to exist and to be of sufficient scale to have a significant effect on the market, such assessment should take into account that potential access seekers - who are not yet providing access-based services - do not have to consider switching costs when choosing their access platform. Furthermore, such analysis should assume a hypothetical competitive access regime facilitated by regulation, disregarding non-objectively justifiable impediments to switch which may have been artificially inflated by the network operators to prevent switching away from, or to a given platform.

Staff working document page 11

In order to reflect the forward-looking nature of ex ante regulation, a substitutability analysis needs to be carried out in a prospective, forward-looking manner, taking into account not only the currently existing market structure. This analysis should consider ~~but also~~ whether new access seekers, unless they are unlikely to exist and to be of sufficient scale to have a significant effect on the market, would be able to choose their access products without facing switching costs otherwise associated with a switch between platforms. Furthermore, every analysis of switching costs should assume a competitive market environment and disregard possible-non-objectively justifiable impediments to switching that would not be in place in a competitive and fully functioning markets.

Staff working document page 15

When performing a SSNIP test, switching costs incurred by access-seekers already present on a given platform should be taken into account. However, other factors also need to be considered to ensure that the analysis does not reflect only the status quo, but is carried out in a prospective, forward-looking manner. For instance, the occurrence of further market developments may affect the durability of the identified barriers might render the identified barriers not durable. Furthermore, such a prospective analysis should consider - on a realistic basis - potential demand by access seekers not yet providing access-based services, to the extent that it is likely that there will be new entrants on the market and should assume-evaluate an access regime that would exist in a competitive market and where efforts have been made to the extent possible to address barriers to switching and interoperability.

NRAs should take into account all relevant impediments to switching. NRAs may include platform or network operator's switching costs from the past that still have an impact on market entry in their assessment should these be considered a real impediment in a forward-looking perspective. Impediments to switching, which are technically not justified and which may have the sole purpose to render switching either technically or financially unattractive by unduly inflating the related costs, should be disregarded. In relation to cable-based bitstream, the Commission has previously pointed out that a 'market analysis should also take into account the possible role of regulators in incentivising suppliers and operators of the DOCSIS community into developing a standard allowing VULA-type access to their networks'.²

While existing operators may consider certain costs as prohibitive in relation to switching access platforms, potential entrants, if any, would be indifferent to such costs and will chose the platform on the basis of the prospective costs of access to and

²Case NL/2015/1727. The development of a VULA standard on cable would enable it to be considered in the context of wholesale local access.

the performance of the chosen platform, in order to be best situated to compete in the retail market.

On the other hand, the footprint of the networks may play an important role for the question, whether access to the respective network can in fact be viewed as a demand side substitute. Where the footprint of the respective other network is significantly smaller than the relevant geographic market,³ i.e. not ubiquitous, NRAs may find that even if access to both infrastructures is functionally equivalent, switching would be unlikely because access to the non-ubiquitous network would not allow alternative operators to compete in a sufficiently large part of the geographic market.

Depending on the particular market under review, ~~t~~he overall assessment may put high switching costs of an existing operator into question and may suggest the finding of a multi-platform wholesale market that encompasses copper/Fttx and coaxial cable, in particular where both networks are ubiquitously available in the relevant geographic market.

Chain of substitution⁴ (captive users)

Paragraph 45 of the Draft SMP Guidelines states:

“Once most customers have switched to a higher performing infrastructure, a group of captive users may still be left behind using the legacy technology. In this event, NRAs should take a regulatory approach that does not perpetuate the cycle of captivity by defining narrow captive markets, but rather encourages migration onto modern networks and ultimately makes it possible to switch-off legacy networks.”

BEREC supports the view that migration onto modern networks should be encouraged, and that regulatory intervention should not prevent switching off legacy networks where they are no longer required. However, there will be cases where older and/or vulnerable consumers will see the legacy service as an essential (“lifeline”) service, and will be unable or unwilling to switch to newer services⁵. This is a matter of regulatory judgement: the NRA must weigh the needs of vulnerable citizens and consumers against other considerations, such as efficiency and practicality, when deciding on appropriate remedies.

In terms of methodology, paragraph 45, as drafted, also creates a risk that an NRA will have to reconcile evidence (e.g. from applying the SSNIP test) indicating a narrow market, with a guideline that it should not define such a market. Yet, the exercise of market definition

³ For the definition of the relevant geographic market, see below.

⁴ The heading “Chain of Substitution” is used to discuss a range of substitutability issues in the Draft SMP Guidelines and the Staff working document. While the concept is relevant to the discussion of bandwidth breaks, it is less relevant to issues of captive markets and asymmetric substitution. In the existing SMP Guidelines, the concept of “chain substitutability” is treated as a special case, and one that should be treated with caution. BEREC suggests ordering the text so that this heading covers a narrower range of relevant topics.

⁵ The Framework Directive requires NRAs to ensure that “users, including disabled users, elderly users, and users with special social needs derive maximum benefit in terms of choice, price and quality.” (Article 8.2 (a)), and to promote the interests of citizens of the EU by addressing the needs of specific social groups, in particular disabled users, elderly users and users with special social needs” (Article 8.4 (e)).

should be primarily driven by the assessment of qualitative and quantitative economic evidence, whereas the benefits of migrating onto modern networks should be considered when assessing the appropriateness and proportionality of remedies.

BEREC would recommend drafting which removes the reference to market definition and recognises the need to protect vulnerable consumers, for example:

“Once most customers have switched to a higher performing infrastructure, a group of captive users may still be left behind using the legacy technology. In this event, NRAs should take a regulatory approach that does not unnecessarily perpetuate the cycle of captivity ~~by defining narrow captive markets~~, but rather encourages migration onto modern networks and weighs the needs of vulnerable citizens and consumers against the benefits of migration onto modern networks, which may ultimately make it possible to switch off legacy networks.”

Moreover, BEREC notes that the penultimate paragraph on page 19 of the Staff working document makes essentially the same point but uses a different wording from the Draft SMP Guidelines. This is a particular example of the potential for ambiguity arising from having two separate documents. In this case, the paragraph in the Staff working document adds nothing to what is already in the Draft SMP Guidelines, and therefore BEREC recommends deleting it.

4. Assessing SMP

Firstly, a relatively minor remark is that BEREC proposes the removal of the citation to the Portuguese case PT/2017/2023 in footnote 52 of the Draft SMP Guidelines, as it does not illustrate correctly the sentence to which it is related (*“even an undertaking with a high market share may not be able to act to an appreciable extent independently of customers with sufficient bargaining strength”*). Indeed, the main argument used by the EC in this specific case was that it *“considers it unlikely that consumers could be negatively affected by the deregulation of the fixed telephony market as competitive pressure in other parts of the market is sufficient to constrain the national pricing of PSTN-based services.”*

4.1. Single SMP

Market shares

BEREC is of the view that the SMP Guidelines would benefit from greater clarity when it comes to the interpretation of the role of market shares in an assessment of dominance. But such an objective should not materialise at the expense of side-lining well-established practice for measuring market presence in the electronic communications markets as well as in competition law.

In this regard, BEREC considers that Paragraph 75 of the current SMP Guidelines, highlighting the 25% and the 40% share thresholds, offers a tried and tested formula in line with competition law practise to evaluate market shares and ultimately to provide an initial indication as to the level of competition in a market.

The 25% threshold was based on the old merger regulation.⁶ However, it should be noted that the latest merger regulation⁷ from 2004, still in force, confirmed that threshold.

Furthermore, the 40% threshold is based on case-law.⁸ It is repeated by the Commission itself in the Horizontal Merger Guidelines.⁹ The guidance on enforcement priorities of the European Commission on Article 102 stresses that only for a market share below 40% is it unlikely to find single dominance, although *“there may be specific cases below that threshold [40 %] where competitors are not in a position to effectively constrain the conduct of a dominant undertaking, for example where they face serious capacity limitations.”*¹⁰

BEREC does not see a reason to delete these thresholds and the respective references, since they are still relevant and a number of NRAs have referred to them (mainly to the 40% threshold) in the past in their decisions.

Barriers to entry

Paragraph 58 of the Draft SMP Guidelines assumes that legal and regulatory requirements may limit the number of available spectrum licenses, impeding market entry, and as such may be considered as barriers to market entry when assessing single SMP.

BEREC wonders why the EC considers the availability of spectrum licenses to be based upon legal and regulatory requirements, which in BEREC's view could only refer to the spectrum authorisation regime. Should that be the case, BEREC points out that the authorisation regime as such is not the cause for market barriers in the first place. The legal and regulatory requirements are rather to ensure that spectrum is being efficiently used, i.e. safeguarding an efficient award procedure. Strictly speaking, and as already noted by BEREC's predecessor (ERG) in its Revised Common Position on the approach to appropriate remedies in the ECNS regulatory framework (ERG (06) 33), the consideration of spectrum as a legal or regulatory barrier due to its scarcity is better described as *“a limitation [that] is typically linked to a related technical or technological barrier, e.g. a constraint on the amount of spectrum that can be assigned and consequently a limit on the number of licences given to undertakings seeking to enter a market”*.

In this context, BEREC can only assume that the EC is referring to the general limited availability of spectrum, which does not depend on the spectrum authorisation regime itself. Since spectrum is a scarce resource, certainly the number of available spectrum is limited. BEREC thinks it would make sense to clarify the guidance in paragraph 58. Should the EC insist on referring to the limited availability of spectrum licences, BEREC suggests the following wording:

An SMP finding depends on an assessment of the ease of market entry. In the electronic communications sector, barriers to entry are often high due to, in particular, the existence of

⁶ See recital 15 of Council Regulation (EEC) No 4064/89.

⁷ See recital 32 of Council Regulation (EC) No 139/2004.

⁸ See Case 27/76 United Brands v Commission and Case COMP/M.1741 - MCI WorldCom / Sprint as quoted in footnote 77 in paragraph 75 of the existing guidelines.

⁹ See paragraph 17 of Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, p. 5–18.

¹⁰ See paragraph 14 of the Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02).

~~technological barriers such as the scarcity of spectrum existing legal and other regulatory requirements~~ which may limit the number of available spectrum licences or where entry into the relevant market requires large investments and the programming of capacities over a long time in order to be profitable.

In addition, the reference to sunk costs in footnote 58 should also include economies of scale, as these are the most important barriers to market entry in the electronic communications sector:

Hoffmann-La Roche v Commisison, op. cit., at paragraph 48. ~~One of the~~ The most important types of entry barriers ~~is~~ are economies of scale and sunk costs. Economies of scale and sunk costs are particularly relevant to the electronic communications sector in view of the fact that large investments are necessary to create, for instance, an efficient electronic communications network for the provision of access services and it is likely that little could be recovered if a new entrant decides to exit the market.

4.2. Joint SMP

Throughout its dialogue with the Commission, BEREC called for more guidance and clarity as to how NRAs assess joint dominance, as well as on the standard of proof required to designate joint SMP. To this effect, BEREC welcomes the Commission's update of the guidance on collective dominance in the revised Draft SMP Guidelines to give greater clarity to NRAs when assessing joint SMP.

BEREC shares the Commission's view that, in the perspective of ex-ante regulation, NRAs have to analyse on a forward-looking basis whether the structure of a relevant market is conducive to coordinated effects, i.e. whether tacit collusion would be a likely market outcome in the circumstances under investigation. Furthermore, BEREC agrees that the methodological guidance based on the relevant cases (Impala and Airtours) is appropriate in seeking to determine joint dominance.

However, BEREC notes that the criteria for assessing joint dominance mentioned by the Commission are numerous and points out that not all factors are necessarily applicable in all cases. Potential cases in the coming years will show if and how the standard of proof will be met in specific cases, thereby showing the practical applicability of the revised SMP Guidelines.

Market outcomes as an indicator of joint SMP

The Commission refers to evidence for potential SMP situations based on existing market conditions. For example data on prices, profitability, ARPU-levels, close alignment of prices over a long period (above the competitive level), complaints and EU averages are mentioned as a potential starting point for analysing market failures at the retail level, which may in turn lead to conducting an analysis of the existence of joint SMP at the wholesale level.

BEREC would like to point out that in an already regulated market, the NRA should use these indicators with caution, as they do not necessarily provide useful information in a joint SMP case in which a modified Greenfield approach is required.

On the other hand, these elements could be very useful in analysing a market which is not regulated. If, for example, an NRA observes relatively high ARPUs and prices far above a competitive price level this could give useful insights when assessing the likelihood of coordination.

In general, BEREC is of the opinion that the Draft SMP Guidelines should be more cognisant of the likelihood that the nature of proof may differ, depending on whether the market under investigation is regulated or not.

Transparency

Transparency is one of the key conditions for joint dominance to be sustainable. Parties should be able to monitor each other's behaviour and have the possibility to detect deviations from the coordinated outcome.

BEREC agrees with the Commission that in general the electronic communications sector can be considered to enjoy a high level of transparency, but notes that the section "Transparency" (starting at paragraph 78) gives a more general description of how a coordination mechanism could work, instead of focusing on transparency itself and how this would influence the coordination. For the sake of clarity, it is recommended that the revised Guidelines separately address in different sections (i) the issues related to the transparency of the common coordination strategy (i.e. the focal point and the ability of the operators to monitor it) and (ii) the structural elements (e.g. the maturity of the market, the links between the parties and the elasticity of demand) that prove the incentives and the capacity to reach a common understanding.

Sustainability

Paragraph 85 of the Draft SMP Guidelines refers to short-term price wars as a possible retaliatory mechanism. In footnote 89, the Commission suggests that the potential for an oligopolist to conclude an access agreement with other competitors may not be a credible deterrent against other oligopolists deviating from the tacit collusion, because it could have long-term effects on the market and further undermine the profits of the retaliating party. BEREC however considers that this reasoning may go too far. For example, the credibility of the retaliatory mechanism could depend on the impact of the provision of wholesale services for the different actors. These impacts should be assessed on a case-by-case basis. Moreover, the Commission states in paragraph 84, that the most effective deterrent mechanism is the one which has not been used.

Finally, BEREC believes that when assessing tacit collusion, there should be less of an emphasis on "symmetry". Firstly, BEREC underlines that all references to "common policy" is to be understood as "coordinated policy", as collusion does not necessarily require every participant to follow the exact same strategy (for example, the collusion could concern a segmentation of the market through product differentiation, whereby each oligopolist avoids competing on the others' market segment). Secondly, it is not required that deviation from the coordinated policy would lead to a retaliation through "identical actions from others"; indeed, retaliation for deviating from the coordinated policy is not necessarily punished by

others also deviating from the coordinated policy¹¹. As stated by the Commission in paragraph 76, retaliation can even take place on a different market than the one of the focal point: therefore, it is possible to activate the retaliatory mechanism while the coordinated policy is still maintained. Such retaliation can even be more efficient if it can be focused solely towards the deviator (in contrast to a punishment of all market participants).

¹¹ See, for example, C-395/96 P - *Compagnie Maritime Belge Transports and Others v Commission*, par 117: “It follows that, where a liner conference in a dominant position selectively cuts its prices in order deliberately to match those of a competitor, it derives a dual benefit. First, it eliminates the principal, and possibly the only, means of competition open to the competing undertaking. Second, it can continue to require its users to pay higher prices for the services which are not threatened by that competition.”