23.01.15

Name of the organization responding to the questionnaire:

TDC

Brief description of the role of the organization (operator, consumers' association, academia, etc.):

TDC is the largest Danish provider of telecommunications and cable network services. TDC operates mobile and fixed (DSL, fibre and coax) networks. TDC is present in Norway (business services and cable operator) and Sweden (business services).

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Name, email:

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General comment:

TDC has the following introductory observations on the consultation concerning:

Scope:

It is unclear if the questions are based on the markets identified by the Commission's 2014 Recommendation on relevant markets or if the questions are to be applied to telecom markets in general which may not be subject to ex-ante regulation. It should be made clear that markets outside the 2014 Recommendation on relevant markets are handled by competition rules and therefore fall outside BEREC's remit and the current consultation.

Justification:

The consultation appears to be based on an unproven assumption that the possible presence of oligopolies by definition leads to a restriction of competition.

However the consultation's validity would have benefitted by first setting up a structured analytical approach to: 1) Definition of oligopolies, 2) To what extent oligopolies may or may not represent a challenge to competition, 3) To what extent ex-post competition law based interventions may be sufficient to meet such challenges and 4) If different markets represent different challenges concerning possible anticompetitive effects of oligopolies.

Such a standard analytical approach[1] should include the specificities of the capital intensive telecommunications network industry. Thereby the scope for any possible application of sector specific rules and the total effects on investment, competition etc. could have been outlined and thus provided a helpful framework for the consultation which could bring forward the well-founded consistent conclusions which the current consultation may have difficulties to achieve.

QUESTIONS

2.1. Situations of oligopolistic competition in the electronic communications sector

1. In the electronic communications sector, do you consider that there are markets that were characterized by oligopolistic structures from the outset? In your view, which factors (scarcity

[1] E.g. as in The International Bank for Reconstruction and Development / The World Bank, InfoDev, and The International Telecommunication Union: *TELECOMMUNICATIONS REGULATION HANDBOOK* and Richard Whish and David Bailey: *Competition Law*, 7th edition, 2012

of spectrum, high level of required investments, etc.) explain the existence of these market structures? Are wholesale markets more prone to oligopolies than retail markets?

From the outset the electronic telecommunications sector is extremely capital-intensive when it comes to activities in the markets for electronic communications networks and in these markets (both wholesale and retail) the industry exhibits characteristics in the form of natural entry barriers concerning particularly deployment of fixed but also mobile networks. Accordingly there will in a given geographical area be a relatively limited number of network operators, and for mobile networks the number will also be restricted by number of licenses.
But even if these network markets may tend towards oligopolistic competition with a limited number of large players these players are not in an impregnable position and competition may be both dynamic and efficient.
As it has been demonstrated during the past few years the arrival of disruptive new business models and technologies can rapidly erode otherwise well-established market positions, e.g. the impact by Skype and other VoIP providers on both fixed and mobile voice services, or the impact by Netflix/ YouTube on the cable industry[2].

With this in mind the basic question concerning the sufficient number of operators needed to ensure efficient competition cannot be answered categorically[3]

The key point is that this question can only be answered after a careful case-by-case market analysis of the impact on competition in case of a situation with oligopolistic[4] competition situation. If an oligopoly is present in one of the relevant markets then to avoid regulatory 'type II errors' an application of any regulatory ex-ante regulatory intervention (cf. reply to q2.4) should only be considered if sustaining negative effects to competition in the relevant telecom markets have been demonstrated. This is important since the risk of possible harm to competition will be less compared with the case of single dominance and thus any regulatory intervention will be prone to mistakes.

At the same time at European or regional level it seems evident that consolidations may lead to the emergence of a few very large players which may lead to oligopolistic competition and potential issues with competition. In particular the total strengths of the consolidated and oligopolistic companies mainly in the mobile or business markets have to be taken into account when their presence in a specific national relevant market is analyzed. A player in a national market which also is part of a pan-regional or pan-European oligopoly may thereby play a role in a national market which goes beyond what is observed if the national market is analysed in isolation.

2. Do you consider that there has been an increase in oligopolistic market structures (including duopolies) in any of the electronic communications services markets or more generally in the sector?

The number of consolidations have been increasing both at national and at European level not least in the mobile sector. However there are as well other trends observable as mentioned in reply to q2.1.1 and instances of consolidation may not as such reduce the degree of competition.

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[2] While so-called 'cable cutting' may not be very visible for the European cable industry (yet) an appreciable downgrade of cable packages in favour of streaming services can be seen at least in some national markets (e.g. Denmark)

[3] For example as raised by OPTA in its *Economic Policy Note*[3] back in 2006: '*Is two enough?' (*understood: to have efficient competition without regulatory intervention)

[4] Assuming a duopoly represents a specific subset of oligopoly with the highest risk of some maybe inadvertent collusion

On the contrary a consolidated company which may be one of the actors in an oligopolistic national market can because of the consolidation be able to increase its investments and thus increase the competitive pressure on competitors or to expand into new markets.

i.	*If so, please state in which electronic communications services markets you observe this evolution, making reference to specific retail and wholesale electronic communications services markets. Please state whether you observe this evolution at a subnational, national, or European level.*

It is as mentioned in reply to q.2.1.1 important to distinguish between different levels of geographical markets and how these levels interact. For example a consolidation in a national market that leads to higher concentration and presumably an oligopoly needs to be seen in the context of consolidation at EU/European level.

A national consolidation can be essential to maintain competition if a consolidated company which is only present in the national market faces large pan-European or pan-regional players which are part of oligopolistic mergers or joint-ventures.

A specific competition problem where regulation leads to type II errors may arise in the case of a duopoly/oligopoly with few (2-3) players operating different networks but where only one of these players is regulated as 'dominant'.

The regulated player, typically the traditional DSL-based 'incumbent', is then obliged to provide open access while the other networks (cable or FTTH) remain 'closed'. In this case no development of an efficient wholesale market will be possible because of the unilateral regulation which may distort investment signals and negatively impact investment in the regulated network whereas the vertical integrated provider(s) of the unregulated 'closed' network(s) can take full advantage of a vertical integration. This call for a new regulatory approach as described below in reply to q2.4

ii. What do you consider to be the main drivers of this increase (if any) in oligopolistic situations (mergers, fixed-mobile convergence, bundled offers, roll-out of next generation or other networks, operators' strategies, etc.)? Do you expect this trend to continue?

Concerning 'drivers' it should be noted that roll-out of NGA may rather offer the opportunity for entry of new geographically dispersed companies offering NGA networks that replaces an earlier 'essential facility' network.

The roll-out of NGA may thus lead to replacement of one 'monopoly' networks by few but nevertheless competing networks. Such a structure may be characterized at wholesale level as an oligopoly but the competing networks (even if limited to max. 2 wired and 2-4 mobil) will have to attract as much usage as possible to recap their NGA investment so the intensity of competition will rather increase

The overall observation is that for example the convergence f/m, the offering of differentiated bundlesetc. increase the heterogeneity of competitive offerings. A described in reply to q2.1.2.i the outcome is that even with presence of an oligopolistic structure a potential harm to competition is unlikely to occur

There may of course in a given relevant market be indications that the presence of a duopoly/oligopoly appears to weaken competition i.e. first and foremost competition in the market for wholesale fixed networks. This will call for a test of the possible indications of e.g. tacit collusion or other anti-competitive behaviour as listed in the Annex II of the Framework Directive 2009/140/EC.

If indications of competition problems due to the oligopolistic character of a wholesale market with competing networks are found the procedure should in line with the 2014 Recommendation on relevant markets be to analyze if a significant lessening of competition can be observed in the downstream retail markets. Only in this case and after analysing the wholesale up-stream market the imposition of regulatory measures can be considered. At this stage it should first and foremost be considered to a reassess the regulatory measures currently present which unilaterally focus on only one player (see also reply to q2.4 below).

As shown by different studies [5] a roll-out of parallel FTTH networks is highly inefficient and in a case where a dominant player also roll-out FTTH NGA and thus consolidates its dominant position in a fixed wholesale market the appropriate bottleneck regulation can still be applied.

2.2. Possible effects of oligopolistic competition
3. What are the main threats to competition and to the interests of end-users, which might result from the oligopolistic market structures referred to above?

Mergers and other types of consolidation together with the natural barriers for deployment of telecommunications networks infrastructure increase the probability of an oligopoly. But as explained because the telecommunications markets are rapidly evolving then even in the case of a market with only few large companies present this structure cannot be assumed to be harmful to competition cf. reply to q2.1.2.ii

4. Do you consider that there are any benefits or opportunities (for instance related to the roll-out of NGA networks in the context of broadband access) that could arise from oligopolistic situations? Please explain your reasoning.

Often a degree of consolidation leading to an oligopoly may offer benefits for end-users. The two most important are:

a) Better opportunities for long-term investment in NGA or LTE since these investments most efficiently are done by large players with the necessary capital resources.
b) Improved conditions for service innovation as competition will rather be based on new/improved services and not just on a short-term price competition e.g. driven by 'hit-and-run' players.

5. In your view, are there any electronic communications services where oligopolistic markets are more susceptible than others to uncompetitive outcomes? Please, explain your view.

As explained in reply to q2.1.2.ii this is not necessarily the case not even when it comes to telecommunications networks although due to investment requirements the number of competing networks will be restricted. The key concern for regulators should be if any anticompetitive behaviour or effects can be observed.

2.3. Regulating oligopolies
6. In your view, are there any areas of concern in relation to oligopolistic outcomes which are not adequately addressed by the current regulatory framework (i.e. both the European Union relevant texts and NRAs' policies)? In particular, what is your appreciation of the concept of collective dominance? What do you consider to be the most effective regulation of anti-competitive oligopolistic situations?)

See reply to q2.4 and the proposal to introduce less intrusive symmetrical obligations in the regulatory toolbox for the sector specific regulation. In general possible competition issues

[5] For example WIK: The Economics of Next Generation Access - Addendum, 2009

because of consolidation are handled under competition law by merger control as described by the Commission[6].

2.4. Remedies in the context of oligopolies
7. In your view, what are the main ex ante remedies (which are currently present or could be introduced in the European ex ante regulatory framework) that could be applied to electronic communications services markets exhibiting oligopolistic market structures? (similar or differentiated remedies, symmetric regulation, etc.)?

The pivotal point is as explained in reply to q 2.1.2.ii that ex ante regulation should address access to '*essential facility*' kind of networks. The current toolbox in the regulatory framework may however be less suited to deal with the presence of competing networks where competition exhibits an oligopolistic character and may be less efficient, but where the identification of one single dominant operator is not evident
The challenge with the current regulatory framework is that in practice the imposition of regulatory measures is a binary decision dependent on presence of one company holding a dominant position.

In the case of an oligopoly/duopoly a possible negative impact on competition is less likely to occur than is the case with single dominance. Any negative impact may further be counterbalanced by other positive effects for both investements and consumers as mentioned earlier and the toolset of regulatory measures should therefore be adapted to this situation before being applied and assuming a proper market analysis of a relevant market has been undertaken.

When it comes to wholesale access to more than one network there is scope for more balanced and symmetrical measures. This could be in the form of a symmetrical obligation to provide access at reasonable conditions to electronic communications networks which could be imposed on the 'oligopolistic' operators again if justified by a market analysis. A disagreement on what is meant by 'reasonable' access conditions could be referred to the NRA if no agreement can be achieved within a certain timeframe.
This use of symmetrical access obligations in case of parallel networks would follow the approach introduced in the Infrastructure Directive 2014/61/EU Article 3,4 and should be extended to apply as well for access to electronic communications networks and services falling under Markets 3 a and/or b.
Thereby the disadvantages of the current unilateral imposition of access obligations on the current dominant operator could be relieved to the advantage of a more investment friendly and balanced regulation

2.5. Other issues
8. Please, provide any other insight or opinion regarding oligopoly analysis and regulation.

n.a.

4 PROCEDURE TO SEND RESPONSES AND CONFIDENTIALITY ISSUES
All stakeholders are invited to send their contributions by the 25th of January 2015 at the latest to pm@berec.europa.eu, in English, in order to speed up the processing of the contributions. Questions regarding the questionnaire itself can be sent to kevin.wood@berec.europa.eu.

[6] E.g. Commission Staff Working Document Accompanying the White Paper: Towards more effective EU merger control, 2014.

BEREC will publish all individual contributions on its website, taking into account stakeholders' requests for confidentiality (if any), which should be clearly indicated in the contributions to be submitted. is also possible to send both a confidential and a public version.

No confidentiality issues