

ETNO Response to BEREC Consultation on Oligopoly Analysis and Regulation - BoR (14) 172



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About ETNO

ETNO (the European Telecommunications Network Operators' Association - www.etno.eu) represents Europe's telecommunications network operators and is the principal policy group for European e-communications network operators. ETNO's primary purpose is to promote a positive policy environment allowing the EU telecommunications sector to deliver best quality services to consumers and businesses. ETNO members account for 60% of the total investments in European networks.

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1. General Remarks

ETNO welcomes the invitation to provide inputs to BEREC's consultation on Oligopoly analysis and regulation.

ETNO believes that the EU telecoms sector needs right now a proper debate on the future regulatory framework, that takes into account all the facts and aspects affecting the industry and particularly the conditions and incentives for operators' investments. In the last 10+ years we have witnessed a major development of competition, with increasing convergence of platforms and services, including Internet-based services, and a substantial deployment of infrastructures providing intense network competition in many geographic areas of the EU. In order to fulfil the objectives of digitalization and modernisation of the European economy, further significant investments in network infrastructures are required. These facts underline the need to

substantially deregulate the sector and undertake a comprehensive review of the EU framework.

BEREC frames the present work stream partly as a contribution to the forthcoming Regulatory Framework Review. However, this exercise looks at one specific issue in isolation, in a way that potentially leads to more regulation and regulatory complexity. It is not addressing a full set of issues and the wider policy objectives such as investment incentives and the related dynamic efficiencies, competition and market structures, consumer welfare, etc., giving proper priority to all policy objectives. We therefore believe that the consultation is incomplete and as such not helpful to inform the forthcoming framework review.

The rationale for having new regulatory tools for specific market structures (other than those already offered by the current framework) is not clear. It would raise enormous complexities and also go against the transitory nature of ex-ante regulation and the transition to competition law that should begin to occur after 10+ years of SMP-based regulation and the high degrees of competition already reached. Trying to move the regulatory target raises uncertainties and gives a negative signal to investors. That is why it is necessary to highlight that:

- For the *current* framework the need for ex-ante regulation has to be proven on the basis of the competition law approach described in the SMP Guidelines. If no single or joint dominance exists, there is no role for ex-ante regulation. Under the current framework, no extension of the concept of dominance/SMP is possible or advisable.
- For the upcoming *review*, it is necessary first and foremost to focus on modernising and reducing regulation in the sector in light of market developments. We see no justification for devising specific regulation for “oligopolies” in telecoms markets (or in other adjacent markets). Moreover, the upcoming review should ensure that the addressee of potential regulation is determined in an objective and equitable manner, allowing operators to compete on an equal basis with each other.

Regarding the concept of “oligopolies” itself, we note that it is not clearly defined, and its use without a proper academic/economic context may be misleading, creating the idea that potentially oligopolistic market structures would constitute a competitive problem in the sector. On the contrary, telecom markets have their own specificities and are a good example of how a relatively concentrated market structure is in fact necessary to produce competitive outcomes, and must be analysed on that basis.

2. Specific answers to 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 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?**

While in traditional markets it is generally believed that less concentrated market structures are associated with lower prices and better performance, in markets with high rates of innovation and other characteristics such as economies of scale and scope – usually associated with the electronic communications sector –, the relationship between structure and performance is more complex. Firms in such markets engage in “Schumpeterian” competition, vying to offer consumers products with new and more valuable features, a process which involves making large, risky investments. In dynamic markets, increasing competitive intensity may lower consumer welfare by reducing the rewards available from investment and thus the incentives to undertake it.¹ Firms will be discouraged from investing if they have reasons to believe that competition policy will undermine the competitive advantage they had hoped to build.²

Providing end-users with access to electronic communications networks is characterised by intensive use of capital and high fixed costs, which requires scale. The heavy investments enable the incorporation of technologies into services offered to the consumers. These features entail a degree of concentration of the access market as it tends towards a smaller number of larger players with the required scale. If fixed costs resulting from capital expenditure are large relative to sales, a higher degree of market concentration is efficient and inevitable in equilibrium.³ In the electronic communications sector this evolution has led to a widespread deployment of networks and new broadband services at competitive prices to the benefits of end-users.

It should additionally be noted that several wholesale markets in the electronic communications sector have been created through regulatory intervention. Under the EU regulatory framework, if a retail market produces competitive outcomes absent wholesale regulation, these markets should be deregulated. In such a case, the market structure of the wholesale market is no longer relevant for regulatory purposes.

¹Aghion, P., N. Bloom, R. Blundell, R. Griffith & P. Howitt (2005): *Competition and Innovation: An Inverted-U Relationship*. The Quarterly Journal of Economics, 120(2), 701-728.

² Aghion, P. & R. Griffith (2005): *Competition and Growth: Reconciling Theory and Evidence*. MIT Press.

³ Sutton, J. (2007): *Market Structure: Theory and Evidence*. In *Handbook of Industrial Organization*, vol. 3, edited by M. Armstrong and R. Porter, 2301 - 368.

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?

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.

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?

Operators have been subject to considerable competitive pressure, and been forced to differentiate, by: (1) high efficiencies/cost advantages/economies of scale or (2) bundling of new services from adjacent sectors (e.g.: TV or content). Additionally, this trend has been accelerated by the transition to the IP world and the increasing global nature of services beyond connectivity, which have provided additional competitive pressure.

This fact and the need to undertake substantial investments have in some cases led to the concentration of existing market players. This is a natural response to rebuild a more stable and dynamic economic equilibrium, compatible with the investment that the industry needs to deliver the highest possible quality to the consumers.

This evolution has led to a widespread deployment of networks and new broadband services in a competitive environment to the benefit of end-users.

Mergers, fixed-mobile convergence, bundles, roll-out of NGA are not drivers leading to foreclose markets or other anticompetitive outcomes. Instead, those are natural competitive market responses aimed at increasing differentiation in such a competitive landscape driven by price competition and declining margins. It should be noted that increasing price competition, thereby diminishing margins, limits both the capacity and the opportunity for investment. To restore a sustainable market outcome, the competition authorities should, when reviewing mergers, take account of the dynamic efficiencies triggered by investments. This supposes *inter alia* to consider a trade-off between possible short run relative price increase and medium run increase in investment, hence higher quality at lower unit prices for consumers at the end.

We also note that electronic communications services markets have characteristics that limit the usefulness of traditional approaches to competition policy which tend to focus on high market shares and/or high concentration ratios. They are characterized by both supply- and demand-side economies of scale and scope, typically implying high market share and/or high levels of concentration. Although such market structures could result in market power, traditional concentration measures are not

necessarily meaningful for determining such potentialities given their limited and static nature. Indeed, rapid innovation and the potential for disruptive entry imply that such market power may be ephemeral. Consolidation may generate real while sometimes difficult-to-assess benefits for innovation, or demand-side externalities from network effects.⁴ In a market environment in which new infrastructure needs to be substantially upgraded and a former monopoly has developed into an extended ecosystem of rival market players, static economic models are unsuitable as a basis for regulatory or competition policy recommendations.

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?

For highly concentrated markets, competition law foresees an established legal test of joint dominance, which has been included in the present framework in the form of joint SMP. Findings of “collective dominance” or joint SMP have been very rare in the sector, so there is no presumption that could potentially make regulators expect that anticompetitive results are likely to happen in the near future.

The electronic communications sector does not feature the negative effects of overly concentrated markets⁵. During the last years we have been continuously witnessing constant price declines due to strong competition, intense innovation, rapid diffusion of new products and services in the market, development of alternative infrastructures, etc.

Telecommunications services are increasingly being sold as bundles. Some players have called for improved transparency and comparability of prices between retail providers. Increasingly market actors have divergent strategies (converged operator, mobile only, TV/broadband only, etc. / broadband + OTT, etc.). Price innovation coupled with diversity in actors reduces the likelihood of aligning incentives amongst actors. These and other factors strongly suggest that anticompetitive behaviours should not arise in telecommunications markets.

Regarding the interests of end users, it is necessary to avoid a situation in which the sector could slow down the pace of the development of new services and deployment. Fair competition is needed in all market economies and sectors.

⁴ Eisenach, J. & I. Gotts (2014): *In Search of a Competition Doctrine for Information Technology Markets: Recent Antitrust Developments in the Online Sector*. In: F. Cugia di Sant’Orsola, R. Noormohamed, D. Alves Guimarães (eds.): *Communications and Competition Law Key Issues in the Telecoms, Media and Technology Sectors*, Wolters Kluwer, 69-90.

⁵In fact, from our point of view, the concept of “Oligopoly” is not properly contextualized with the competitive dynamics of this sector and can lead to wrong conclusions, due to the connotations brought by the term. In our opinion, some markets, of which the telecom sector is a good example, require a certain concentration level in order to produce competitive outcomes.

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.

First, starting from the market reality in many European markets, it should be noted that artificially fragmented market structures exist. This is true especially when facilitated by ex-ante regulation which promotes entry (notably of low-cost operators), increasing the intensity of price competition leading to a decline in revenues and profit margins. Such decline limits the funding capacity of operators, who have to sustain high levels of investment in fixed capital to deploy their network and services.

Moreover, ex-post regulation in the form of market structure monitoring through merger control can also discourage investment because of the remedies imposed (notably spectrum divestiture, mandatory MVNOs access) to clear the mergers. This control of market structure provides sub-optimal results in terms of network investment. Less fragmented markets can improve incentives and capacities of private operators to invest in the deployment of NGAs, at the benefit of consumers who will access high quality services at declining unit prices.

Strong players competing fiercely in many ways (infrastructure, innovative services, prices, etc.) can provide an efficient, and sustainable competitive environment, in terms of prices, network differentiation, quality, innovation, etc. A sustainable competitive environment should focus on private investments needed to provide NGA / high quality broadband services. Given that investment is the main driver of unit price decline, fostering investment is the most effective policy to promote both high quality and affordable prices to the consumers.

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 said above, cases of joint dominance (ex-ante or ex-post) in the electronic communications sector in the last years have been very rare, so it is not easy to presume markets susceptible to uncompetitive outcomes.

Access markets will be more prone to show relatively more concentrated market structures due to capital intensive activities if compared to services (as recalled above, high investment in fixed capital incorporating technologies requires market concentration). However, this does not mean that they are generally susceptible to uncompetitive outcomes. Moreover, one should acknowledge, that, as a result of competitive rivalry on the market, competitors can also be “overtaking each other”, so that *another* single operator may now “be in a position to behave independently from consumers, customers and competitors”.

3.3 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?)**

The current regulatory framework and competition law provide sufficient tools to react/act if necessary. Collective dominance is foreseen by the ex-ante regulatory framework, with very little practical application. This does not mean that the concept has to be changed, but that the existence of potential collective SMP is unusual in the sector. There is no need to devise new ex-ante tools or review the thresholds for its application. The sector has in general advanced towards substantial higher levels of competition and lower prices, especially lower unit costs to the benefit of users.

In any case, it is necessary to point out that, if any different threshold were to be devised for ex-ante regulation, to be proportionate it would in fact have to be stricter than the joint dominance test under competition law. Ex-ante regulation places higher regulatory burdens on undertakings than scrutiny under ex-post competition law (notably by not requiring a proof of anti-competitive behaviour before regulation applies).

It is necessary to have an efficient approach, taking into account the dynamic efficiencies in the long run which arise from investment (that cannot be sustained through the application of a higher regulatory burden), and at the same time safeguarding competition in electronic communications markets. The current ex-ante framework has more than enough tools to grant this.

Lastly and foremost, we experience an increasing need for geographically tailored regulatory solutions, adapted to the increasingly geographically diverging competitive conditions between different types of geographical areas. This calls for a differentiated regulatory approach.

3.4 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.)?

Concentration processes taking place in Europe are already analysed by NCAs that incorporate safeguards to competition. Competition authorities have also the possibility to initiate antitrust proceedings to tackle collusive agreements or abuses of collective dominant positions. No further ex-ante remedies are required.

Other issues

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

In the light of the above, the main concern of competition authorities and policymakers alike should be the search for the optimal level of competition intensity allowing dynamic competition through investment, rather than the increase in the number of market players for the sake of reducing the degree of market concentration.