



**BEREC Report on Oligopoly analysis and  
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***KPN's reply to questions to stakeholders***

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## Summary

KPN welcomes the opportunity to provide input to BEREC's consultation on the regulation in oligopolistic markets. KPN is a Dutch telecommunications operator, with nationwide fixed and mobile networks, offering a large variety of fixed, mobile and ICT services to residential-, business- and wholesale customers.

In general it seems to us that the discussion on 'the regulation of oligopolistic markets', that is started fairly recently, seems to be based on an insufficient problem definition. It would be helpful if this exercise of BEREC would lead to a better understanding as to whether there would indeed be any problem originating from such market structures. The concept of 'oligopolies' as such is too broad and unspecific to build any conclusions upon.

The need for sector specific regulation in the telecoms sector found its origin in the historic (state owned) monopolies. So phase one was to liberalise and open the networks for third parties ('the ONP-regime'). The 1999 review of that regulatory framework led to phase two, in which it was considered necessary to regulate the previous monopolists on an *ex ante* basis as long as they still would enjoy dominant positions as defined under EU competition law. This current 'SMP-regime' leads to the application of general competition law only, once (single or joint) dominant positions as defined in competition law are no longer present. Somehow it feels that the question whether 'oligopolistic markets' need to be regulated is based on a reluctance to accept that the sunset-clause of this regulation is (almost) reached in some markets and member states. That reluctance, however, cannot lead to a different application of the current framework than provided for in the framework itself and – in our view – gives insufficient ground to pre-empt a phase three of a European Regulatory Framework, since it would be based on an insufficient problem analysis.

The main point of departure of the current framework is that no regulation is necessary on competitive markets, even if the amount of players on some of these markets would have slightly decreased in recent years. Only a market where single or joint dominance (SMP) is found is susceptible to *ex ante* regulation. The concept of joint (or collective) dominance may be a complex one, as has been described in economic theory as well as in European court cases, but only if the required level of proof thereof is available the concept can be basis for *ex ante* regulation. If the criteria have not been met, the market is deemed competitive and general competition law is sufficient to deal with potential market coordination.

The fact that it is not very likely that the criteria for joint dominance will be met on a competitive market, with a limited amount of fixed network operators with different technological and commercial starting points, has also been set forth in two reports RBB Economics have prepared for KPN in relation to the Dutch market (annexed to this document).

Imposing remedies on the basis of an extended application of the joint dominance concept would be even more problematic, since any remedy imposed on a competitive market may in itself distort the competition between the respective companies. This would especially be the case if the perceived 'jointly dominant' market parties are not treated equally. Without a legal basis and with the risk of distorting competition by imposing remedies the extension of the concept of collective dominance under the current framework is not justified.

Please find below the detailed input of KPN.

## Situations of oligopolistic competition in the electronic communications sector

*1. In the electronic communications sector, do you consider that there are markets that were characterised 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?*

Electronic communications markets can be characterised as network markets. The structure of these markets in Europe has changed rapidly in recent years, due to the liberalisation of these markets, the internationalization, the technological developments such as digitalization and convergence between telecoms, internet and media. A variety of services and applications is offered by many organisations operating on different markets and using their assets, such as content rights, internet access services, operating systems and mobile networks in different roles. In the last years, the arrival of a great variety of over-the-top players has changed the markets even more radical.

This is also required in respect of today's EU *ex ante* regulation which is solely aimed at the traditional telecoms market and thereby based on market definitions that does not (yet) sufficiently take into account the impact of over-the-top players and on an assessment of the competition on markets. The question into the regulation of oligopolistic structures must not only be assessed on the basis of the traditional market definitions. An approach which only takes into account the networks and (wholesale) services on the current markets is too narrow, as is the conclusion that a limited amount of network providers in itself means that the respective markets are oligopolistic. We acknowledge that in the current markets 'access to broadband' is the central issue to be addressed, but the traditional scope to define any access technology as a separate market no longer reflects market realities. The paradigm that access regulation would lead to more innovation and investment (the 'ladder of investment') has proven not to reflect realities as the infrastructure competition that exists is mainly based on investment in mobile, cable and fibre networks that did not start on the basis of access regulation.

A rethinking is necessary as regards the question why a certain market structure exists. The network industry characteristics of the sector means that high investments are necessary to build and operate a network. For mobile networks the scarce frequencies, the high costs for obtaining national licences and large investments to roll out networks lead to a market structure where the amount of network operators per country will be limited (in Europe roughly between 3 and 5 network operators). This situation has not changed fundamentally since liberalisation of the mobile market. Compared to the early days of liberalisation the market positions of former incumbents however, have changed as they by now, in many countries, operate on competitive markets. Market players that have entered only after the liberalisation are by now among the largest players on the market (such as Vodafone, Liberty Global). Instead of considering that a small number of large players in itself is 'a problem', it should be noted that the objectives of sector specific regulation – to create competition and level playing fields between former state-owned incumbents and new entrants – in most relevant markets have been achieved. Under the current framework there is no room to extend the scope of *ex ante* regulation outside the legal framework of an appropriate application of the concept of 'dominance' (SMP) defined in competition law. And we question strongly whether in a next generation regulatory framework there would be a necessity or advantage to do so.

Even if consolidation in the market would lead to less providers in Europe than before, the strength, market position, internationalisation and vertical integration of the remaining competitors shows a totally different market structure compared to the period just after liberalisation. Consolidation is primarily driven by factors which exceed a specific national market. The former 'incumbents' on average no longer dominate national or international telecommunications markets. A conclusion of existing or upcoming oligopolies therefore might not be based on historic

market positions, but on other aspects related to the sector: increasingly high investment needs and risks, high level of innovation, strong and increased competition from adjacent markets. The communications (networks and services) markets thereby would be comparable to many other markets without sector specific regulation, not in the least the internet related markets that are the closest to the telecoms-sector. On these markets a decreasing number of manufacturers of devices (e.g. Samsung, Apple), network component manufacturers, operating systems (e.g. Microsoft, Google, Apple), search engines (e.g. Google), social networks (e.g. Facebook), communications applications (e.g. Facebook, Microsoft) etc. is active on far more oligopolistic markets than the traditional telecoms sector. Scale of these other markets is almost always of global nature and therefor exceeds any forward looking discussion on the potential oligopolistic nature of a national (per country) telecoms markets.

Also from this perspective, we do not feel that wholesale markets are more prone to oligopolies than retail markets. Network operators will have an incentive to provide access in order to recoup their investments in the network. Wholesale operators need to invest in their services and need to make a decision whether or not to access a specific market. Their possibilities to access and to behave independently on the market have not been changed in the last years. Therefore, the mere fact that the amount of players on retail markets is often higher does not automatically lead to the conclusion that wholesale markets with lesser players are more prone to oligopolies.

*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?*

As explained in the answer to question 1, KPN does not feel that an increase of oligopolistic market structures is taking place, taking into account the long period after liberalisation until now. The pitfall is to adhere to traditional market definitions while ignoring the relevant convergence and over-the-top developments. A focus on just a the number of market parties on these traditional national markets without taking into account the international competition from both non-traditional players and players with multiple activities acting on adjacent markets, is too limited.

For example, in the Dutch situation the merger of Ziggo into Liberty Global does not automatically lead to the conclusion that an oligopoly emerged from that merger. This would not only ignore the fact that in the past most of the households in the Netherlands already had a choice between KPN and the cable as network operators but also the fact that mobile players, alternative access players and – on the service level – an ever increasing number of over the top services has changed and will continue to change the market(structure) and the competition. The strong national competition that emerged from the cable-merger could as well lead to a further increase of investment in the market, since both national networks are based on different technologies and investment needs. See also our remarks on the concept of joint dominance hereafter.

## 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?*

An oligopolistic market structure in itself does not lead to threats for competition and end-users as long as competition exists. As explained above KPN feels that the assessment of competition and interests of end-users must be made from a broader perspective than the traditional telecommunications markets. Threats will only arise if competition would be restricted with the effect that investments can be hampered and end-users cannot use the services they want. KPN feels that these threats do not occur on the markets for electronic communications. Market statistics indicate that competition leads to higher penetration and service quality of broadband access than on monopolistic markets, but there is no indication at all that this effect would be hampered by sector developments like consolidation, or could be accelerated by a regulatory framework based on the number of network operators. The large investments and innovation needs in competitive markets have shown that third, fourth or fifth national network operators are unable to follow market developments in the longer run. Nevertheless it is also apparent from the large number of small, local, regional or niche, operators on e.g. fibre networks that it is unnecessary for competitive pressure to compete on the same scale with national or supranational operators. Direct and indirect competition between access technologies and between various types of market parties create sufficient competitive pressure to refrain from imposing asymmetric *ex ante* obligations.

*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.*

We do not see specific benefits or opportunities from oligopolistic situations as such. However, the necessary investments etc. may lead to the necessary scale and scope that would not allow a great number of identical nationwide competitors. But that does not rule out that competition exists forcing existing companies to react to the competition from other markets, including international or over-the-top players. Some of these over-the-top players have even entered network markets, and announced new type of access possibilities (such as embedded sims in the mobile market).

*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.*

We refer to the answers above. The electronic communications services markets are very competitive and recent developments illustrate that new competition can come up from unexpected adjacent markets. Also the adjacent market for content, being an essential market for offering triple play and fixed-mobile converged propositions, influences the competition on the electronic communications market. Due to these fast developments we do not assess that some electronic communications markets would be more susceptible than others to uncompetitive outcomes.

## 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 is based on the concepts stemming from competition law, such as market definition methodologies, determination of dominance and assessment of competition problems leading to *ex ante* imposed remedies to a company with significant market power. The merits of this framework are twofold; obligations can only be imposed if necessary and propor-

tionate and overlapping (*ex post* and *ex ante*) market regulation is based on equal concepts. If *ex ante* regulation no longer necessary, the market will rely on the *ex post* competition rules.

The concept of joint-dominance is also based on competition law and should not be applied in a different way in the *ex ante* regime, in order to avoid that the objectives of harmonization of competition law and sector specific law are endangered. Joint-dominance has shown to be a restrictive notion, as has been proven in economic theory and EU competition law court cases. A number of conditions cumulatively need to be fulfilled for a finding of joint dominance: the two (or more) parties would need to be able to tacitly agree on an important parameter of competition, they would need to be able to detect and punish deviations from the coordinated market outcome to make such deviation unattractive, and third parties should not be able to challenge the coordinated outcome. The notion of collective dominance is not meant as a regulatory tool to be used for any situation where, *e.g.* as a result of consolidation and the existence of supra-national economic drivers, the number of markets players is decreasing. It is also not meant as a regulatory tool to keep *ex ante* regulation in place while in accordance with the point of departure of the regulatory framework no specific *ex ante* regulation could exist due to the competitive situation on a certain market.

Hence, the current framework does not allow to impose *ex ante* regulation where lifting of the regulation would be justified based on the competition on the markets. It also ignores that in a competitive network market the market parties will make decisions on the basis of their business cases and voluntarily enter into access arrangements, such as has been shown in mobile and increasingly in fixed markets. By imposing specific types of access via *ex ante* regulation the regulation may negatively influence these market developments and stifle rather than promote innovation. Applying the concept of collective dominance for *ex ante* regulation outside the market conditions that comply to the criteria developed by the European Courts would not only lack a legal basis under the legal framework, but would furthermore create uncertainties for market players – irrespective of whether it concerns the regulated parties or the access seekers. This does not benefit the development of a competitive electronic communications market.

As background information to an attempt to use the concept of joint dominance under the current regulatory framework KPN refers to a recent *draft* decision of the Dutch NRA ACM. In the specific Dutch market situation the ACM recently proposed to introduce the concept of joint-dominance as basis for the regulation of (virtual) access to the unbundled local loop (MDF and ODF FttH), KPN has asked RBB Economics to further elaborate on the criteria for assessment of a joint-dominance in the context of the Dutch market. The reports of RBB can be found in Annex 1 and Annex 2 to this reply. In Annex 1 RBB analyses the situation on the Dutch market in the context of the framework for assessment of joint dominance. The conclusion is that on the Dutch market no (risk of) joint dominance exists. Relevant factors supporting this conclusion are, for example, the fact that it is highly unlikely that Liberty Global, operating in the Netherlands under the brand of Ziggo, and KPN would be able to reach a tacit agreement, the fact that credible punishment mechanism is overtaken by the long existing and head-to-head across the board retail competition and the fact that presence of mobile operators increases the level of competition. In Annex 2 RBB further elaborates on the relevant conditions for assessment of joint-dominance in the context of ACM's draft market analyses decision. The conclusion of RBB Economics is that the draft decision lacks a clear and coherent theory of harm and fails to demonstrate in any level of detail how its theory of harm is supposed to work in practice in the relevant market. It does not contain any assessment that is capable of demonstrating the likelihood of tacit collusion to arise in practice. The report also addresses the conclusion of ACM that KPN would not provide wholesale access and would foreclose third parties in the absence of regulation and substantiated that this conclusion is not based on an economic assessment of the financial driver for KPN would have to choose such strategy. This example in the Dutch context illustrates that using the concept of joint-dominance as a basis for *ex ante* regulation requires is not suitable to regulate markets with a seemingly oligopolistic appearance merely based on a decreasing number of operators in a country.

The most effective regulation of anti-competitive oligopolistic situations is to rely on the application of *ex post* competition law, like other markets with a small amount of players (e.g. oil market and internet-related markets mentioned above). In combination with the *ex ante* merger control approval system this will give enough safeguards to prevent that consolidation will lead to a restriction of competition.

## 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.)?*

As concluded above, regulation of competitive markets based on an extended application of joint-dominance (compared to the criteria defined in competition law) does not only fail to fit in the legal framework, but also create risks of imposing *ex ante* remedies with detrimental market effects. How can a regulator assess that the remedies support the competition on the market instead of raising obstacles for the respective parties to compete? How will the balance between the proportionality of the remedies be safeguarded as regards the access to be given to parties which would normally only be protected through the *ex post* competition rules and rely on contractual arrangements. In case the regulatory authority decides to vary in the remedies to be imposed on the respective parties a very complex assessment will be required. In the most extreme situation where the regulator only imposes regulation on one of the parties – which is the current proposal in the Netherlands – the regulator will directly influence the competition of the two competing platforms, networks and respective companies and may hamper the competitiveness of the platform/company by imposing remedies. Such regulation will not only disturb the level playing field, but would also be a strong disincentive for innovative access arrangements on a commercial basis. The current legal framework does not provide any basis or justification for imposing obligations on only one platform, network, or company if this leads to restriction of the freedom of this platform, network, or company to compete with its main competitors.

And since it is highly questionable whether appropriate remedies can be found that would lead to more innovation and investment in access technologies and services, also for a future regulatory framework we see no advantage in considering an *ex ante* regulatory for ‘oligopolistic markets’ as such. If national regulators would like to have a regulatory toolbox to impose regulations in a competitive but oligopolistic situation they can rely on the applicability of the competition rules. Competitive markets do not justify *ex ante* regulation. This point of departure must be taken into account when carrying out a full review of the fundamentals of the current EU telecommunications regulation and competition law principles in place. An assessment of the scope of the regulatory framework, more specifically as regards the over-the-top parties as well as the framework for deciding whether *ex ante* remedies could be imposed on market parties, cannot take place without carrying out a profound analyses of the competitiveness of the EU market, as well as the level of innovation and investments. Such an analysis would also be needed if any consideration on the proper working of the internal market of the EU would be used as a relevant consideration for introducing an *ex ante* regulatory framework because of the oligopolistic nature of certain markets.

## Other issues

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

We regret that this questionnaire only focusses on oligopolistic markets. As explained above a profound analyses should address the competitiveness and assessment of the market from a broad

perspective. This includes an assessment of internationalisation, other supra-national economic drivers and convergence developments as well as a rethinking of the notions the regulator used when developing the current ex ante framework 12 years ago. Rather than concluding that the end goal of the current regulation has been achieved if a number of competitors fiercely compete on equal terms, the questionnaire implies a newly invented purpose and scope of a regulatory framework. Under the current framework no ex ante regulation is justified on competitive markets, even with a per-country limited amount of players. The (un)desirability of the market structures which led BEREC to present the current questionnaire should be studied in far more detail before any regulatory conclusions may be drawn. And if these conclusions would ultimately be that any form of regulatory influence would be needed, that conclusion should be part of the review of the current regulatory framework (as announced by the new Commission) and cannot be part of an application of the current framework.

## Annexes

./ . Annex 1. It takes two to tango. Is there a risk of joint dominance in the Dutch broadband market?, RBB Economics, 24 October 2014.

./ . Annex 2. Joint dominance on the Dutch retail market for internet access? A response to ACM's draft market analyses decision on unbundled access, 11 December 2014.