

## **Promoting investment, protecting competition, and preserving the integrity of the SMP framework**

### **Competition drives investment**

BEREC welcomes the Commission's explicit acknowledgment that competition promotes investment. The regulation of national markets by NRAs remains important in ensuring fair competition, ultimately to the benefit of European consumers.

However, the draft Code contains a series of restrictions on NRAs' ability to promote competition, in the name of incentivising investment, which creates a risk that connectivity is pursued to the detriment of both competition, and, ultimately, investment. This is exacerbated in the draft ITRE report. BEREC's analysis of these proposals is collected in four papers on access regulation<sup>1</sup> together with an earlier BEREC paper on non-competitive oligopolies, which address the high-level concerns described in this paper and also include drafting amendments. In brief, competition and investment are equally important objectives which can be pursued jointly, and should not be pursued at each other's expense.

### **Making it harder to pass the 3 criteria test (paper on market analysis, point 1)**

The restrictions begin with the steps NRAs must follow to determine whether or not a market is susceptible to ex ante regulation. The Commission's proposals make it harder for NRAs to pass the so-called "3 criteria test" by raising the evidentiary bar for finding a market susceptible to ex ante regulation (Article 65), and the draft ITRE report goes further still (AM 117), removing the presumption on which NRAs can rely that the 3 criteria are met even for markets identified by the Commission as being susceptible to regulation. This would also risk rendering the Commission's Recommendation on Relevant Markets meaningless, and contributing the fragmentation of the European market.

### **Lack of clarity around NRA powers to regulate non-competitive markets (paper on market analysis, point 2)**

Neither the Commission's proposals nor the draft ITRE report have seen fit to put beyond a doubt NRAs' power to address consumer harm where there are non-competitive non-collusive oligopolies (as explained in the paper on non-competitive oligopolies in the Electronic Communications Code), and both the Commission and the ITRE drafts propose to remove NRAs' power to regulate non-competitive retail markets altogether (deletion after Article 91), even where wholesale remedies are insufficient to address retail competition concerns.

### **The forced stepping back from regulation (papers on co-investment; vertically separate undertakings; symmetric obligations)**

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<sup>1</sup> See papers on co-investment; market analysis; vertically separate undertakings; symmetric regulation.

A number of provisions proposed by the Commission and sanctioned by the draft ITRE report would require the removal of or forbearance from regulation based not on robust economic analysis but on rigid assumptions defined in the draft Code. For example:

- The proposal to limit NRAs' ability to effectively regulate "wholesale only" undertakings under Article 77 (even when they are potential monopolies which could be charging inefficient prices) (paper on vertically separate undertakings),
- The deregulation of certain co-investments under Article 74 (on the basis of "offers" whether or not they are taken up, and without regard to the nature of the co-investment, the extent to which it creates new monopolies or extends existing ones, or whether it contains effective competitive guarantees similar to the ones ensured by ex ante regulation) (paper on co-investment), and
- The effective narrowing of existing NRA powers to impose symmetric regulation under Article 59 (paper on symmetric regulation), which could prevent NRAs from intervening effectively to avoid localised service bottlenecks, or in some cases inefficient network element duplication.

Despite explicitly recognising the importance of the integrity of the SMP framework in public statements and in its explanatory memorandum to the draft Code, the Commission contradicts this principle in the draft Code by proposing deregulation outside of the market analysis process. The draft ITRE report seems to follow the same line, and to want to create a separate framework for the regulation of "very high-capacity networks" as an exception to the SMP framework. BEREC disagrees with this approach, which undermines the principle of technology neutrality and introduces substantial regulatory uncertainty by anchoring legal provisions to a vague and aspirational definition of "VHC" networks.

***While the overarching goal of the Framework remains to gradually rein back ex ante regulation as competition becomes established across national markets<sup>2</sup>, in practice these proposals risk setting the clock back by reinforcing market power and making it more difficult for NRAs to tackle it, and extending the lifetime of ex ante regulation rather than hastening its removal. In any event, there are likely to remain permanent bottlenecks in the market, and technological change will always have the potential to generate new competitive distortions (e.g. the effect of fibre in some Member States on the competitive environment developed under LLU<sup>3</sup>). The proposed forced stepping back from regulation would pose a risk not only to competition and investment but to end users who could see a reduction in choice and quality, and an increase in prices.***

### **Regulation is not the enemy of investment - but regulatory uncertainty is**

Regulation is not the enemy of investment, and deregulation is not the panacea that will unleash the significant sums of capital needed to meet the Commission's ambitious political targets for a Gigabit society. In fact, just as over-regulation or disproportionate regulation can undermine investment incentives for both incumbents and new entrants, so can the reduction

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<sup>2</sup> The idea was for the 2002 Framework to provide an intermediate phase towards an anticipated future situation where the telecommunications market would be sufficiently mature to allow it to be governed solely by general competition law: see Council's statement of reasons of 20 July 2001, OJ [2001] C337/15.

<sup>3</sup> In France, regulated physical access to FTTH networks has been in place since 2008. While building on the competitive heritage of physical LLU (ongoing geographical extension of physical access, constitution of backhauling networks assets...), it has enabled co-investment in physical access to new networks.

of competitive pressure and targeted pro-competitive regulation undermine the very incentives and opportunities for investment the Commission wishes to promote.

### **Unpredictable market review timetables (paper on market analysis, points 3, 5, 6 and 7)**

Regulatory stability is key to incentivising investment, and the Commission's proposals to extend the period between market reviews from 3 years to 5 years, which BEREC supports, is evidence of the importance it gives to regulatory stability. However, the draft ITRE report (AM 118, 119) pull in the opposite direction, by removing the predictability of market review timetables, allowing regulatory obligations to be amended without a market review, and causing regulatory obligations to automatically lapse at the end of a market review cycle. These proposals would unpick regulatory certainty in ways that would ultimately undermine the stability of the regulatory landscape, acknowledged by industry and regulators as a key pre-requisite for investor confidence.

***Regulatory uncertainty would ultimately hurt competition, and, by extension, investment, undermining the very connectivity objectives to which all three EU Institutions have agreed.***

### **Tying the hands of NRAs is not the answer**

#### **Restrictions on choice of remedies (paper on double lock, and paper on market analysis, point 4)**

The regulatory compact of the Framework is based on the notion that national markets need national regulation, albeit based on a common set of EU-wide regulatory principles. Thus, NRAs follow principles of EU competition law, supplemented by EU-level guidance from the Commission, in carrying out the economic assessments of their national markets. The Framework provides a menu of regulatory remedies, and these are complemented by Commission recommendations and BEREC common positions, aimed at ensuring consistent high-quality regulation across Europe, and addressing unwarranted variations in regulatory responses between national markets.

But despite acknowledging the importance of subsidiarity and of equipping NRAs with the appropriate tools to address the specific circumstances of their national markets, the Commission (in Articles 3(3)(f), and 71(1)) is seeking to restrict NRAs' ability to select appropriate remedies, by proposing to hardwire the principle (which BEREC otherwise supports) of the hierarchy between "physical" access and other access remedies, and by over-prescribing the application of the proportionality test. This over-prescription is also picked up by the draft ITRE report (e.g. in AM 120). Furthermore, the Commission (in Article 33) (supported by the draft ITRE report) is also proposing to subject NRAs' choice of remedies to further scrutiny and, ultimately, to a Commission veto.

***These proposals risk undermining the successful promotion of competition across Europe, which has delivered real benefits to consumers and has been a major driver of new investment.***