BoR PC 05 (12) 10

BEREC report on co-investment and SMP in NGA networks: ECTA response

Co-investment is a relevant and important concept in relation to telecoms networks, because numerous studies for NRAs (including Analysys Mason on behalf of OPTA, BIPT and Comreg) suggest that the last mile of fibre networks constitutes a natural economic bottleneck due to the high costs and scale economies involved.

This means that co-investment may be the only means in which multiple players could be physically present in the access network. In this context, it would be helpful for the BEREC report to clearly describe under which circumstances co-investment may have a positive effect on competition. Equally, we agree that there is a strong risk that certain forms of co-investment may strengthen the market power of the dominant player or foster parallel behaviour and collusion.

In this brief response, we focus on a few of the factors identified in the report which seem to us to be particularly significant in influencing competitive outcomes.

A general remark is that BEREC should more clearly distinguish considerations applying to the approval of co-investment by competition authorities and those applying when regulators determine market definitions and assess SMP in the context of a market in which co-investment is present or proposed.

Type of contract (joint ownership vs IRU vs swap arrangements)

The BEREC report describes a number of examples of what it calls co-investment regimes including joint ownership, IRUs on the basis of symmetric regulation (eg in France) and network swapping arrangements (which could be on the basis of IRUs or access). In its conclusion, the paper seems to favour IRUs over joint ventures as being less supportive of collusive outcomes. This may be true in a generic sense in a normal competitive market. However, it should be borne in mind that the starting point in telecoms is typically a network controlled by a single dominant firm.

Compared with this starting point, **co-ownership/joint ventures (in specific circumstances) is the most likely of the different forms to have a positive effect on competition in the market**. This is because, unlike other forms of co-investment, co-ownership could influence the current monopoly over the local loop by enabling participation in this part of the market by alternative operators or by players outside the telecoms sector. Whether the outcome is positive or not depends on the structure of such arrangements (see below). However, it should be recognised in the BEREC paper that co-ownership is the only scenario in which conceivably a greater degree of competition in the local physical access bottleneck could be achieved than is present today.

Because IRUs rely on access to the network of a given player (most likely the dominant firm in the case of access or a firm which has been given a quasi-monopoly eg in France over the installation of

in-building wiring), the terms of the IRUs are likely to require the intervention of the regulator whether on a symmetric or asymmetric basis. Particular care is needed that IRU terms are not anticompetitive (cf. Swisscom multi-fibre contract clauses challenged by competition authority) and that IRU terms are compatible with realistic market shares and do not exclude existing or potential new players in the market. Unless access points are relatively high in the network (aggregating a relatively large number of customers) and the required market share is very low, it is unlikely in most cases that an IRU regime alone would be sufficient to secure competition in downstream markets. Most likely unbundling on a line by line basis and other forms of access eg bitstream for business providers and in rural areas for residential providers would be needed in addition to ensure effective competition at the retail level.

"Swap" arrangements (whereby regional players trade access between each other in different areas) differ from co-investment in that there is no shared control (whether through IRUs or shareholdings) by operators in the same infrastructure, but rather an agreement to access each other's (potentially closed) infrastructure on given terms. Where practiced by SMP operators such arrangements are unlikely to increase competition and could breach regulatory requirements since they would discriminate in favour of particular firms effectively reinforcing regional monopolies. Indeed, should the SMP operator choose not to roll out in a particular areas where an alternative player has installed fibre, it should be considered whether both players may have dominance in the regions where they operate.

Number of players and entry barriers/third party access

The BEREC paper suggests (section 3.1.3) that three players could be considered sufficient to deem a market competitive under optimal circumstances. Later in that section however, it clarifies that where such players are not active on markets 4 and/or 5 this would tend to reduce their competitive influence. We would strongly agree with this last conclusion on the basis that "lack of entry barriers" is an important condition over and above absolute numbers of players that is important for markets to be considered competitive. We would add that the presence of absence of competitive dynamic needs to be assessed on a case-by-case basis, i.e. there is a need to examine the behaviour of the operators (e.g. the extent to which they are willing to provide, and effectively make available, fit-for-purpose wholesale inputs). Competitive markets also tend to result in reasonably priced wholesale offers being made available in the market – so the existence of effective market 4 and 5 products can also be an indicator of competition.

It would be helpful for the report to clarify and include in its conclusions that the potential for further participation in a co-investment venture by later entrants and third party access conditions (including the presence of participants focused on the wholesale market) are important in assessing the extent to which co-investment arrangements are pro-competitive or lock in a narrow oligopoly.

The conclusion to the report identifies some of the relevant factors which might reinforce the independence of participants to the co-investment vehicle and lower entry barriers. It would be helpful to identify the optimal factors which combined would tend to improve competitive conditions in the market. These should include:

- Sufficient number of participants – preferably at least four, with the potential for further participants to join at any stage
- No financial or operational control or potential for control of the co-investment entity by a single or limited number of players
- Structural separation of the co-investment vehicle with clearly separate operating conditions and incentives
- Same terms available for access to those outside the co-investment vehicle as within – ie the vehicle is considered from a financial perspective as a "standalone" entity.
- Participation of a wholesale only provider within the co-investment vehicle
- Construction of network so as to allow the independent operation of networks by each player. This can be achieved through point to point fibre architectures or similar (large aggregation point) – see below.

From a regulatory perspective when assessing its impact on market 5, it is also important that a co-investment arrangement delivers not only unbundled fibre on a line-by-line basis, but also downstream bitstream products for operators with smaller local scale such as business service providers. If competitive outcomes resulting from the co-investment differ as regards consumer and business-oriented wholesale products in market 5, this could justify a segmentation of the relevant markets accordingly.

Multi-fibre vs single fibre (chapter 3.2.2)

We agree with BEREC's assessment that, whilst multi-fibre has some positive pro-competitive properties, it is not a panacea to securing competitive outcomes. Other mechanisms – especially point to point fibre – can be used to enable joint venture partners to operate independently.

Furthermore, we note that multi-fibre has some less positive properties – in particular it tends towards a structure in which market players would be asked to bear an equal share of costs of the roll-out eg 50:50 for two etc. This split is unlikely to reflect actual market shares and thus could be unattractive or uncompetitive especially for smaller players in the market. For example, we understand that in Switzerland, the incumbent has concluded deals with municipalities/utilities on a 60/40 split despite the fact that the co-investing party currently has no telecoms customers.

A model based on point to point fibre with line by line unbundling could allow more flexibility as regards the financial commitment of firms of different sizes. Furthermore it should be remembered that if a single dominant player rolls out multi-fibre it is unclear why it would be incentivised to offer IRUs to fibres on fair terms and cost-based rates and without applying restrictive conditions. Such provision would probably have to be supervised by the regulator.

Geographic roll-out

Co-investment arrangements may be restricted to particular regions. From a market analysis perspective, this should only be considered relevant when defining the geographic boundary of the market if the nature of the co-investment delivers a significantly different competitive outcome compared with regions where the co-investment arrangement is not present. For example, a swap arrangement between alternative telcos operating in parallel with a dominant firm with extensive coverage is unlikely to influence the geographic boundaries of the market or dominance designation

of the incumbent, unless – in addition to the second infrastructure of the alternative operators, further infrastructures are available and cost-based access is offered on commercially attractive terms to the wider market – beyond those engaging in the swap arrangement.