

**BEREC report on the public consultation
of the Report on Oligopoly analysis
and regulation**

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Executive summary

The BEREC Report on Oligopoly analysis and regulation was discussed and approved for public consultation at the BEREC Board of Regulators meeting in Bergen, Norway, on 4 June 2015. The public consultation ended on 1 August 2015. According to Article 4 of the Decision of the Board of Regulators on the BEREC procedures for public consultations held by BEREC, BEREC shall publish a summary of all contributions received and an explanation as to how the views expressed were taken into account in the final position, taking into account confidentiality requests submitted.

Twenty contributions from the following stakeholders have been received in response to the consultation.

1. Cable Europe
2. Coop Voce
3. Deutsche telecom
4. ECTA
5. ETNO
6. Feasey
7. FTHH Council Europe
8. GSM Association
9. Horstmann, Krämer, Snurr
10. KPN
11. Liberty Global
12. Numericable-SFR
13. Orange
14. Poste Mobile
15. PT Portugal
16. QSC AG
17. VATM
18. Vodafone
19. Telefonica
20. One stakeholder [*confidential*]

I. General Remarks

1.1 Is it justified to assess tight oligopolies?

ECTA is generally supportive of the draft report, and refers to its concerns with fixed oligopolistic/duopolistic market structures. While the finding of single/joint significant market power (SMP) must remain the first threshold to regulate fixed network oligopolies/duopolies, **ECTA** stresses that an option worth exploring is to also allow for regulatory intervention in the absence of a single/joint SMP finding if remaining enduring economic bottlenecks or the market structure are on a forward looking basis likely to significantly impede the development of effective competition and thus evidence enduring market failure. In the same line, **VATM** appreciates **BEREC's** awareness of the strong impact on competition by oligopolies and therefore supports **BEREC's** initiative as well. The assumption that the existence of two NGA networks (duopoly) is enough, is still omnipresent. Therefore, **VATM** believes that it is the right moment to work out an alternative strategy in view of the announced review of the telecoms framework.

In **Poste Mobile's** and **CoopVoce's** view, the Regulatory Framework should be adapted in order to ensure that ex ante regulatory intervention in oligopolies and duopolies is not only made depending on a finding of joint dominance but also triggered by the finding of a market structure which on a forward looking basis is likely to significantly impede the development of effective competition, notably in markets where permanent economic bottlenecks persist. **ECTA**, **CoopVoce** and **Poste Mobile** consider that the application *mutatis mutandis* of the principles underpinning the '*Significant Impediment of Effective Competition*' (SIEC) test to ex ante regulation of such type of market structures should be explored and thoroughly tested in the context of the upcoming Framework Review.

On the other hand, most of the stakeholders put forward a number of concerns with respect to the regulatory approach proposed.

PT Portugal does not believe that there are founded reasons to deviate from the current concept of "effective competition" which is equivalent to the absence of dominance (single or collective) and from the principle that ex-ante regulation is not warranted unless dominance can be determined. **Deutsche Telekom** considers that the draft report does not properly describe the current level of competition in the telecoms sector and does not provide evidence for the need to add a new tool for regulatory intervention.

Liberty Global finds that BEREC largely overestimates the “oligopoly problem” even though BEREC itself acknowledges that an oligopolistic market structure can lead to a competitive outcome. **Liberty Global** explains that the very nature of network industries implies that there can only be a certain number of infrastructures deployed due to the high fixed/variable costs ratio, economies of scale and scarce resources. **Liberty Global** does not endorse either the argument according to which the two market trends set out by BEREC (i.e. increased consolidation through M&A and technological convergence going on in the European electronic communications markets) may lead to more concentrated markets with an anti-competitive outcome.

Numericable-SFR also refers to the highly specific features of the electronic communications markets to state that oligopoly situations may occur naturally without such market structure presenting any competition problem. **Numericable-SFR** concludes that the existing framework for ex ante regulation should not be modified to address potential new problems such as tight oligopolies.

Telefónica considers that the concept of effective competition is not a well-defined state rather it describes a market that both lacks an SMP player, but which is also not perfectly competitive. It is not beauty or the beast, but it is hard to really define what it looks like. BEREC looks to the SIEC test in merger cases to support its proposition that assessing the effectiveness of competition is tractable. However, in a merger clearance process, the competition authority is being asked to determine whether one market structure (taking prices and investments into account) is no worse than the counterfactual market structure before the merger. It is a comparative test. In the context of a specific merger, a competition authority may be able to determine an appropriate balance between changes in the competitive landscape and improvement in investment conditions. For **Telefónica** in this regard BEREC’s constant reference to the SIEC test is misleading. Given the absence of a sound empirical basis for measuring the “effectiveness” of competition, Telefónica believes that it is wholly inappropriate to use a subjective test as the basis for opening up ex ante regulation of an entire industry.

BEREC is fully aware that the observed trend towards an increasing emergence of oligopolistic settings within electronic communications sector does not necessarily lead to efficient outcomes in terms of price, quality and product choice. On the other hand, this trend does not ensure, in all circumstances, that the affected markets will be effectively competitive from both theoretical and practical points of view (see sections III and VII).

BEREC would like to stress that many markets (namely the broadband markets) where such trends are observed are subject to ex-ante regulation and therefore drawing conclusions about the future state of competition and the strategies of competition in absence of such regulation

is not as straightforward as some stakeholders claim to be. Assessing whether the level of competition achieved by means of *inter alia* the regulatory remedies in place will be sustained in the absence of regulation is not only key (in line with the Greenfield approach) but also more complex in an oligopolistic setting.

As thoroughly described in the report, at this stage BEREC has identified a possible gap in the current regulatory framework, similar to the one that was found in the context of merger control and that led to significant changes to the dominance test that had traditionally been applied in mergers. The implications (if any) of the said gap from the perspective of telecommunications regulation are further discussed below.

In sum, this report should be seen as a first BEREC contribution to the debate on the revision of the existing legislative framework, that the EC has recently launched¹, and that also enquires about the possible existence of a regulatory gap in the treatment of oligopolistic market structures². BEREC is committed to engage in a constructive dialogue with the EU institutions as well as stakeholders, to ensure that all the different angles to this important issue are fully reflected and duly taken into account.

¹ See in particular EC's public consultation on the evaluation and the review of the regulatory framework for electronic communications networks and services, September 2015, available at <https://ec.europa.eu/eusurvey/runner/TelecomFrameworkReview2015>

² See in particular Question 42: "*Should there be exceptions to the principle that ex ante access regulation can only be imposed in circumstances where regulators can demonstrate SMP, individual or joint?*" and Question 43: "*In the event that the wholesale access market in a given area is deemed no longer subject to SMP, or that access remedies are no longer deemed appropriate in that area, by virtue of ongoing infrastructure-based competition on quality and price between a limited number of operators, would you consider it justified in the interests of market stability and existing levels of competition to maintain for some period wholesale access comparable to that previously enjoyed by access-based operators?*"

1.2 Sufficiency of the actual regulatory framework (plus the horizontal application of competition law) to address tight oligopolies

Vodafone considers that the case for deviating from existing regulatory principles in the context of tight oligopolies has not been made, and that the SMP framework remains relevant as it ensures clear, predictable and consistent rules for *ex ante* regulation.

Deutsche Telekom does not see the need for a specific new approach to impose remedies on SMP operators and hence granting NRAs with more regulatory tools. **ETNO** also warns against calls for an extension of the scope of regulatory intervention to situations characterized by the absence of single/joint SMP. From ETNO's point of view, a specific market structure should not constitute *per se* the trigger for ex-ante regulation. It should only be the result of the work of competitive forces. In the hypothetical case that this outcome raised competitive concerns, these should be addressed by the available general competition law tools, as is the case for any other sector.

Deutsche Telekom believes that the current regulatory framework, combined with general competition law, provides sufficient tools to tackle the situation described by BEREC in its draft report. For **Deutsche Telekom**, the framework for intervention – either through general competition law (in joint dominance cases) or in the context of merger control (through the application of the Airtours criteria and the SIEC test) – is well established.

With respect to tacit collusion, **FTTH Council Europe** states that ex-post regulators are better placed to assess it because ex-ante regulators do not have the appropriate tools to make a full analysis of such behaviour. Competition Authorities have more checks and balances (e.g. a requirement to show consumer harm) than ex-ante regulators and also have greater powers (e.g. the ability to conduct dawn raids and to question witnesses under oath). According to **FTTH Council Europe** such differences may be crucial when dealing with borderline cases.

ETNO claims that BEREC's proposals should incorporate the objective of a progressive removal of ex-ante supervision and a handover to competition law to monitor and address possible competitive concerns, as already foreseen in the current regulatory framework. However, the draft report points to the opposite direction, introducing a new concept as "tight oligopoly" which would pave the way to impose regulation in virtually all situations of current and future telecom markets.

GSMA is concerned that that BEREC's proposal may lead to the adoption by NRAs of regulation of oligopolies *in the telecom sector only*, fragmented along national lines. **GSMA** believes that any proposals to adopt extra controls of oligopolies should be considered across all sectors of the economy and that there should not be a presumption that oligopolistic market

structures require ex-ante regulatory remedies. Ex-ante remedies should only be considered following careful analysis with clear evidence of durable market failure or abuse and, even then, when no other remedies exist.

In the opinion of **KPN** there is no justification to change the current framework. **KPN** considers important to promote an approach in which commercial agreements would take precedence over the current *ex ante* regulation. **Orange** believes that there is a need to i) change the objectives of the framework upgrading investment as a top priority ii) base fixed regulation on a principle of physical infrastructure sharing, when necessary and proportionate to achieve the new framework objectives and iii) restrict market analysis SMP regulation to the cases where physical infrastructure sharing has already been mandated, irreversibly excluding mobile from its scope. **Numericable-SFR** also stresses that there is no need to change the regulatory frameworks and notes the relevance of the remedy consisting of physical infrastructure sharing.

As it can be seen, the majority of stakeholders put into question the reflections contained in the draft Report on the potential limitations of the existing telecommunications framework, when applied to oligopolistic market-settings (where no operator holds individual SMP, but a limited number of operators is active though). Some stakeholders further argue that the current regulatory framework may be restraining innovation and further investment, and that any evaluation of the framework should also take into consideration whether *ex ante* regulation as it now stands is still fit-for-purpose (as the sole application of the horizontal competition rules may by now suffice to ensure a healthy marketplace).

With regard to these observations, as it has been already stressed, the main purpose of BEREC's report on Oligopoly analysis and regulation is to set the stage for an in-depth reflection of the current strengths and weaknesses of the *ex ante* regulatory framework that has been in force since 2003, when applied to oligopolistic market structures. Substantial sections of the draft report have been amended in this regard, to make it clear that at this point in time BEREC identifies a possible regulatory gap and proposes the ways the perceived gap might be addressed.

Nonetheless, in light of the structural features that electronic communications markets exhibit and the risk that tight oligopolies may arise, BEREC believes that the current regulatory framework, as it now stands, as well as competition law, may prove insufficient to address the challenges that tight oligopolies would eventually pose on the electronic communications markets. This is however an issue that requires further reflection from all stakeholders, including public administrations as well as private parties.

In this regard, it is worth noting that a growing number of broadband markets could be considered to be sub-national in scope and thus in absence of ex-ante regulation they might be characterized by the presence of a duopoly where the competitors would not necessarily need to tacitly coordinate their strategies to achieve results that might not differ significantly from those that would shape a market where single or joint SMP operators are found.

In this scenario, as it is the case with markets where *ex ante* regulatory intervention is required, the application of Competition Law might come too late and may not be sufficient (in terms e.g. of the remedies available) to address the competitive failures that may be detected in the new economic settings that are described in the report.

1.3 Effects on regulatory certainty and investments

FTTH Council Europe takes the view that BEREC's proposal as to the regulation of tight oligopolies could amount to a fundamental change in the threshold for regulation and does not believe that this is appropriate.

Deutsche Telekom considers that the approach suggested by BEREC would only lead to more regulatory complexity, uncertainty and potential inefficient overregulation when a simplified and future-proof regulatory regime is needed. It would also carry the risk of further fragmentation of regulatory intervention, a feature that would go against the objective of single market integration.

In **Deutsche Telekom's** opinion the confidence of investors and their ability to invest in modern broadband infrastructures in Europe would be fostered by regulatory restraint, making sure that at least from the regulatory side a reasonable return on capital invested will not be undermined. Investors need to get a reasonable return of investment instead of facing additional regulatory risks, e.g. by being put in a worse position compared to those seeking access. **Deutsche Telekom** supports an upcoming framework that has a strong focus on investment incentives, sustainability and innovation. This can only be achieved through an ambitious deregulatory agenda that provides for fewer and less complex rules and ultimately ensures legal certainty for investors.

For the same reason, **ETNO** calls upon BEREC to consider how to assist better in achieving the objective of creating a truly internal market, namely through simplifying and ultimately lifting unwarranted regulation. Policy-makers must increasingly reflect on how to encourage the significant additional investments that are required for the deployment of Next Generation Access networks (NGA). According to **ETNO**, BEREC focuses on a particularly difficult and discretionary concept of "effective competition" to distinguish between "good" or "bad" oligopolies. This approach would run the risk of increasing the overall regulatory burden of the

sector, even in the absence of real competition issues characterized by the presence of single or joint significant market power in a given market. Moreover, introducing a new and vague trigger for ex-ante regulation would go against the principle of regulatory certainty and would send a negative signal to investors.

KPN fears that the introduction of new oligopolistic concepts in the current *ex ante* regulatory framework would hamper the future development of the electronic communications markets and create uncertainties, which are contradictory to the original aim of *ex ante* regulation: temporary but predictable regulation of SMP-situations still existing after the liberalisation of these markets. In a similar way **GSMA** argues that new oligopoly regulation will lead to uncertainty for investors, national regulators and competition authorities because: i) SMP regulation has clear boundaries: it is about what to do when a party with SMP has been identified; ii) collective SMP requires the finding of joint SMP based on the so-called *Airtours* criteria, iii) yet the proposed oligopoly regulation appears to require a subjective determination of whether a market is functioning in the consumer interest; and iv) oligopoly regulation would only apply to the telecoms industry and not the remaining sectors of the economy.

The section in the draft report dealing with tight oligopolies is, in **Cable Europe's** view, contradictory with the goal of creating regulatory certainty to encourage investment. According to **Cable Europe** BEREC seems to take the approach that further regulation might be necessary to address potential competitive ineffectiveness in oligopolistic situations that are not covered by the current SMP principles. **Cable Europe** believes that BEREC's proposed approach could be sending the wrong message to investors.

GSMA believes that the forthcoming review of the electronic communications regulatory framework should focus on modernising and wherever possible reducing regulation in the mobile sector taking full account of new sources of disruptive competition that are emerging from non-traditional sources. A major concern of the GSMA is that BEREC seems to see the need for regulatory action on oligopolies as a consequence of consolidation, raising the spectrum of multiple reviews and disparate national outcomes following mergers already examined by a competition authority with a general remit over the economy as a whole.

BEREC does not share the view that providing NRAs with more regulatory tools would necessarily lead to unjustified regulation (i.e. type I errors). That would critically depend upon the quality and robustness of such regulatory tools, as well as the existence of sufficient means and balances to ensure that no abuse is made of the potential new regulatory tools put at the disposal of NRAs.

From BEREC's perspective, ensuring effective competition is the right way to promote further investment. Likewise, setting the terms of the debate in the context of the current review of the legislation ensures the level of transparency and consistency that is required to prevent that any decision might be detrimental to the correct functioning of the electronic communications markets and the promotion of investments in the long run.

1.4 Temporary nature of *ex-ante* regulation

KPN stresses that the current system of *ex ante* regulation is temporary by nature (until no single or joint SMP longer exists) and that there is no need and no legal basis to change the standard of proof. **KPN** believes that the concept of tight oligopolies in itself can be no criterion to justify any *ex ante* regulatory intervention. **KPN** considers that recent developments in the Dutch market support this view.

Deutsche Telekom also raises the issue of the transitory nature of *ex-ante* regulation. From its point of view BEREC's suggested approach is not consistent with the principle according to which sector-specific regulation should be phased out when effective and sustainable competition is in place.

Telefónica has a strong view that the current regulatory framework is no longer fit for purpose and requires a whole review. BEREC's proposal to "stick with what they know" and extend the perimeter of the current regime to include "tight oligopolies", looks like a step in the wrong direction, potentially leading to include in the regulatory scope most Electronic Communications Markets, including currently unregulated markets. In **Telefónica's** opinion, *ex-ante* regulation in the Telecom Sector has already played its role for introducing competition in the market and now it is the time to think on the progressive removal of *ex ante* supervision and the handover to competition law. *Ex-ante* regulation has significant counter effects on investments and innovation which should never be overlooked.

BEREC is not asking for an artificial extension of the powers that the current regulatory framework confers to NRAs. BEREC's objective is to ensure that, if it is proved that this is required to achieve the goals set in Article 8 of the Framework Directive, NRAs are provided with all the necessary tools to meet said objectives.

Bearing this aim in mind, it is worth reflecting on whether a tight oligopoly can be deemed to lead to a situation of effective competition (this being the line that separates out markets that require to be regulated on an *ex-ante* basis from markets where *ex-ante* regulation is no longer necessary) or not. Therefore, BEREC does not put into question the temporary nature of *ex ante* regulation, for as long as the conditions set for removal of *ex ante* regulation (existence of effective competition) are really present.

In this line, the reflections made by several stakeholders on the different triggers for merger control analysis and the application therein of the “significant impediment of effective competition” test (once a structural change takes place as a result of a merger) and ex ante regulation (which looks at prevailing market structures) is a legitimate concern that will have to be factored in the debate that will ensue on this topic. Likewise, as noted by other stakeholders, the potential strengthening of already available regulatory instruments (such as consumer empowerment, or the adoption of legislation or symmetrical regulation that may contribute to reduce barriers to entry and investment) is also an important feature that should also be taken into consideration when reflecting on the possible way forward. Before drawing a final conclusion in this regard, it will in any event be necessary to thoroughly assess to which extent other means (symmetric regulation, end-users’ regulation) might prove sufficient to address the competitive problems that arise from tight oligopolies.

II. Content

III. Context and objectives

3.1 Assessment of market trends: OTTs

ECTA agrees that Markets 3a, 3b and 4 of the 2014 EC Recommendation on Relevant Markets Susceptible to *Ex Ante* Regulation (2014Rec) generally show an increased occurrence of oligopolistic market structures. **ECTA** notes that Market 3a is inevitably a quasi-monopoly or tight oligopoly.

ECTA, **CoopVoce** and **Poste Mobile** believe that OTTs are unlikely to increase competition at the fixed access infrastructure level or to distort a coordinated outcome at the wholesale level due to the fact that OTT providers depend indirectly on the underlying infrastructure provided by telecoms operators. OTTs’ ability to affect single or joint dominance at the infrastructure access level is thus limited. They add that the experience to date has shown that despite technological advances and the development of new services at the retail level, the economics of fixed network deployment still determine that the duplication of the last mile is not economically feasible or sustainable in most areas. A plethora of services can be developed at the services layer, but the fixed network layer, which enables retail service provision, remains largely monopolised or duopolised. This has not changed with the transition to NGA, nor can it be expected to change in the long term.

QSC disagrees with the statement that “OTT services may exert sufficient competitive pressure at the retail level, especially in fixed (NGA) networks”. In QSC opinion, these services usually serve different user needs than Telco services, either in functionality or in reach. Whereas OTTs usually cater to some specific user demand, telecoms services like voice calls or SMS are a ubiquitous instrument with universal accessibility and connectivity.

In **Orange’s** view, BEREC is concerned in its report with the growth of market power in European telecom markets due to the development of a more oligopolistic market structure. This theoretical concern overlooks the reality of revenues and profits decrease in Europe for the past years, a trend which is not forecasted to change in the coming years. At the same time, volumes continue to grow. Such an observation is incompatible with a growth of market power, which implies either growing profits, or decreasing outputs, or both.

KPN believes that the BEREC report is mostly focussing on the telecommunications market as a market in itself, without analysing properly the **internet value chain** and external competitive forces. KPN stresses that not only the **role of OTTs** as competitors in traditional telecommunications markets should be more critically included, but also the dynamic effect that – in two-sided-markets – the role of other players in the internet value chain has for potential dominant positions of traditional telecommunication operators.

With regard to the role of OTTs, **VATM** believes that creating a level playing field – equal opportunity for all – has to be the goal of the new European digital strategy. However, this must not be confused with doing away with essential access control. The current provider structure in the EU, with many regionally companies involved, offers distinct advantages for the economy as a whole and will continue to grow, driven by market forces. Government intervention to the benefit of former monopolists would result in major market distortions without improving their competitiveness, for instance, against OTT groups.

One stakeholder believes that on fixed and mobile electronic communication markets, risks of anticompetitive effects due to market concentrations may come from other players of the ICT sector as a whole, which actually are part of the communications and digital ecosystem. It is also underlined that OTT players are typically characterized by a worldwide presence and today are collecting value to the detriment of traditional telecommunication services, exploiting telecommunication network resources. In this light, European regulators should focus their efforts on catching such OTT-driven market developments and trends, in order to prevent anticompetitive outcomes.

Section 3 of the draft report (“Context and objectives of the report”) is mainly descriptive. In this line, the reference in this section to existing trends such as technological convergence, bundling, increased infrastructure deployment (in particular, NGA deployment) or

consolidation serve to illustrate some of the reasons why in BEREC's view oligopolistic market structures are becoming more prominent.

The reference in the draft report to the impact of OTT providers on access regulation and at the retail level should also be seen from this perspective (description of the prevailing trends in the market). That is, in this report BEREC does not intend to take a stance on the potential need (or not) to address from a regulatory perspective the role of OTTs, or on the specific impact of OTT providers on the process of *ex ante* market analysis. These issues are beyond the scope of the work undertaken by BEREC in the field of oligopoly analysis.

On the role of OTTs at a general level, reference is made to BEREC's draft report on OTT services (BoR (15) 142), which has been recently submitted to public consultation.

On a different note, an additional reference to the links and interdependence between merger review and *ex ante* market analysis has been introduced to duly take into account the comments made in the public consultation by some stakeholders (as noted throughout the draft report) on the relationship between both areas of the law.

IV. Oligopoly theory

Many respondents, such as **ECTA**, **CoopVoce** and **Poste Mobile** agree with the economic theory and conceptualisation put forward by BEREC in Chapter 4.

Telefónica explains that the existence of oligopolies is not in dispute; in many industries and markets they function effectively, giving good consumer outcomes and attracting investment. It is difficult to understand why, uniquely, the telecommunications sector requires a novel *ex ante* regime to manage what in any other sector would be viewed as competitive markets and could potentially be addressed by *ex-post* competition law in many countries.

Telefónica suggests that NRAs would need to place values on prices, output, quality and innovation when assessing whether a market is effectively competitive and that such a multidimensional problem would be difficult to resolve.

Orange highlights BEREC's view that any analysis of the need for regulatory intervention should take into account not only static efficiency but also dynamic efficiency. Orange believes that it should be added that in the Communication of the European Commission about the Digital Single market, the need for creating the right conditions leading to universal high-speed coverage, has been emphasized.

BEREC's report on oligopolies does not state that oligopolies cannot function effectively. Having said that there may be circumstances in which oligopolies might lead to an outcome that is clearly detrimental to consumers and overall welfare, that cannot be addressed under the current regulatory framework, even after taking into account considerations about dynamic efficiency. Some markets of the telecommunications industry are very specific in the sense that they are natural oligopolies, in which market entry is not possible for new competitors. On the other hand, in BEREC's view, functioning competitive markets should not be addressed by regulatory intervention. Even in light of inefficient market outcomes, this report is not meant to answer if or how such tight oligopolies should be regulated. Instead, the goal is to stir a further discussion about these issues.

V. Relevant precedents on oligopoly analysis and regulation

5.1 General comments

ECTA, CoopVoce and Poste Mobile welcome the comprehensive analysis of relevant precedents on oligopoly analysis and regulation described in Chapter 5.

GSMA considers that the framework for intervention both as a matter of competition law (in joint dominance cases) and indeed in the context of merger control (applying the *Airtours* criteria) is quite well established and GSMA broadly agrees with the framework set out in the BEREC Report.

BEREC notes the overall positive sentiment that emerges on the report's overview of the European regulatory framework for the assessment of SMP, which establishes the parameters upon which NRAs define and assess electronic communications markets, with the aim of identifying market dominance on a forward-looking basis. BEREC also supports the view, shared by several stakeholders, that the judgements of the General Court and Court of Justice with respect to the finding of joint dominance should remain a reference point to NRAs. BEREC considers that a strong focus on these judgements is more than justified given the relevance and applicability of the *Airtours* Criteria and the conclusions from the *Impala* judgement when assessing joint dominance. Nevertheless, BEREC is also of the view that a more comprehensive picture of the state of competition may require additional considerations to those arising from general case law, such as might be the case where markets exhibit tight oligopolistic conditions. These considerations are described in more detail throughout the BEREC Report on Oligopoly analysis and regulation.

5.2 Likelihood of finding joint dominance in electronic communications market

GSMA notes that existing precedent would not appear to support a finding of “coordinated oligopoly” in the mobile industry. As BEREC states in several paragraphs, one of the necessary conditions for coordination is transparency in the market, such that a focal point can be identified, and that it should be relatively simple to monitor adherence. Given that BEREC also notes that collusion is often price based, it is important to bear in mind that the mobile industry has a very large range of retail tariffs and menus of non-linear tariffs for both individual and business customers. Furthermore, many customers will often have tailored tariffs and/or special offers.

In **GSMA**'s opinion this is consistent with NRA's findings, for example, in the UK Ofcom found in the 2015 Mobile Call Termination review, that there is a high degree of retail price discrimination in the mobile market. It is therefore not clear that prices are sufficiently transparent for operators to use as a focal point for collusion.

Cable Europe underlines that recent merger decisions confirmed that tacit collusion is not a concept that plays a key role in electronic communication markets. In none of the recent telecom and cable mergers by the Commission, did the Commission make a positive conclusion that the transaction would lead to coordinated effects.

Orange reminds that tacit collusion is very unlikely to be observed in the telecom markets. On mobile, because there are no less than three MNOs in nearly all European countries and that tacit collusion is nearly hardly impossible to maintain with three or more players, first of all because above two players there is no certainty about who deviates which makes retaliation scenario inefficient. In this respect existing regulatory precedent of regulation under joint dominance do not appear particularly convincing. On fixed, because even if competition is limited to one telco and one cable network, the technical and economical characteristics of the respective infrastructures are very different and do not exhibit the level of symmetry required for tacit collusion.

Vodafone notes that the infrastructure based competition has been more constrained in fixed markets as compared to mobile markets. This is largely due to the underlying network economics, in particular the irreplicability of the last mile and the related perseverance of monopolistic market structures. The presence of sunk costs, market power and the possibility of strategic behaviour on the part of incumbents implies that such market structures are not necessarily contestable in the absence of regulation. On this basis the current SMP framework identified market failure and introduced access regulation which has effectively unlocked competitive potential in retail markets.

Regarding the lack of tacit collusion and coordinated behaviour in telecoms, BEREC takes note of the reference made by stakeholders to the mobile market, whereby they argued that this market may have lack of transparency, given the availability of a wide array of retail tariffs for end-users (individuals and businesses) and / or the presence of a relatively high number of market players. Stakeholders also mentioned that, in the case of fixed markets, the presence of technologically and economically different network infrastructures generate asymmetries that make it difficult for operators to coordinate their market behaviour. However, BEREC underlines that the issues concerning tacit collusion / coordinated behaviour remain very relevant to telecoms, thereby necessitating further guidance as to how NRAs are to deal with potential market shortcomings in this respect. BEREC is of the opinion that the way the relevant cases were presented in its Report on Oligopoly analysis and regulation may very well serve as a reference guide to NRAs when dealing with joint dominance cases, although more work may be necessary in this regard.

VI. Issues arising in assessing joint dominance

6.1 General comments

QSC supports BEREC's description of the criteria of finding joint dominance and its proposal to revise the relevant chapters of the regulatory framework to help NRAs assessing these cases

ECTA, CoopVoce and **Poste Mobile** agree with BEREC's guidance and suggested framework for assessing joint dominance.

The **FTTH Council Europe** believes ex-post regulators are better placed to consider issues of tacit collusion and that ex-ante regulators do not have the appropriate tools to make a full analysis of such behaviour.

6.2 Joint dominance analysis

The **FTTH Council Europe** does not believe that telecom markets exhibit the kind of transparency that would facilitate tacit collusive co-ordination. Moreover, telecom markets are usually not symmetric enough to facilitate joint dominance. In addition, the methods to enforce discipline are generally not obvious in telecom markets.

GSMA disagrees on BEREC's statement that "*in oligopolistic markets as well as in a monopoly, prices are typically above marginal costs, foremost, because firms are able to exert*

a degree of market power". **GSMA** underlines that such a characterisation, correct in general economic theory, does not hold true in the telecommunications market.

BEREC notes that the analysis of whether a market can facilitate collusion or not should be made on a case-by-case basis.

Liberty Global believes that the existing ex-ante sector-specific regulation for electronic communications equips NRAs with sufficient powers to intervene in the case of joint dominance. The criteria in the Framework Directive, supported by the Airtours/Impala case law, give NRAs appropriate tools to make a robust, holistic economic assessment with a required standard of proof in order for ex ante intervention to be justified. In this respect, **Liberty Global** agrees with BEREC's initiative to assist NRAs in their economic argumentation for a finding of joint dominance, as well as BEREC's interpretation of how such an argumentation should be presented. BEREC is correct to highlight the importance of finding a coherent collusive mechanism in the market before concluding that joint dominance is present. **Liberty Global** agrees with BEREC that a "checklist" approach of market criteria should be avoided but would like to stress that an analysis of joint dominance should always start by analysing the retail market.

Vodafone fully supports BEREC's recommendations in relation to joint dominance. Here the theoretical underpinnings are clear and empirical evidence supports an update of Annex II of the Framework Directive, which will align current criteria with relevant case law. The Airtours case criteria establish a meaningful basis for assessing joint dominance on an ex ante basis.

In **Feasey's** opinion, BEREC fails to engage with (what in his view is) the core question in joint SMP analysis: 'Does a finding of SMP in the wholesale market require a finding of SMP in the retail market?' In his opinion, the Commission got it wrong in 2006 and BEREC should debate properly whether a finding of joint SMP is required in the retail market to find joint SMP in the wholesale market, whether it is coherent to find joint SMP in a retail market but single SMP upstream (as the ACM recently proposed to do), and how NRAs will harmonise their approach to oligopoly if this is the line they wish to pursue (which **Feasey** strongly advises against).

Feasey further wonders whether, with joint SMP, there is a credible retaliation mechanism against firms who deviate by signing access agreements and questions how NRAs should deal with voluntary access undertakings, such as that recently offered by KPN.

BEREC notes that the current practice is that NRAs need to find consumer harm at the retail level before conducting a wholesale SMP analysis (as follows from the Commission's Explanatory note accompanying the Recommendation on relevant markets). Telecommunications' wholesale products typically represent an input to serve several retail

markets. Therefore, it can be the case that competitive dynamics on the various retail markets are different (e.g. competitive conditions on business markets tend to differ from competitive conditions on consumer markets, other players are active etc.). In this view, BEREC does not think that joint SMP on all retail markets is a prerequisite for a finding of joint SMP at the wholesale level. Likewise, a finding of joint SMP on one (or only several) retail markets does not automatically imply joint SMP on a wholesale market. A thorough analysis of each market on its own is necessary in order to conclude on the presence of joint or single SMP.

A relevant question in answering the question of Feasey in how to deal with voluntary access agreements is under which conditions this voluntary access was established. E.g. was the voluntary access established under the pressure of the NRA? Was it established because the party in question feared regulation? Alternatively, was it an access agreement that would have been offered in the absence of regulation too (with the same conditions)? Therefore, the credibility of the retaliatory mechanism has to be assessed on a case-by-case basis taking into account the specific incentives which lead to a certain reaction of the operators.

6.3 Standard of proof

With regard to the standard of proof, **ECTA**, **CoopVoce** and **Poste Mobile** agree that conceptually the same standard of proof should apply to markets with existing (single SMP) regulation in place and those without existing regulation. The prevention of a regulatory gap should primarily be tackled through the consideration of an additional threshold for regulatory intervention in case of fixed tight oligopolies rather than through the definition of different standards of proof for joint dominance.

As regards to joint dominance **ETNO** considers that the draft report ultimately does not suggest departing from the standard of proof and list of criteria mandated by the current framework. However, in some parts, the document seems to suggest that the required standard of proof represents an obstacle to regulatory intervention. In **ETNO's** opinion, the current standard of proof has proven adequate for developments in competitive markets and should not be questioned. In this respect, the proposal that the proof of joint dominance should be exempted from the provision of adequate empirical data appears inappropriate and not in line with the need for a fact-based application of the rules.

KPN believes that there is no need or reason to change the standard of proof beyond or below the general threshold in cases of presumed oligopolies. **KPN** agrees with the conclusion of BEREC that the standard of proof for joint SMP should not be different for regulated and unregulated markets. This standard should not be lowered to a (only or mainly) hypothetical analysis, but should continue to be a factual analysis. If this level of proof is found to be

complicated by NRAs, the conclusion must be that no justification for additional regulations exists instead of imposing *ex ante* regulation without fulfilling the SMP criterion. The notion of complexity raises the probability of false positives in *ex ante* regulation.

Cable Europe believes that any relaxation of the standard of proof to establish collective dominance beyond the standard of competition law would be misguided. The only relevant approach to correctly assess collective dominance has to follow the strict criteria of the *Airtours and Impala* judgments. These criteria suggest according to Cable Europe that tacit collusion is unlikely to arise in telecommunication markets, which are characterised by innovation and asymmetry, and in which no economically sound mechanism through which collusion could be achieved and sustained has been identified by competition authorities. Still, the merger review process does consider the scope for tacit collusion and ensures that telecom mergers do not lead to tacit collusion; since competition law already covers the concept of tacit collusion, *ex ante* regulation aimed at preventing tacit collusion does not appear needed.

PT Portugal underlines that the most important aspect to consider is that the required burden of proof cannot be relaxed, in order to avoid unwarranted regulation. In this respect, PT Portugal does not agree with BEREC's view that in markets with existing single SMP based regulation in place a joint dominance case should rely more on a hypothetical rather than a factual analysis. **PT Portugal** stresses that the standard of proof for joint dominance must remain high given the low probability of its existence and the likely occurrence of type I errors. It is not enough to identify the market conditions that potentially favour the emergence of a collective dominant position by checking a set of criteria. On the contrary, it is necessary to demonstrate rigorously that the observed market equilibrium is collusive instead of competitive.

Orange believes that the BEREC conclusion that, when the outcome of a market analysis is to move from single SMP regulation to joint dominance, providing empirical evidence might not be possible is questionable. In **Orange's** point of view even though a situation under SMP regulation may not directly allow the observation of tacit collusion, the mechanisms which are supposed to lead to joint dominance after the deregulation of the SMP operator should already be present in the market and as such can be empirically evaluated. **Orange** considers that a demanding standard of proof reflects the unlikelihood of joint dominance and should not be questioned, neither lowered, for instance by using theoretical instead of empirical evidence. If an NRA cannot provide the required standard of proof, it means that there is no joint dominance.

Numericable-SFR agrees with BEREC's position that the standard of proof in order to demonstrate a joint dominance must be the same i) in the case of a market previously

regulated and ii) in case of markets which were never regulated. However, BEREC is making a semantic shift when considering that the type of proof could be different in both cases. According to BEREC, NRAs should rely more on forecasts and economic reasoning than on real facts in the case of previously regulated markets. **Numericable-SFR** disagree with such position: demonstration of a joint dominance must be based only on factual evidence so as to ensure a prospective analysis without speculating on the most probable market situation in the absence of regulation (greenfield approach) and avoid type I errors (per se ban of pro-competition practices).

Numericable-SFR opposes that the fact that few precedents exist regarding ex ante regulatory obligations imposed to known joint dominance does not mean that the test of the three criteria of the Airtour's case is not adapted but means that the concrete implementation of the three criteria led to the conclusion of the absence of joint dominance.

BEREC notes that it was not its intention to exempt empirical evidence in proving joint dominance in regulated markets. BEREC will clarify this as follows: as long as empirical data that is relevant to joint dominance is available, NRAs should include this in their argumentation. Given that in markets where there is single SMP regulation in place the joint dominance analysis will be more hypothetical in nature and hence empirical evidence on some of the elements that may be helpful in establishing joint dominance may be absent, NRAs can also rely on economic theory to prove (elements of) joint dominance.

VII. Tight oligopolies

ECTA, CoopVoce and **Poste Mobile** welcome the comprehensive analysis of the assessment of the 'regulatory gap' in the treatment of 'tight oligopolies' in Chapter 7.

The following two-step test could be explored:

1. The finding of SMP would remain the first and foremost threshold to justify regulatory intervention;
2. In those cases where serious concerns remain regarding a fixed oligopoly/duopoly, NRAs would run a second test to assess whether remaining economic bottlenecks or the market structure, on a forward looking basis, are likely to significantly impede the development of effective competition (e.g. due to the lack of competitive constraints and pressure on the

few/two market players) and thus evidence enduring market failure, and if so, warrant regulatory intervention.

According to **QSC**, beyond the concept of dominance authorities should have the possibility to intervene if a merger outcome or NGA deployment have negative effects on competition and consumers welfare. **QSC** proposes to assess tight oligopolies an analogue application of the SIEC-test and indicates that the toolkit for NSA/NRAs has to be specified in coming months. It should contain the necessary criteria for analysis as well as information concerning the standard of proof, the Greenfield evaluation and a list of adequate remedies. This guideline has to be part of the regulatory framework. In general, **QSC** supports BERECs plan to engage in a constructive dialogue with all stakeholders to find the best approach for dealing with these challenges.

7.1 Type I errors

The **FTTH Council Europe** agrees with BEREC that further work and research is needed with respect to tight oligopolies, but opposes any attempt to lower the threshold for market intervention below the current SMP requirement. The **FTTH Council's Europe** sees a risk of creating a massive number of type I errors, which would be more costly to society than type II errors, and raises a fundamental concern about the nature of regulatory oversight in the sector and its impact on certainty and investment. **Liberty Global** has serious doubts that the notion of tight oligopolies does not serve as a “regulatory joker” to be applied by NRAs when a joint dominant assessment is unsuccessful. From **PT Portugal's** point of view, the new concept raises concerns also regarding its practical implementation: competitive, “tight” and collusive oligopolies would be hard to distinguish, even in conceptual terms. **PT Portugal** sees the risk that ex ante intervention based on of tight oligopoly would increase the likelihood of Type I errors.

BEREC stresses in its draft report at numerous occasions that lowering the threshold for market regulation is not at the heart of its concerns. Therefore BEREC is at no time looking for lowering any threshold. Nevertheless, BEREC aims at highlighting that, as it is currently usually interpreted, the SMP requirement as the only criterion that indicates underperformance by a market may not be future-proof.

Moreover, BEREC does not seek to circumvent regulatory difficulties by extending regulation to any oligopoly. The report stresses continuously that oligopolies may perform in different manners with different market outcomes. Only where an oligopoly leads to an inefficient market outcome, regulatory intervention might be desirable.

Regarding the concern that BEREC may be asking for a regulatory joker, it repeatedly stresses in its draft report that this is not the case. BEREC notes that the NRA should assess the level of competition in a specific oligopolistic market against the three alternative oligopolistic scenarios as set out in section 4.2 on an equal footing and without following any step by step analysis as some stakeholders propose (by firstly determining whether there is joint dominance or effective competition and secondly whether there is a tight oligopoly). Therefore, where joint dominance could not be established because the NRA could not fulfil the required the standard of proof a fall back to the notion of tight oligopoly would be unjustified and undue.

7.2 Ambiguity concerning the concept of tight oligopoly

Vodafone believes that BEREC fails to define ‘tight oligopolies’ in an unambiguous way. The varied nature of oligopolistic markets would make it very difficult to determine which market outcomes can be deemed sufficiently competitive and which outcomes are deemed insufficiently competitive. **Vodafone** states that there is no theoretical toolkit to set a threshold at which oligopolies cease to deliver effective competition. Accordingly, an ill-defined lowered threshold would risk divergent approaches across member states and arbitrary ex ante regulation. In **Vodafone's** view, this runs counter to the Digital Single Market strategy which calls for a more concerted and consistent approach across the EU.

BEREC is well aware of the fact that at this point in time more analysis is needed to find definite thresholds in order to identify non-effective outcomes. Yet BEREC is convinced that plausible, workable and resilient approaches and toolkits can be elaborated. Therefore the risk of an arbitrary ex-ante regulation is considered as highly unlikely. BEREC has pointed out in its report that dealing with tight oligopolies does not mean lowering any threshold for regulatory intervention; rather BEREC seeks to ensure that competition is effectively fostered where emerging market structures do not lead to effective competition even though market participants do not exert SMP. Thus, the implication that if no SMP operator is identified effective competition is implied may not cover all competition problems.

Finally BEREC cannot agree that taking tight oligopolies into account when considering regulatory analysis and measures runs counter to efforts made to implement an ever-consistent approach across the EU. The fact that BEREC has picked up timely the present topic, points exactly in the opposite direction. It is one of the most prominent tasks of BEREC to develop consistent approaches across the EU. While the conclusions drawn may differ due to national circumstances the approach applied to a specific aspect is to be the same (as for example the Common Position on Geographical Segmentation). By setting up e.g. common positions, BEREC has the necessary tools to ensure a common approach across member states.

KPN believes that the concept of tight oligopolies in itself can be no criterion to base any *ex ante* regulatory intervention upon. In the opinion of **KPN** there are no ways to define precisely enough a new regulatory trigger for *ex ante* regulation because there are no easy criterion to define when tariffs are to be considered “market failure” and when not. **ETNO** states that BEREC should carefully consider how difficult it would be in practice to make such an assessment. According to **ETNO**, the concept of “tight oligopoly” rests on loose and discretionary criteria, with regard to terms as “sub-competitive outcome”, “non-effective market outcome”, “profits above competitive levels”, which involve a very high degree of discretion. The draft report expresses concerns for a possible growth in market power in European telecom markets as a result of trends towards more oligopolistic market structures. According to **ETNO** this theoretical concern does not take into account the fall in revenues and profits occurred in the European telecom sector over the past years, despite continuous growth of traffic volumes. Such trends would be incompatible with a growth in market power, which implies either growing profits, or decreasing outputs, or both. **PT Portugal** believes that some of the factors BEREC associates with “tight oligopolies” are neither observable in the telecommunications sector nor can be addressed using the existing tools in the framework (e.g. high switching costs can and are already addressed by consumer protection legislation). **GSMA** believes that merger control is neither the appropriate benchmark to take into consideration nor a justification for further regulation of tight oligopolies and there is not sufficient clarity about what factors would lead to a finding of a tight oligopoly.

BEREC agrees that at this point in time the concept of tight oligopolies might involve some degree of discretion. This is why BEREC advocates more thorough analysis on this topic. Nevertheless BEREC currently is not of the opinion that there are no ways to define precisely enough triggers for *ex-ante* regulation.

BEREC does not find itself in a position to comment on whether or not revenues and profits fell indeed throughout the last years. While traffic volumes undoubtedly grew in the past, the fall of profits is not so clear. Moreover, BEREC is not in the position to make any general assumptions on whether there exists a correlation between market concentration/consolidation and the level of profit and/or output. Nevertheless, even though clear conclusions cannot be drawn, looking at the US-market one could assume that market consolidation creating oligopolies may lead to higher prices and higher profit. Obviously further research and analysis is needed.

ETNO considers that the criteria listed by BEREC are a subset of SMP criteria and plus do not include the most important criterion which is market share. For **ETNO** it is therefore not justified to use these secondary criteria to demonstrate the existence of a market failure in an oligopolistic market. Additionally, BEREC's approach would also leave a lot of uncertainty about how these criteria would be applied, as it does not propose a consistent application procedure, thereby further increasing regulatory uncertainty.

Feasey states that there is no sound basis to distinguish between a 'tight oligopoly' and a competitive market equilibrium, or to suppose that 'loose oligopolies' are sustainable in telecoms. According to **Feasey**, any threshold for intervention in 'tight oligopolies' will be subjective, arbitrary and therefore undermine a key feature of the current SMP regime and its foundations in European competition law. Furthermore, **Feasey** thinks that BEREC needs to explain how firms or NRAs would ever escape perpetual regulation if its proposals were accepted.

BEREC agrees that high market shares are an important (but not the only) factor when evaluating the existence of market power. Notwithstanding the specific characteristic of a tight oligopoly is that despite not being able to identify a single or joint dominant position, there still remain inefficient market results. Therefore, in BEREC's opinion, the criteria listed reflect a situation where firms are able to exert a certain degree market power without necessarily having market shares suggestive of single firm dominance. BEREC stresses that it remains open for further discussion whether and how to apply these criteria.

BEREC is aware of the difficulties arising when distinguishing between a competitive and a non-competitive market outcome that could result not only from collusive oligopolies but also from tight oligopolies as set out in sections 4.2 and 7 of the report. Nevertheless, BEREC sees the need to provide a greater understanding of tight oligopolies and to start a discussion about possible methods and instruments to prevent consumer harm.

GSMA considers that the main factors named in the BEREC report that could lead to "ineffective" oligopolistic competition in the absence of (tacit) collusion do not provide enough clarity to either regulators or operators. In **GSMA's** opinion, BEREC seems to single out two factors: capacity constraints and high entry barriers, and quotes spectrum availability in mobile as an example for both.

GSMA is concerned that the mobile sector could be made a prime candidate for extra regulation of tight oligopolies, at a time when the mobile market would be subject to fundamental changes and fierce competition. **GSMA** doesn't agree with this example and is concerned that BEREC may be basing its views on incorrect or outdated factual assumptions.

According to **Feasey**, there is no evidence that tight oligopolies will develop in mobile absent mergers,³ nor are there capacity constraints in fixed markets that would mean BEREC's tight oligopoly theory applies there.

BEREC believes that the presented examples explain sufficiently why tight oligopolies might be or might become a problem in the telecommunication sector, e.g. with regard to the NGA-deployment, converging market shares and mergers. BEREC acknowledges that oligopolistic market structures may result in effective competition, but has concerns about the competitive effects of oligopolies where this might not be the case. BEREC does by no means suggest in this report that tight oligopolies may only arise in the mobile market.

Orange further notes that the "tight oligopoly" concept introduced by BEREC is not defined in the economic literature. Consequently identifying a tight oligopoly would be discretionary. As there is no robust theory of efficient regulatory intervention in a "tight oligopoly", the outcome of such intervention would be unpredictable, with no guarantee or even presumption that it would do more good than harm or lead to a viable organisation of the market. **Orange** states, the SIEC test is not an absolute test of competition intensity but a relative test and does not justify imposing ex ante regulation based on "tight oligopoly" finding.

The report explains why the current market developments create the need for taking into account the possibility of anticompetitive effects linked to an oligopolistic market structure. The fact that the concept of tight oligopolies is being discussed and widely acknowledged in economic theory and that it is addressed in merger law justifies a discussion about how to deal with this market structure from a regulatory perspective. As BEREC states in the report, a transposition of the SIEC-Test to the ex ante regulatory framework might be challenging and remains subject of an in-depth analysis of the criteria and evidence to be used in the ex ante regulatory framework.

However, the SIEC-Test supports BEREC's objective to overcome the lack of explicit tools in the current regulatory framework about tight oligopolies and might serve as a starting point when seeking to define an instrument to address tight oligopolies in ex ante regulation.

7.3 Dynamic competition

³ Feasey adds (page 4): *"The Report does not attempt to show that demand is stabilising or that mobile operators are becoming capacity constrained, which are the key conditions for BEREC's tight oligopoly theory to apply. I deal with the issue of capacity later, but I think it is hard to describe demand for mobile data services as being stable when traffic is growing by 60% a year, much of the population has yet to own a smartphone and 4G remains the preserve of a minority of users."*

In **Telefónica**'s opinion it is not feasible that tight oligopolies, as described by BEREC, are present or will emerge in the telecommunication sector, because the dynamic competition in which the market is evolving, characterized by a constant and progressive technical and commercial innovation, would not allow it. In particular, for **Telefónica** the telecommunication sector does not exhibit the characteristics of a tight oligopoly described by BEREC in chapter 7.

ETNO sees in the report no indication whatsoever on the need to take into account dynamic efficiencies in the analysis. Only at the end of section 7.1.1, BEREC would engage in a reflection about prices and profits above competitive levels, but with no clear conclusion of when a price or a profit level can be considered "effectively competitive".

BEREC understands that further analysis must be undertaken with regard to the underperformance of certain oligopolistic market structures in order to further clarify under which circumstances such market structures yield inefficient market outcomes.

The approach by BEREC to point the potential regulatory and economic problems that may arise does not go against the transitory nature of ex-ante regulation, according to which sector-specific regulation should be lifted when effective and sustainable competition is in place. The concept of oligopolies as defined in the report does not prompt immediate regulatory intervention. Instead, intervention would be feasible only where and when oligopolies do not lead to effective and sustainable competition.

7.4 Profitability level

According to **Deutsche Telekom**, profits suggested to be the result of "tight oligopolies" or "tacit collusion" are, in many cases, only the result of economies of scale and scope needed to attain a high level of operational efficiency and invest in innovation, business cycle effects, or risk premiums for investments with sunk costs. In all these cases regulatory intervention would clearly have counterproductive effects. Therefore, in **Deutsche Telekom's** opinion the question that BEREC should be assessing is if, despite an oligopolistic market structure, there is still vital competition or not. In the view of **Cable Europe** BEREC's draft report ignores the operator's dynamic incentives to invest: some degree of ex-post market power might be necessary for investment to take place in the first place.

While BEREC understands the concerns expressed by Deutsche Telekom and Cable Europe, it is to be stressed that the report repeatedly focuses on the aspect of investment and the effects that go along with it. BEREC is well aware that a very sound balance is needed to encourage market participants to invest on the one hand and to initiate and foster competition

on the other hand. In line with this, BEREC has made clear in its report that effective oligopolistic competition delivers good consumer outcome including benefits from increased innovation and investment incentives can outweigh higher prices in the short-run.

7.5 Effect based approach vs. structure-based approach

Cable Europe believes that any competitive analysis should be based on a market behaviour approach (tacit collusion, competitive oligopolistic outcome) rather than a market structure approach, as it is the case for tight oligopolies. **Cable Europe** therefore states that regulatory intervention in the absence of collusion raises the question of the threshold for intervention and risks sacrificing dynamic efficiencies for the benefit of short-term static efficiencies.

Liberty Global highlights that endorsing (even considering) ex ante regulation for tight oligopolies is an onerous burden imposed on market participants, due to variables that are determined by the nature of the industry (network industry, high fixed costs/low variable costs) and not attributed to their behaviour. **Liberty Global** also believes that tight oligopolies are not captured under competition law since this market structure is not related to the behaviour of firms.

BEREC states several times that dynamic efficiencies have to be taken into account when analysing the efficiency of a market. The threshold for intervention in an oligopoly should be the result of a careful analysis of the competitive effects on the respective market. BEREC highlights that despite the absence of a (tacitly) collusive behaviour of the market participants, non-effective competition may exist. In such a situation, regulatory intervention might be necessary to prevent market distortion.

As BEREC states in the report, with regard to the possible rise of tight oligopolies it may be necessary to address this market structure ex ante to avoid the development of inefficient market outcomes where such a risk has been recognized. The application of competition law might not be able to address adequately the market failure, because timing may become crucial to prevent inefficient market outcomes.

VIII. Remedies in the context of oligopolies

In general, stakeholders agree with BEREC's assessment, namely that a case-by-case and proportionate analysis is needed when imposing remedies on harmful oligopolistic and duopolistic markets. **ECTA**, **CoopVoce** and **Poste Mobile** highlighted this.

Furthermore, imposing remedies in tight oligopolistic markets with regard to the nature of the problem identified and in the light of the objectives laid down in Article 8 of Directive 2002/21/EC (Framework Directive)⁴ was also stressed by **ECTA**. In this respect, and according to **KPN**, remedies should be picked by NRAs without hindering innovation and investments. In particular, when it comes to access policy, regulatory obligations should not prevent undertakings to upgrade their networks.

About joint dominance, BEREC introduces the idea to impose differentiated remedies on undertakings having joint SMP. While it was welcomed by **ECTA**, it was not in the opinion of **Richard Feasey** and **Deutsche Telekom**. Indeed, **ECTA** considers imposing differentiated remedies would allow intervening at different points in the value chain when NRAs would have to impose remedies on two undertakings with different technologies, such as imposing access obligations on telco and cable companies. In contrast, **Richard Feasey** stressed the point that imposing differentiated remedies could lead to impose on at least one of the joint-SMP operators' stricter remedy and so brings up the point on which basis or objective factors it should be done. For Deutsche Telekom, it will lead to regulatory discrimination between undertakings.

BEREC agrees that applying differentiated remedies may lead to a situation where one of the joint SMP operators would have stricter remedies than the others. NRAs must therefore consider with caution whether imposing different remedies on joint SMP operators is appropriate. However it can be argued that under certain circumstances (e.g. technological or other differences) it might be more proportionate and effective to impose different remedies.

As regard to tight oligopolies, some stakeholders – like **Vodafone**, **Telefonica** – call for BEREC to focus on regulatory remedies on the lasting actual bottlenecks. However, **Cable Europe** raises an objection. Indeed, in **Cable Europe** opinion, imposing access obligation would be inconsistent with one of the objective of the regulation by setting up a non-friendly investment environment.

Cable Europe goes further by discriminating former monopoly and privately financed operator without any past SMP position in the decision to impose remedies on several undertakings.

⁴ See in this regard article 8 (4) of DIRECTIVE 2002/19/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive)
<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002L0019&from=EN>

BEREC's report states that remedies must be appropriate and proportionate, and that every approach should follow a case-by-case analysis taking into account the characteristics of the firms involved.

Symmetrical regulation is quoted by some stakeholders, always in the context of the deployment of infrastructures for broadband and ultra-high speed fixed networks. This cross regulation is defined as giving regulatory guidance to a market by imposing common rules on all operators, **Numericable**, **Orange**, **PT Portugal** agree with this new approach which is consistent with current innovation and investments issues and prevents the development of tight oligopolies. When considering symmetrical approach, **Orange** refers to "*a need for creating the right conditions*". In this objective, stakeholders call for an upstream approach based on already existing regulatory levers such as Article 5 of the Access Directive. This last point is also mentioned by **GSMA**.

Finally, in **KPN's** opinion the joint SMP or tight oligopoly concept proposed by BEREC gives NRAs no guidance in assessing the adequate and proportionate remedies to be imposed.

BEREC does highlight that the aim of the remedies' analysis in this report is not to give guidance to NRAs in establishing remedies, but to provide NRAs with a set of parameters to consider before deciding on the remedies.

IX. Recommendations to amend the regulatory framework

9.1 Joint Dominance

ECTA, **CoopVoce** and **Poste Mobile** welcome the clarification and guidance on joint dominance provided in the BEREC draft report and agrees with BEREC's proposals concerning the review of the SMP Guidelines (amendment of section 3.1.2).

Vodafone also supports the recommendation to strengthen existing guidelines of 'joint dominance' and update Annex II of the Framework Directive. This establishes a meaningful basis for assessing joint dominance on an ex ante basis and will ensure that the existing framework adequately reflects relevant European jurisprudence.

BEREC is grateful of the support that some stakeholders have expressed regarding the need to update the Framework Directive as well as the SMP Guidelines, in order to fully take into account developments in the notion and application of the joint dominance test. Said proposals are maintained in the final report.

The final report also makes it clearer that the need to engage in a more detailed discussion of the factors that may be conducive to coordinated effects should by no means lead to a mechanical (“checklist”) approach to the concept of joint dominance.

9.2 Tight oligopolies

The points made by the stakeholders in this regard have been addressed in section I.