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BEREC views on non-competitive oligopolies in the Electronic Communications Code

In this paper, BEREC proposes amendments to the Electronic Communications Code aimed at ensuring NRAs can address consumer harm arising from non-competitive oligopolies. This paper is without prejudice to BEREC´s future positioning on other elements of the legislative proposal, and to other articles which might be relevant to the regulation of wholesale access. Also not addressed further in this paper is the topic of numerous subnational markets, which is relevant in several member states and deserves attention.

Not all oligopolies are competitive

In the draft Code proposals, the Commission has preserved the general principle of addressing and remedying market failures through SMP regulation. However, in several Member States, fixed markets once characterized by single dominance are evolving towards oligopolistic or duopolistic market structures. Indeed, recently senior EU official Anthony Whelan publicly acknowledged that most EU countries will soon have a duopoly in the fixed-broadband market.[1]

As was mentioned in the BEREC report on oligopoly analysis and regulation[2], not all oligopolies raise competition issues, and therefore oligopolies are not necessarily problematic. Oligopolistic market settings are only of concern when they risk resulting in consumer harm/welfare loss, thus requiring regulatory action to address evident or potential market failures. Non-competitive oligopolies are either characterized by joint dominance, where tacit collusion is taking place, or other situations where there is no such coordination and where the market structure might not result in effective competition. The latter situation corresponds to those oligopolistic markets characterized by unilateral effects arising in the absence of explicit collaboration or tacit collusion. Unilateral effects arising from non-competitive oligopolies can lessen competition and translate into prices that are consistently and significantly above the competitive level, ultimately to the detriment of the end-user.

The draft Code does not address non-competitive oligopolies of this sort and the Commission has argued that as a matter of principle access regulation in oligopolistic markets should be minimal. However, this blanket approach creates the risk that NRAs will not have adequate tools to address competition concerns in concentrated markets. Ultimately this leads to higher prices and lower investment, innovation and consumer welfare.

In the related area of merger assessments, the Commission has already recognized that single and joint dominance are not the only forms of competitive harm that might arise. Indeed, in 2002 it adapted its merger assessment methodology to take into account any significant impediment to effective competition (SIEC) likely to result from the proposed merger, including

[1] Mlex market insight (2017), ”Beware attempts to curb telecom oligopolies in EU, Whelan warns”, 25 January 2017.

[2] BEREC (2015) BoR (15) 195 Report on oligopoly analysis and regulation. http://berec.europa.eu/eng/document_register/subject_matter/berec/reports/5581-berec-report-on-oligopoly-analysis-and-regulation

through considering unilateral effects which are not captured under joint dominance. While a direct application of the SIEC test to the market review process might not be appropriate, it nonetheless signals the recognition of a broader range of causes of non-competitive market outcomes.

Regulators need clear powers to address non-competitive oligopolies

As telecommunication markets evolve from monopolies to oligopolies, it might no longer be possible to find SMP within the current SMP framework. Despite the absence of an SMP finding based on single or joint dominance, competition might nonetheless be ineffective, leading to inefficient market outcomes. In such cases NRAs might be unable to impose remedies. This situation should be prevented from occurring under the Code.

For example, where each of two or more firms have a position of unilateral market power (UMP), these undertakings have the ability and incentive to behave in a way which creates a self-sustaining reduction in competition and prevents the development of competitive outcomes. This is likely to be detrimental to consumers in the long term, through higher prices, restricted choice, low quality and lower innovation. In contrast to joint dominance there is no tacit collusion and this market outcome does not require any form of stability mechanism such as retaliation. The market is non-cooperative and stable and the market outcome results from each undertaking's individual best reaction to the other undertaking's behavior. UMP leads to inefficient market outcomes, from both static and dynamic points of view.

The Commission has acknowledged that competition drives investment and strengthens both the internal market and consumer welfare. BEREC agrees, and notes that non-competitive oligopolistic markets undermine investment and are to the detriment of consumer welfare. For this reason, we believe it is important that NRAs have the power to regulate in non-competitive oligopolistic markets.

BEREC is therefore proposing that the draft Code is amended to give due consideration to competition issues raised by unilateral effects in oligopolistic markets. There are various means of achieving this. BEREC sets out two possible approaches below. In both cases, the rationale and purpose of each set of proposed amendments would also need to be reflected in the relevant recitals. BEREC does not express a preference for either option, nor does it wish to imply that there are no other ways to address non-competitive oligopolies in the framework. The rules on symmetrical access obligations remain relevant for this subject, although they are not further explored in this paper.

Proposals for amending the draft Code

Option 1: define Unilateral Market Power (UMP) *to be part of* SMP

One possible approach is to broaden the scope of the definition of significant market power (SMP) to encompass unilateral effects arising from non-competitive oligopolies. There already exists an economic theory of harm based on inefficient outcomes in non-competitive oligopolies resulting from economic strength arising from unilateral effects. This acknowledges the possibility of unilateral effects arising from non-competitive oligopoly scenarios.

Article 61

SMP is defined in Article 61(2) of the draft Code. Added to this section could be a sentence introduction a legal fiction which considers the situation of a non-competitive oligopoly as equivalent to SMP:

> *„2. An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.*
>
> *In particular, national regulatory authorities shall, when assessing whether two or more undertakings are in a joint dominant position in a market, act in accordance with Union law and take into the utmost account the guidelines on market analysis and the assessment of significant market power published by the Commission pursuant to Article 62.*
>
> *Two or more undertakings are each deemed to enjoy a position equivalent to having significant market power when they might significantly impede effective competition."*

The SMP Guidelines would have to be updated to provide guidance on the assessment of « significant impediments to effective competition ».

Option 2: introduce Unilateral Market Power (UMP) *in addition* to SMP

Another possibility would be to introduce a new definition in the draft Code of 'Unilateral Market Power (UMP)' alongside the concept of SMP, though SMP would remain the primary focus, with UMP playing a complementary role. As explained in relation to Option 1 above, there already exists an economic theory of harm based on inefficient outcomes in non-competitive oligopolies resulting from unilateral market power. Option 2 involves amendments to the draft Code to specifically deal with market failures in UMP situations, separate from SMP situations, whereby NRAs would analyze whether UMP can be derived from weak competitive constraints in the oligopolistic market. The concept of UMP could be introduced in Articles 61, 62 and 65.

Article 61

SMP is defined in Article 61(2) of the draft Code. A similar approach to that definition could be adopted to the definition of UMP, in a new Article 61(3) of the draft Code:

> "*An undertaking shall be deemed to have unilateral market power where, in the absence of significant market power, it enjoys a position of economic strength by virtue of the weakness of competitive constraints in an oligopolistic market, enabling it to act in a manner which is detrimental to consumer welfare*."

Importantly, this definition does not contain a direct link to the competition law concept of dominance, so it does not disturb the integrity of the SMP framework.

Article 62

To complement the introduction of a definition of UMP, guidelines could usefully be developed on the assessment of UMP (e.g. through a revision to the SMP Guidelines). Since there is no competition case law on the concept of UMP, it is necessary to amend the Code to enable the Commission to go further than competition law in the SMP Guidelines. Article 62(2) of the draft Code could be amended as follows:

> "*2. The Commission shall publish, after consulting with BEREC, at the latest on the date of entry into force of this Directive, guidelines for market analysis and*

the assessment of significant and unilateral market power (hereinafter "the SMP guidelines") which shall be in accordance with the relevant principles of competition law and the objectives of the Code.""

Article 65

Having defined UMP, it would then be necessary to make provision for the imposition of remedies. This could be done by amending Article 65(4) of the draft Code to allow the imposition of regulation to address UMP:

"*4. Where a national regulatory authority determines that the imposition of regulatory obligations in accordance with paragraphs 1 and 2 of this Article is justified, it shall identify:*

(a) any undertakings which individually or jointly have a significant market power on that relevant market in accordance with Article 61(2); or in case of the absence thereof:

(b) undertakings which enjoy a position of unilateral market power on that market in accordance with Article 61(3).

The national regulatory authority shall on such undertakings impose appropriate specific regulatory obligations referred to in paragraph 2 of this Article or maintain or amend such obligations where they already exist."

This amendment would have the effect of placing a finding of UMP on the same footing as a finding of SMP and allow the imposition of the same remedies to address the competitive concerns identified. The Code should also clarify that NRAs should assess the appropriateness and proportionality of any remedies, taking into account the specificities of the particular UMP market situation. Applying the principle of proportionality will remain a case by case exercise in which all circumstances should be considered.

Additional consequential amendments would be required to other articles of the draft Code, including in relation to remedies. Also, changes in the SMP Guidelines would have to be introduced.