



Full fibre for a digital and sustainable Europe

Response to the consultation on the 'Draft BEREC Report on Competition amongst multiple operators of NGA-networks in the same geographical region

27 January 2023

Introduction

The review of BEREC into the extent of multiple NGA networks and the impact on competition is timely and useful. The results are interesting to the FTTH Council as it highlights how quickly these markets are evolving (in terms of network availability). Much of the data referred to in the BEREC Report, based on the market analyses conducted by NRAs across Europe, is already quite out of date. Based on its own 2021 data, the FTTH Council can see that already there are a little over 50% of European households passed with FTTH/B (or 107m units) but that approximately 280m lines have been deployed, or on average just under 2.5 lines per home passed. Interestingly, this excludes CATV networks in most instances (but not all, it depends on the location of the last amplifier in the network). Therefore, the existence of multiple NGA networks in the same geographic region is much more prevalent today, and based on the EECC and other instruments, these investments are accelerating.

Comments

The FTTH Council believes that the main purpose of market definition is to identify in a systematic way the immediate competitive constraints faced by an undertaking. The objective of defining a market in both its product and geographic dimension is to identify all actual competitors of the undertaking concerned that are capable of constraining its behaviour. It is not an abstract exercise but has a purpose – in a given product market is there a dominant entity? If the answer is yes, then over what geographic area is this true?

There is a danger that if that geographic market definition becomes an objective in itself regional markets may be defined when such market segmentation is neither necessary or appropriate. For instance, it may be that the conditions of competition are radically different in different parts of the same Member State but, in the context of determining the constraints on a given operator, this does not imply different geographic markets and can result in large administrative costs in the market. What is critical is the behavioural response of the potentially dominant entity to these differing market circumstances – for instance if that entity chooses to ignore the differences it may be that (a) the firm simply remains dominant despite the different conditions (b) that the market is not of a meaningful size (c) that it chooses to operate on a national level despite variations in regional competition (either for regulatory or commercial reasons)... On the other hand, if the potentially dominant firm reacts by adopting different approach regarding pricing, this may indicate that a distinct and separate geographic market exists.

NRAs can also consider whether competitive conditions are sufficiently different within Member States to justify the defining of regional markets for NGA, or alternatively, to limit the scope of remedies geographically. Choosing to vary remedies can be an appropriate response where market boundaries are uncertain or still in the process of change (as new technologies deploy or new business models are explored). In practice, it is necessary to assess in detail on a case-by-case basis whether regional market definition can be sufficiently justified on the basis of competition law principles. The European Commission has always recognised the fact that competition is more, or less, likely in certain areas and for certain classes of customers.

As shown in the BEREC report, the European Commission in its reviews has considered product market definition as a possible mechanism to target regulation where it would be most beneficial and delineation of access was an attempt to capture this dynamic. However, certainly in relation to access markets it is clear that geography and the features of that geography may be the determinative factor in predicting the possibility for competition.

From the FTTH Council's perspective, the economics of density are critical to the viability of infrastructural deployments and those economics are markedly different in urban rather than rural areas. In this context the long-term prospects for competition development, due to the presence of potentially non-replicable assets in less densely populated areas, may mean that the basis on which competition develops may differ within a single geographic market. The phenomenon of variations across geographic markets may not be stable over time such that any remedies reflecting geographic variations would need to be sensitive to developments that affect those variations. It is notable that in many European markets that as deployment techniques and technologies advance (and indeed as demand strengthens) the scope of competitive build increases. It is also true that the presence of access regulations (e.g. BCRD) and the quality of their implementation by NRAs can have a profound impact on the scope of infrastructure based competition.

As operators move to VHC networks, different technologies may be deployed in different geographic areas in order to deliver end-services to customers. It is likely that the most effective strategy for VHC deployment may utilise a mixture of technologies to deliver these services depending on specific local characteristics.

Under the EECC, markets will be defined and SMP will be assessed using the same methodologies as under competition law. Therefore the definition of the geographic scope of markets, the definition where necessary of relevant product/services markets, and the

assessment of effective competition by NRAs should be consistent with competition case-law and practice.

The extent to which the supply of a product or the provision of a service in a given geographical area constitutes the relevant market depends on the existence of competitive constraints on the price-setting behaviour of the producer(s) or service provider(s)¹ concerned. There are two main competitive constraints to consider in assessing the behaviour of undertakings on the market, (i) demand-side; and (ii) supply-side substitution. These may be further differentiated depending on the separate product market definition into service competition, deployment competition or infrastructure competition. A third source of competitive constraint on an operator's behaviour exists, namely potential competition.

The difference between potential competition and supply substitution lies in the fact that supply-side substitution responds promptly to a price increase whereas potential entrants may need more time before starting to supply the market. Supply substitution involves no additional significant costs whereas potential entry can occur even with significant sunk costs. The existence of potential competition should thus be examined for the purpose of assessing whether a market is effectively competitive within the meaning of the EECC, that is whether there exist undertakings with SMP.

A relevant geographic market comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which area the conditions of competition are similar or sufficiently homogeneous and can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different².

In practice, broad indicators such as a preliminary analysis of pricing and price differences at national and regional levels as well as an analysis the distribution of market shares between the parties and their competitors provide a starting point of analysis. It is unusual therefore to see in the assessments reviewed in the BEREC report that retail price differences were not considered in seven instances by NRAs. From a competition law perspective this is a prerequisite – but while a necessary condition, it is not a sufficient condition because retail price differences can also simply reflect different costs of supply. A further analysis of demand

¹ EN C 165/10 Official Journal of the European Communities 11.7.2002

² United Brands, *op. cit.*, paragraph 44, Michelin, *op. cit.*, paragraph 26, Case 247/86 Alsatel v Novasam [1988] ECR5987, paragraph 15; Tiercé Ladbroke v Commission, *op. cit.*, paragraph 102.

characteristics (importance of national or local preferences, current patterns of purchases of customers, product differentiation/brands, other) in order to establish whether companies in different areas do indeed constitute a real alternative source of supply for consumers.

If it can be established that operators which are not active on the relevant market can decide to enter that market at low cost in the short term in the event of a relative price increase then the market definition should be expanded to incorporate those ‘outside’ operators. However supply-side substitution is often limited by either the area covered by a network or the existence of legal and other regulatory instruments.

The FTTH Council note that many of its Members are deploying network in areas which were previously thought to be ‘uneconomic’ – this is also because the cost of capital can be higher or lower based also on the firms’ profiles (whether integrated or infrastructure-focused for instance). Infrastructure-focused operators have a lower cost of capital than traditional incumbents and so can reach further geographically with FTTH/B. A forward looking assessment of potential competition should be careful to take the changing business models driving investment into account.

Substitution arising from changes in relative prices rather than absolute prices and ease of switching are central to any assessment of geographic markets. It should be noted that the definition of the geographic market does not require the conditions of competition between traders or providers of services to be perfectly homogeneous nor indeed is the question asked in the abstract but rather has the purpose of determining over what geographic area an entity is or is not constrained (dominant)³. As stated in the judgement of United Brands:

‘with reference to a clearly defined geographic area in which [the product] is marketed and where the conditions are sufficiently homogeneous for the effect of economic power of the undertakings concerned to be able to be evaluated’.

Therefore irrespective of the prevailing conditions, the overriding concern of the NRA must be to what extent the prospectively dominant operator might be constrained and whether that operator might be more constrained in one part of the area in which it operates than in another.

In terms of replicability, it is important to note that the replicability of a particular asset type may vary in different circumstances: for example, local access networks may be more “easily” replicable in geographic areas with a greater population density or in different Member States

³ The geographic unit will not necessarily correspond to existing network or administrative units.

where there are differing prevailing competitive situations. As operators move to NGA networks, different technologies may be deployed in different geographic areas in order to deliver end-services to customers. It is likely that the most effective strategy for NGA deployment may utilise a mixture of technologies (for instance fibre or fixed wireless access) to deliver these services depending on specific economic characteristics in a particular geography.

As a result, the economics of NGA networks are likely to vary across different technologies and different geographies. Conditions are likely to differ greatly among Member States and within different regions of Member States and may lead to significantly different competitive conditions possibly justifying the definition of sub-national markets (unless there is e.g. a common price constraint). Even where a national market is defined regulators can still differentiate remedies within that national market.

Future prospects for competition

Where economies of scale or of density are large, replicability is proportionately limited for instance if economies of scale continue to a point close to full coverage, no entry will be possible. The extreme of this is captured by the notion of a single-product natural monopoly – a single product market which can most cheaply be supplied by a single-product firm, where average total cost – ATC – is still declining as the whole market is supplied by a firm. Equally economies of scope where the average incremental cost of supplying an additional service, such as broadband, to customers of an existing service, such as voice telephony can determine supply replicability and may represent a barrier to entry.

One way to evaluate prospects for replication is simply to rely on engineering estimates of the cost curves for the services in question as well as control over future earnings flows.⁴ However the cost estimates can be subject to error and incomplete but absolute accuracy is not required given that the aim of the exercise is not only to establish *absolute* levels of replicability (for which purpose empirical observation may be most relevant) but *relative* measures, which can guide NRAs as to their strategies in promoting infrastructure competition.

Historically, a key characteristic of the European Broadband market had been the variation in supply mechanism and the drivers of consumer take up across Europe. Experience showed that take up was fastest where there is competition between different delivery platforms or technologies (or at least that threat). This happens for a number of reasons, traditionally cable

⁴ This type of modelling is quite different in its nature and purpose from the cost modelling utilized, for example, to set interconnection prices. The type of modelling contemplated here is at a much higher level, and intended to identify the broad cost characteristics of a technology over a large range of current and prospective demand.

platforms made sense in densely populated areas. Densely populated areas were also cheapest to upgrade for DSL so that there is a double effect of price competition on access and ease of supply. Where inter-modal competition is not effective the market growth was reliant on LLU since LLU allows entrants to bypass the incumbent network and that competitive threat of losing the new market stimulated incumbents to develop the market. Consistent with the 'ladder of investment' hypothesis Public Policy has made intermediate access products available to facilitate entry. In particular, forms of resale and bitstream became the biggest competitive forms of broadband supply. The ladder of investment hypotheses encouraged regulators to use variations in access pricing to elicit entry at various levels of the value chain such that new entrants could then decide on their investment in a step-by-step way and gradually establish a customer base (critical mass) before they would go on to the next step of deploying their own infrastructure. In those areas where infrastructure based competition is feasible, such interventions have as their long-term objective the emergence of self-sustaining effective competition and the ultimate withdrawal of regulatory obligations.

With the move to fibre based network FTTH/FTTB and their equivalent, the extent to which a 'gradual' ladder of investment approach can be applied is limited as a number of rungs are effectively removed (LLU is effectively removed as a remedy for instance). This means that entrants must take larger investment decisions and earlier. The data suggests that entrant operators are taking these investment decisions to a greater extent than had been anticipated. The reality is that the extent to which this will happen is ultimately unknown and that the market is still testing deployment techniques and business models to determine the best mix of solutions.

In the meantime, the position of dominant entities in markets and the resultant need to control their behaviours cannot be determined simply by the presence of competing networks – pricing differences are key to identifying behaviours constrained by competition – an entrant with a large discount which elicits no response for the dominant entity suggests that either the area is not meaningful or the entrant is not seen as a threat – in practice therefore its behaviour is determined elsewhere and not in the putative regional market.

In all this there is a risk that the fruits of competition in competitive areas will be lost through geographic differentiation of markets. For instance, where the competitive portion of the market, is geographically large, this may determine the outcomes for the whole national market.

The regional market where only one network exists may act on the basis of the national market which is determined by the competitive area. In this way, even the customers in a monopoly supply area may enjoy the benefits of competition simply because the network owner operates on a national basis. Setting geographic markets in such a circumstances would break that constraint and possibly lead to worse outcomes for regional consumers. Note also, that a regional infrastructure monopoly does not imply the absence of competition at the service level. In case of open network access, customers still have the possibility to have the choice among different retail operators.

It was noted that the traditional incumbents often fail to invest with the result that there are increasingly non-overlapping networks and this is a cause for concern.

Conclusions

Replacing one access network (which has economies of scale) with another which has similar economies of scale but greatly increased economies of scope is not likely to change the competitive entry proposition. It is important to remember that population densities and ability to project retail or wholesale broadband SMP are critical to the proposition of competitive infrastructural build but even here the cases for deployment are very limited.

NGA and VHCN deployments in Europe are advancing quickly, already BEREC's data which refers to recent market analyses is out of date.

There is a risk that a rush to defining regional markets within a Member State may deny consumers in less competitive areas the benefits of competition that spill over from more competitive areas where the potentially dominant entity operates on a national basis. Identifying regional markets may by itself fragment the market. However, the FTTH Council notes BEREC's finding that traditional incumbent operators are themselves ceasing to operate nationwide networks in all instances.

The definition of relevant market (national or subnational) should primarily take into consideration the market shares at wholesale and retail level. The presence of homogeneous retail offers at national level is a strong hint of a single national wholesale market.

The actual and prospective coverage of alternative operator's networks can be a useful for the subsequent assessment of the incumbent market power but it is not relevant for the assessment of market definition

According to BEREC results, retail prices seem to be almost always the same at national level; in such cases, geographical segmentation would appear to be odd and require extraordinary justification.

The FTTH Council notes that the geographic scope of FTTH/B networks is not known and that therefore the scope of potential competition cannot be known. By its nature, the boundaries of these network build are not stable over time because (a) deployment models and deployment technologies can change and (b) business models such as Infrastructure-focused or Wholesale-Only can change the cost of capital. Therefore there should be caution exercised in pronouncing on the scope of potential competition and more consideration should be given to remedy variations within national markets.