Dealing with collective dominance in Telecoms

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OUTLINE

1. The Context
   • Typology of regulatory triggers and increase of telecom oligopolies

2. The Law
   • Hard, soft and case-law

3. The Way forward
   • Based on economic insights, the characteristics of the sector and the specificities of the regulation

4. Take-away
Typology of regulatory triggers

<table>
<thead>
<tr>
<th>Principles</th>
<th>Asymmetric</th>
<th>Symmetric</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Some operators with special responsibility</td>
<td>- Market power defined on case-by-case by NRAs under review of Commission and BEREC</td>
<td>- All operators</td>
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<tr>
<td>- Market power defined on case-by-case by NRAs under review of Commission and BEREC</td>
<td>- Intervention threshold pre-defined in the law (in part, assumed market power)</td>
<td></td>
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</tbody>
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<table>
<thead>
<tr>
<th>Legal provisions</th>
<th>Single SMP</th>
<th>Collective SMP</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. 14-16 FWD + Art. 8-13a AID</td>
<td>Art. 12 FWD + Art. 3 BBD Art. 5 AID</td>
<td></td>
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</tbody>
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<table>
<thead>
<tr>
<th>Applications</th>
<th>Single SMP</th>
<th>Collective SMP</th>
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<tbody>
<tr>
<td>- Local access</td>
<td>Very few cases up to now</td>
<td>- Access to passive infrastructures</td>
</tr>
<tr>
<td>- Termination (quasi-symmetric)</td>
<td>- Interconnection and interoperability</td>
<td></td>
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</tbody>
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Pressure on regulation

<table>
<thead>
<tr>
<th>Fixed</th>
<th>Before</th>
<th>Now</th>
</tr>
</thead>
<tbody>
<tr>
<td>- One big copper incumbent and small new entrants</td>
<td>- Convergence between technologies</td>
<td>Single SMP</td>
</tr>
<tr>
<td>- Copper incumbent competes with cable operators</td>
<td>- Copper incumbent competes with cable operators</td>
<td></td>
</tr>
<tr>
<td>- Fibre deployment by entrants and municipalities</td>
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<th>Mobile</th>
<th>Before</th>
<th>Now</th>
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<tr>
<td>- Between 2 to 6 MNOs</td>
<td>Consolidation between MNOs: towards 3-4</td>
<td>Effective competitive</td>
</tr>
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</table>
Pressure on regulation

• BERECC Report of Dec 2015 on oligopoly analysis and regulation
  • Is there a regulatory ‘gap case’ for tight oligopolies which needs to be covered by the current review?

• Council proposed amendment on Article 59 draft EECC re symmetric regulation

• EP proposed amendment on Art. 61 draft EECC re SMP
  • Reintroduce clarification on collective SMP

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• Article 14(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.

• Recital 26

Two or more undertakings can be found to enjoy a joint dominant position not only where there exist structural or other links between them but also where the structure of the relevant market is conducive to coordinated effects, that is, it encourages parallel or aligned anti-competitive behaviour on the market.


• Annex II

Two or more undertakings can be found to be in a joint dominant position within the meaning of Article 14 if, even in the absence of structural or other links between them, they operate in a market which is characterised by a lack of effective competition and in which no single undertaking has significant market power.

In accordance with the applicable Community law and with the case-law of the Court of Justice of the European Communities on joint dominance, this is likely to be the case where the market is concentrated and exhibits a number of appropriate characteristics of which the following may be the most relevant in the context of electronic communications:

- low elasticity of demand,
- similar market shares,
- high legal or economic barriers to entry,
- vertical integration with collective refusal to supply,
- lack of countervailing buyer power,
- lack of potential competition.

The above is an indicative list and is not exhaustive, nor are the criteria cumulative. Rather, the list is intended to illustrate only the type of evidence that could be used to support assertions concerning the existence of joint dominance.

• Para 86-106

• Case-law of the Court up to 2002
  • Compagnie Maritime Belge and Gencor

• Annex II of the original Framework Directive
  • Conditions for collusion
  • Possibility to get to a focal point and sustainability of the focal point
  • Market characteristics facilitating collusion
    • 9 additional characteristics mentioned in the 2002 version: mature market, stagnant or moderate demand growth, homogeneous products, similar costs structures, mature technology, absence of excess capacity, links between firms, retaliatory mechanisms, few scope for price competition

• Commission merger practice in telecom

Case-Law: Airtours – General Court

62. (...) First, each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy. (…), it is not enough for each member of the dominant oligopoly to be aware that interdependent market conduct is profitable for all of them but each member must also have a means of knowing whether the other operators are adopting the same strategy and whether they are maintaining it. There must, therefore, be sufficient market transparency for all members of the dominant oligopoly to be aware, sufficiently precisely and quickly, of the way in which the other members’ market conduct is evolving:

- Second, the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market. (...) The notion of retaliation in respect of conduct deviating from the common policy is thus inherent in this condition. (...) for a situation of collective dominance to be viable, there must be adequate deterrents to ensure that there is a long-term incentive in not departing from the common policy, which means that each member of the dominant oligopoly must be aware that highly competitive action on its part designed to increase its market share would provoke identical action by the others, so that it would derive no benefit from its initiative;

- Third, (...) must also establish that the foreseeable reaction of current and future competitors, as well as of consumers, would not jeopardise the results expected from the common policy.
Case-Law: Impala - Court of Justice

123. Such tacit coordination is more likely to emerge if competitors can easily arrive at a common perception as to how the coordination should work, and, in particular, of the parameters that lend themselves to being a focal point of the proposed coordination. Unless they can form a shared tacit understanding of the terms of the coordination, competitors might resort to practices that are prohibited by Article [101 TFEU] in order to be able to adopt a common policy on the market.

Moreover, having regard to the temptation which may exist for each participant in a tacit coordination to depart from it in order to increase its short-term profit, it is necessary to determine whether such coordination is sustainable. In that regard, the coordinating undertakings must be able to monitor to a sufficient degree whether the terms of the coordination are being adhered to. There must therefore be sufficient market transparency for each undertaking concerned to be aware, sufficiently precisely and quickly, of the way in which the market conduct of each of the other participants in the coordination is evolving.

Furthermore, discipline requires that there be some form of credible deterrent mechanism that can come into play if deviation is detected.

In addition, the reactions of outsiders, such as current or future competitors, and also the reactions of customers, should not be such as to jeopardise the results expected from the coordination.

Case-Law: Impala – General Court

• Paras 251-252
• In the appropriate circumstances, be established indirectly on the basis of what may be a very mixed series of indicia and items of evidence relating to the signs, manifestations and phenomena inherent in the presence of a collective dominant position.
• Thus, in particular, close alignment of prices over a long period, especially if they are above a competitive level, together with other factors typical of a collective dominant position, might in the absence of an alternative reasonable explanation, suffice to demonstrate the existence of a collective dominant position, even where there is no firm direct evidence of strong market transparency, as such transparency may be presumed in such circumstances.
Practice in telecoms

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Fixed broadband cases

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Broadcasting cases

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4. Take-away
Economic insights: Collusion story

• Collusion exists when
  • Firms have mutual beliefs with regards to the use of certain strategies
  • That result in process which are above the competitive benchmarks

• 3 conditions for collusive equilibria
  • Ability and the incentive to get to a coordinated outcome: focal point
  • Ability and the incentive to sustain the coordinated outcome: detection of the deviation and retaliation
  • Absence of actual or potential market constraints destabilising the coordinated outcome

Economic insights: Market characteristics

• Market characteristics identified by industrial economic theory
  • Structural
    • High market concentration, high barriers to entry – sunk fixed costs, transparency, mature market technology and lack of technical innovation + homogeneous products
  • Supply-side
    • Symmetry between firms, links between firms, multi-market contacts + absence of excess capacity
  • Demand-side
    • Low elasticity of demand, high growth in demand, low demand fluctuations and business cycle, lack of countervailing buyer power
Economic insights: Market characteristics

• Those characteristics are confirmed by experimental studies in labs
  • Probability of collusion is particularly high in duopoly settings

• And by empirical and sectoral studies
  • The characteristics of the telecommunications sector make it prone to collusion

Economic insights: Behavioural analysis

• Determine whether firms’ behaviours can be better explained by competition or collusion
  • Is behaviour inconsistent with competition?
  • Is there a structural break in behaviour?
  • Does the behaviour of suspected colluding firms differ from that of competitive firms?
  • Does a collusive model fit the data better than a competitive model?

• Collusive markers
  • Sharp increase in price-cost margin
  • Stability in prices and/or market shares
  • Price parallelism or negative correlation between firms’ market shares over time
Way forward: Integrated analysis

- Determination of collective SMP should be based on a combination of structural and behavioural analysis

- Structural analysis
  - Analyse whether the characteristics of the market make it prone to collusion

- Behavioural analysis
  - Analyse whether market outcomes and firms behaviours can be better explained by collusion or by competition

- The reliance on structural analysis is particularly justified given the specificities of regulation
  - When there is regulation, behavioural indicators are very much influenced by regulation, markets should be analysed under Modified Greenfield Approach
  - Regulation is ex ante and should assess whether the market is conducive to collusion

Way forward: Structural analysis

- Characteristics of the electronic communications sector make it prone to collusion
  - High barriers to entry, high concentration, firms symmetries, links between firms, low countervailing power in mass-market
  - This is particularly the case in duopoly settings

- Story and holistic approach, no checklist approach
  - NRA should explain the collusion story and how market characteristics support it
  - NRA should not tick the box in the list of characteristics
Way forward: Behavioural analysis

- Investigate market outcomes
  - *Inter alia* evolution of price-cost margins, stability of prices and market shares, price parallelism, value and quality, extend of choice, innovation

- Investigate firms behaviours
  - *Inter alia* denial of access, cooperation agreements

- Analyse whether those outcomes and behaviours can be better explained by competition or by collusion
  - Or by regulation when there is (modified greenfield approach)

Way forward: marginal judicial control

- The determination of collective is based on a complex factual and economic assessment

- Judicial control of the economic assessment should be restrained to manifest error
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Context and Law

• Collective SMP is one trigger, among others, for economic regulation
  • This trigger is under pressure due to the increasing oligopolistic structure of the telecom industry

• Collective SMP is based on the competition law concepts and methodologies
  • But should take into account the specificities of regulation and the characteristics of the telecom sector
Way forward

• Determination of collective SMP should be based on a combination of structural and behavioural analysis
  • Structural analysis: holistic, not checklist
  • Behavioural analysis: whether market outcomes and firms behaviours can be better explained by collusion or by competition

• Given the complex economic assessment, judicial control should be restrained to manifest error

Thank you for you attention

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