



CENTRE DE RECHERCHE INFORMATION, DROIT ET SOCIÉTÉ

# **Smart Access Regulation in Electronic Communications**

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- Technological neutrality
  - To be neutral vav technology and market innovations
- Based economic welfare theory
  - Interaction between firms and effect of public intervention
- Minimise regulatory costs
  - Costs of implementation
  - Risks and costs of errors: type I (over-regulation) and type II (under-regulation)
  - Legal certainty
- Rely on concepts which are Europeanised
  - To ensure common regulatory approach across the Member States
  - To stimulate the establishment of a digital internal market

# Normative conditions

- ◉ Taking into account the evolution of the industry and policy context
- ◉ 1990: Opening an already deployed infrastructures
- ◉ 2015: Stimulating investment in new infrastructure
  - Dynamic efficiency is more important
  - Relative costs of type I (resp. II) are higher (resp. lower)
  - More oligopolistic markets

*“One of our concerns with current regulatory reforms is that, beyond the liberalization and free-market rhetoric, one may be creating an environment that will lead to heavy-handed regulatory intervention”*

J.J. Laffont and J. Tirole (2000, p. 141)

*“In what was ostensibly introduced as a system for organizing the transition from sector regulation to competition policy wherever possible, we have mainly seen the imposition of additional sector specific regulation”*

M. Hellwig (2008, p. 26).

# Options

## Economic

## Technologic

**High**

3. Essential  
Facility

4. Bottleneck

1.3CT/SMP

**Low**

2. Derived  
gap cases

# Option 1: 3CT/SMP

- Three Criteria Test (to select markets)
  - High and non-transitory structural, legal entry barriers
    - No strategic/behavioural barriers
  - Market structure which does not tend towards effective competition within the relevant time horizon
  - Competition law alone is insufficient to adequately address the identified market failure(s)
    - Institutional and/or substantive criteria

# Option 1: 3CT/SMP

- Significant Market Power (to select operators)
  
- Single dominance:
  - Power to behave to an appreciable extent independently
    - High market shares
    - High entry and expansion legal, structural, strategic barriers
    - Low countervailing buying market power
  
- Collective dominance
  - Two or several firms, which remain independent, adopt a common policy and behave *as if* they were a single entity
    - Ability and incentive to get to a coordinated outcome
    - Ability and incentive to sustain this coordinated outcome which implies possibility of deviation detection and retaliation
    - Absence of actual or potential market constraints

## ◉ 3CT

- The test should focus on the cause of market power (structural) and on its levels (very high)
- Legal status: hard or soft law ?
- Substantive: 1<sup>st</sup> criterion: how high is high?  
3<sup>rd</sup> criterion: which added value?
- Implementation: Commission and/or NRA ?

## ◉ SMP

- Adaptation of competition law concepts
  - to dynamic and multi-sided markets
  - to regulatory objectives



- Relationship between 3CT and SMP
  - 3CT is stricter than SMP as it aims to identify the subset of the dominance cases where competition law would be insufficient to police market power because of structural market failures
  - Sequence of steps to impose regulation is awkward because logically the 3CT (which is stricter) should be performed before the SMP/dominance test (which is looser)
  - This peculiarity is linked to the division of power between the European and the national levels

# Option 2: Derived gap case

- ◉ Merger control
  - Significant impediment to effective competition
  - 'Gap cases' leading to remedies in recent 4 to 3 mobile mergers
  - Closeness of competition, removal of competitive force, incentives to compete of merged entity and competitors
  
- ◉ No effective competition (without a direct link to SMP/dominance)
  - Is it a relevant test to regulate oligopolistic markets ?

- ◉ *Bronner – IMS Health - Microsoft*
  - No actual or potential alternative for an entrant
    - Which is equally efficient as the incumbent and enjoys the same economies of scale and scope
  - Consumer harm, in particular impede new product for which there is a market demand
  - No efficiency or objective justification for access refusal
  
- ◉ Opinion of AG Jacobs in the *Bronner* case and Commission Priorities Guidance
  - Start analysis on the retail market from which wholesale analysis is derived
  - Balance between short-term and long-term competition
  - Take original sin into account

# Option 3 Essential Facility

- ◉ Essential facility bypasses market definition
- ◉ No essential facility were found in *Bronner* or *IMS*
- ◉ WTO Definition
  - Exclusively or predominantly provided by a single or limited number of suppliers
  - Cannot feasibly be economically or technically substituted in order to provide a service

# Option 4: Bottleneck

- No agreed definition of bottleneck
  - Generic concept based on economic criteria (such as essential facilities)
  - Specific list of network elements
    - Physical infrastructure (Art. 3 Dir. 2014/61)
    - Co-location and sharing of network elements (art. 12 Dir. 2002/21)
  - WIK Study 2013: termination rates, in-building wiring/termination segment of FTTH

# Option 4: Bottleneck

- ◉ Bottleneck is often associated with symmetric regulation
- ◉ Distinction between symmetric and asymmetric
  - No based on existence of market power, but on how market power is assessed
  - In symmetric regulation, assessment is done in the law by the legislator
    - Easier to apply, but risk of errors and violating technological neutrality
  - In asymmetric regulation, assessment is done by the NRA on a case-by-case basis

# The Question

- ◉ Which test is best
  - 3CT/SMP, possibly clarified
  - No effective competition (incl. regulatory gap cases)
  - Essential Facilities
  - Enduring bottleneck: generic definition or specific list
- ◉ According to some normative criteria
  - Technological neutrality
  - Based on economic principles
  - Minimising regulatory costs and maximising legal certainty
  - Europeanised
- ◉ Given the current industry and policy context