

Market definition – the “3 Criteria”

Some perspectives

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9 December 2008

Key deliverables for a regulatory regime

- Evidence-based
- Predictable, consistent, proportionate
- Independent of market players
- Independent of political control of day to day decisions
- Why? Facilitates efficient investment and innovation

The 3 criteria in practice

- Do they – in theory or in practice - lead to the deliverables on the previous slide?
 - Overlapping criteria?
 - Lack of precision?
 - In line with consumer interests?
 - Applied consistently and predictably?

Overlapping criteria? Barriers without dominance

- First criterion – high and enduring barriers to entry
- Second criterion – no tendency to effective competition
- How could first criterion occur without second?
 - Competitive oligopoly?
 - Maybe – but empirical observation suggests that oligopolies in communications markets often not competitive, despite being below the threshold for collective dominance
 - Example – wholesale international roaming

Overlapping criteria? Dominance without barriers

- Can dominance really exist in wholesale electronic communications markets without barriers?
 - Even where no obvious legal or structural barriers, usually other factors having same effect (e.g. brand, lack of customer empowerment)

Lack of precision – insufficiency of competition law (1)

- Under what circumstances is competition law sufficient where there is enduring dominance in a wholesale electronic communications market
 - Doubtful value for dealing with excessive pricing
 - Established case law on margin squeeze – but does not prevent new entrants from being squeezed out
 - Appropriate response to an enduring wholesale bottleneck is an access remedy but ..
 - Ex ante regulation provides:
 - Full range of tools for imposing access
 - Regulatory certainty for the market players

Lack of precision – insufficiency of competition law (2)

- Proposition:
 - In a wholesale electronic communications market which passes the first 2 Criteria, the third is always satisfied
 - Or if not, then the test needs to be much more clearly articulated

No tendency to effective competition – in consumer interests?

- Scenario
 - Market has been characterised by enduring dominance
 - But new entry has occurred
 - Incumbent still able to act independently of competitors but ...
 - Foreseeable that this will no longer be the case in 3-5 years time
- The appropriate response may be
 - Maintain safeguard regulation to protect consumer interests in the medium term but ..
 - Reduce severity of regulation to avoid spillover onto new entrants
- Is this possible? Will such a market pass the second criterion?

In line with consumer interests? Existing regulated markets

- 3 Criteria seems inappropriate test for existing regulated markets:
- If no tendency to existing competition, appropriate response is:
 - Upstream remedies if available and/or
 - Continuation of regulation
- If tendency to competition, may need safeguard remedies for the transition
- If competitive, deregulate
- Either way, 3 Criteria appear to add nothing to SMP assessment

Applied consistently and predictably? Wholesale leased lines – trunk segments

- Ofcom successfully justified regulation in the UK despite disappearance of “Market 13” from the list of recommended markets
- UK has a very high level of altnet investment in trunk infrastructure, not enough to guarantee effective competition at present
- Is it credible that there is a greater level of trunk competition in most other EU countries?
- If not, then the 3 Criteria must generally be satisfied for former Market 13

Applied consistently and predictably?

- Broadcasting transmission
- Mobile access and origination

Conclusions

- Real concerns about fitness for purpose
 - Overlapping criteria?
 - Lack of precision?
 - Appropriate test for deregulating markets?
 - Applied consistently and predictably?