



CENTRE DE RECHERCHE INFORMATION, DROIT ET SOCIÉTÉ

Smart Access Regulation in Electronic Communications

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1. Current Test

2. Context and Principles

3. Three dimensions of regulatory intervention

4. Proposal for tests

5. Conclusion

1. Current Test

- ◉ Ex ante access

- ◉ TCT/SMP
 - Three-Criteria Test: superficially applied, not very clear
 - Significant Market Power: single or joint dominance but not further (non-coordinated behaviours without single dominance)
 - Remedies: Proportionality mildly applied
- ◉ Pre-defined bottlenecks
 - Physical infrastructures

- ◉ Dispute resolution

2. New Context

- ◉ Opening existing infrastructures → Stimulating investment in new infrastructures
- ◉ Monopoly → Oligopoly
- ◉ National market → Regional segmentation
- ◉ Silos in restricted value chain → Layers in extended value chain

2. Old Principles

- ◉ Minimise risks and costs of regulatory errors
 - Type I errors (over-regulation) and type II (under-regulation)
 - Risks of errors depend of the test
 - Costs of errors may depend of context

- ◉ Minimise costs of implementation
 - Ease of implementation and legal certainty

- ◉ Based on economic and neutrality principles
 - Applied by NRAs

3. Types of Intervention

- ◉ Ex ante (pure sector regulation)
- ◉ Dispute resolution (mild sector regulation)
- ◉ Ex post (pure competition law)

3. Tests for Intervention

1. Essential facility

- Indispensability of the input
- Elimination of competition in the downstream market
- Consumer harm, for instance no new product developed

2. TCT/SMP revised

- TCT clarified (structural super-dominance) and applied (by NRAs for all markets)
- SMP clarified: covers tacit collusion

3. TCT/SMP unchanged: *status quo*

4. Tight oligopoly/gap cases

- To cover non-coordinated behaviours without single dominance

5. Pre-defined bottlenecks

3. Tests for Intervention

	Risk type I errors	Risk type II errors	Ease of application	Principle based
Essential facility	low	high	medium	high
TCT/SMP revised	low	high	medium	high
TCT/SMP unchanged	medium	medium	medium	high
Tight oligopoly	high	low	medium	low
Pre-defined bottlenecks	medium	medium	high	low

3. Tests for Remedies

- ◉ Justified: necessary to solve identified market failures
- ◉ Proportionality
 - Low impact assessment
 - Full impact assessment, with quality control

3. Holistic Approach

Remedies	Mild Impact assessment	Full Impact assessment
Test for intervention		
Essential facility	<ul style="list-style-type: none"> - Pure ex-ante - Dispute resolution 	<ul style="list-style-type: none"> - Pure ex-ante - Dispute resolution
TCT/SMP revised	<ul style="list-style-type: none"> - Pure ex-ante - Dispute resolution 	<ul style="list-style-type: none"> - Pure ex-ante - Dispute resolution
TCT/SMP unchanged	<ul style="list-style-type: none"> - Pure ex-ante - Dispute resolution 	<ul style="list-style-type: none"> - Pure ex-ante - Dispute resolution
Tight oligopoly	<ul style="list-style-type: none"> - Pure ex-ante - Dispute resolution 	<ul style="list-style-type: none"> - Pure ex-ante - Dispute resolution
Pre-defined bottlenecks	<ul style="list-style-type: none"> - Pure ex-ante - Dispute resolution 	<ul style="list-style-type: none"> - Pure ex-ante - Dispute resolution

4. Proposal for Tests

- ◉ One infrastructure
 - Subsidized: open with state aids rules
 - Non subsidized: open? With an essential facility test?
- ◉ Several infrastructures: oligopoly
 - With coordinated behaviours: open? with joint dominance test?
 - Without coordinated behaviours: hardest case, need full impact assessment

4. Proposal for Tests

Remedies	Mild Impact assessment	Full Impact assessment
Test for intervention		
Essential facility	<ul style="list-style-type: none"> - <u>Pure ex-ante</u> - Dispute resolution 	<ul style="list-style-type: none"> - Pure ex-ante - Dispute resolution
TCT/SMP revised	<ul style="list-style-type: none"> - Pure ex-ante - Dispute resolution 	<ul style="list-style-type: none"> - Pure ex-ante - Dispute resolution
TCT/SMP unchanged	<ul style="list-style-type: none"> - Pure ex-ante - Dispute resolution 	<ul style="list-style-type: none"> - Pure ex-ante - Dispute resolution
Tight oligopoly	<ul style="list-style-type: none"> - Pure ex-ante - Dispute resolution 	<ul style="list-style-type: none"> - Pure ex-ante - <u>Dispute resolution</u>
Pre-defined bottlenecks	<ul style="list-style-type: none"> - Pure ex-ante - Dispute resolution 	<ul style="list-style-type: none"> - Pure ex-ante - Dispute resolution

5. Conclusion

- ◉ Take new context into account
- ◉ Keep old principles
 - Minimise errors costs and base on principles to be applied by NRAs
- ◉ Adopt a holistic approach
 - Type of intervention: ex ante, dispute resolution
 - Test for intervention: from essential facility to tight oligopoly
 - Test for remedies: from mild to full impact assessment

5. Conclusion

- ◉ Test for access depends on policy choices
 - What kind of settings needed to be regulated and at what costs
- ◉ One infrastructure
 - Subsidised
 - Non-subsidised
- ◉ Oligopoly
 - Coordinated behaviours
 - Non-coordinated behaviours