CENTRE DE RECHERCHE **INFORMATION, DROIT ET SOCIÉTÉ**

# Smart Access Regulation in Electronic Communications

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# OUTLINE

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 / Test for intervention | Mild Impact assessment | Full Impact assessment |
|---|---|---|
| **Essential facility** | - Pure ex-ante<br>- Dispute resolution | - Pure ex-ante<br>- Dispute resolution |
| **TCT/SMP revised** | - Pure ex-ante<br>- Dispute resolution | - Pure ex-ante<br>- Dispute resolution |
| **TCT/SMP unchanged** | - Pure ex-ante<br>- Dispute resolution | - Pure ex-ante<br>- Dispute resolution |
| **Tight oligopoly** | - Pure ex-ante<br>- Dispute resolution | - Pure ex-ante<br>- Dispute resolution |
| **Pre-defined bottlenecks** | - Pure ex-ante<br>- Dispute resolution | - Pure ex-ante<br>- 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 / Test for intervention | Mild Impact assessment | Full Impact assessment |
|---|---|---|
| **Essential facility** | - Pure ex-ante<br>- Dispute resolution | - Pure ex-ante<br>- Dispute resolution |
| **TCT/SMP revised** | - Pure ex-ante<br>- Dispute resolution | - Pure ex-ante<br>- Dispute resolution |
| **TCT/SMP unchanged** | - Pure ex-ante<br>- Dispute resolution | - Pure ex-ante<br>- Dispute resolution |
| **Tight oligopoly** | - Pure ex-ante<br>- Dispute resolution | - Pure ex-ante<br>- Dispute resolution |
| **Pre-defined bottlenecks** | - Pure ex-ante<br>- Dispute resolution | - Pure ex-ante<br>- 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