

The test for economic regulation in telecoms

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Three criteria and Significant Market Power: The view of the European Commission*

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Reinold Krüger

Overview

- 3 criteria vs. SMP
- “3 criteria test” applied
- Excursion: transition period
- Conclusion



3 criteria vs. SMP

- “3 criteria test” vs. “SMP test”
 - “3 criteria test” **identifies markets** (susceptible to ex ante regulation)
 - “SMP test” **identifies operators** (on which remedies need to be imposed)
- Why do we need the “3 criteria test”?
 - Find those markets where dominant positions need different intervention than under competition law
 - Dominance not *per se* triggering ex ante regulation
 - Being able to roll back ex ante regulation when appropriate
 - Certainty for market players



3 criteria vs. SMP

- “3 criteria test”
 - High and non-transitory barriers to entry
 - No tendency towards effective competition
 - Competition law cannot redress the competition problem identified
- “3 criteria test” determines scenario under which a market falls
 - Ex ante sector-specific regulation **and** competition law, or
 - Competition law only
- Consequences for operators



“3 criteria test” applied

- Commission Recommendation on relevant markets (2007)
 - Rigorous application of the “3 criteria test”
 - Presumption that “3 criteria test” is met for the markets identified
- Can further markets be regulated ex ante?
 - Yes:
 - » 1. NRAs to prove that “3 criteria test” is met, and, **in addition**,
 - » 2. NRAs to find SMP
- How can existing ex ante regulation be removed?
 - Two possibilities:
 - » 1. “3 criteria test” not met
 - » 2. No SMP found



“3 criteria test” applied

■ Legal provisions

- Framework Directive (Recital 27)
- Recommendation on relevant markets

■ Cases

- Serious doubts in NL/2005/0247
- Serious doubts in PL/2008/0772



“3 criteria test” applied

■ Sector-specific regulation rolled back

- New Recommendation on relevant markets reduces list from 18 to 7(8)
- Effective wholesale remedies (CS/CPS, BSA, LLU) lowering entry barriers
- ANOs offer retail services while rolling out own infrastructure
- Only some wholesale markets still represent key bottlenecks
 - » Local (loop) access
 - » Technology neutral broadband access
 - » Termination markets

■ Competition law to take over



“3 criteria test” applied

- Regulatory framework is competition law based, thus easier transition of markets from ex ante to ex post
- When do remedies switch to ex post?
 - Administrative answer: *three criteria test not met*
 - Potential market distortions based on behavioural patterns, not structural
 - Competition law enforcement effective, including deterrent effect



“3 criteria test” applied

- Increasing number of notifications under the 2007 Recommendation where NRAs carried out the “3 criteria test”
- Case study: *retail calls*
- Most retail markets subject to competition law remedies only
 - Changing market environment
 - Effectiveness of wholesale regulation
 - Commission and NCAs particularly active as to link between prices at wholesale and retail level
 - Increased legal certainty after recent CFI judgments



“3 criteria test” applied

- Local and national calls less competitive than international calls?
- Too early to draw conclusions
- Commission expects that “3 criteria test” is strictly applied
 - High market shares or high prices alone not sufficient
 - Degree of broadband penetration!
 - For how long are wholesale remedies in place!
 - Demand and supply patterns!



Excursion: transition period

- No general transitional period/regime (*“purgatory”*) necessary before markets can be relieved from ex ante
- Effective ex post abuse control inevitable!
- Different approaches possible
 - Conventional approach
 - Ofcom, EETT
 - Sector-specific ex post abuse control



Conclusion

- Dominance alone not sufficient to intervene ex ante
- The “3 criteria test”:
 - necessary test to pass for sector-specific regulation
 - determines deregulation
 - allows for deviation from Recommendation on relevant markets
 - increased importance with shorter list of Recommendation markets
- No need for a transitional regime





Thank you for your attention !



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Reinald Krüger