

# Market definition – the “3 Criteria”

## Some perspectives

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## 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?