

TILEC – TILBURG LAW AND ECONOMICS CENTER

Sub-national disaggregation in sector-specific regulation

Ofcom's Market 12 Review

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- Ofcom's Review of Market 12
- Commission comments
- Geographic market definition?
- SMP assessment
- Comparison with US approach
- Link with State aid practice
- Concluding remarks

- Concerns Market 12 – Market 11 (LLU) remains unchanged
- Key features
 - > Product market definition: inclusion of LLU and cable operators as a result of indirect pricing constraints
 - > Geographic market definition (leaving Hull aside)
 - Disaggregated approach: what is the appropriate level? → BT exchange

- Key features
 - > Geographic market definition
 - Market 1: local exchanges with only BT
 - Market 2: (i) 2 or 3 Principal Operators now AND (ii) 4+ forecast but < 10 000 premises
 - Market 3: (i) 4+ Principal Operators now AND (ii) 4+ forecast and > 10 000 premises
 - > SMP: not on Market 3
 - > Remedies: lifted on Market 3 (LLU remains in place)

- Sub-national markets
 - > Must be defined in line with competition law principles
 - > More evidence needed than no. of operators: market shares, pricing, products offered, marketing, etc.
 - > SMP assessment: extent to which competitors can constrain behaviour of incumbent, look at barriers to entry/expansion and NGNs
- Comments on Ofcom
 - > Bundling of exchanges
 - > Analysis should also look at market shares and pricing
 - > Monitor LLU and NGN

- According to competition law principles??
 - > Aim: identify competitive constraints
 - > Area where conditions of competition are similar or sufficiently homogeneous
 - > How can this be applied in network industries?
 - Geographic component of the product
 - Regulatory barriers
 - For the rest, definition is relatively arbitrary, since it depends on network coverage

- Ofcom approach
 - > Problem: level of aggregation
 - > Reasonable way of splitting markets
 - No better alternative
 - > Downside: return to technology-based considerations, in particular to BT's network topology
 - > Classification into bundles: Market 1, 2 or 3
 - Practical step, not really market definition
 - Blurs SMP assessment and market definition

- Ofcom quite formalistic: number of operators and number of premises
- Commission would like to add criteria
 - > Market shares, evolution over time, pricing, etc.
 - > Issue: is there constraint on incumbent?
- Which approach is preferable?
 - > Administrative costs
 - > Focus on incumbent or on whole sector?
 - > Question of faith in markets

- FCC deregulated the whole market across the US
 - > No regional or local disaggregation
 - > Huge leap of faith, with distinct possibility of duopoly

Link with State aid practice

- Subsidies for broadband (fiber) network rollout
- Commission practice
 - > White areas: no broadband service available, State aid permissible in practice
 - > Grey areas: some services available, Commission more cautious
 - > Black areas: 2+ providers, State aid not allowable in principle (*Appingedam*)

Link with State aid policy

	State aid	Regulation
White areas	Permissible	Maintained (but of limited use)
Grey areas / Market 1	Perhaps	Maintained
Black areas / Market 2	No	Maintained
“Super-black” areas / Market 3	No	Lifted

Concluding remarks

- Fluid line between service-based and infrastructure-based competition
- Application of competition law or sector-specific approach?
 - > How much of a role should technology and topology play?
- Broader context: LLU and NGNs
- Commission wants to ensure consistency in regulation across the EU
 - > Yet local circumstances can be taken into account
 - > Where is the line to be drawn? How much can other Member States differ from Ofcom now?