

# BEREC's Opinion on draft SMP Guidelines

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Body of European Regulators  
for Electronic Communications

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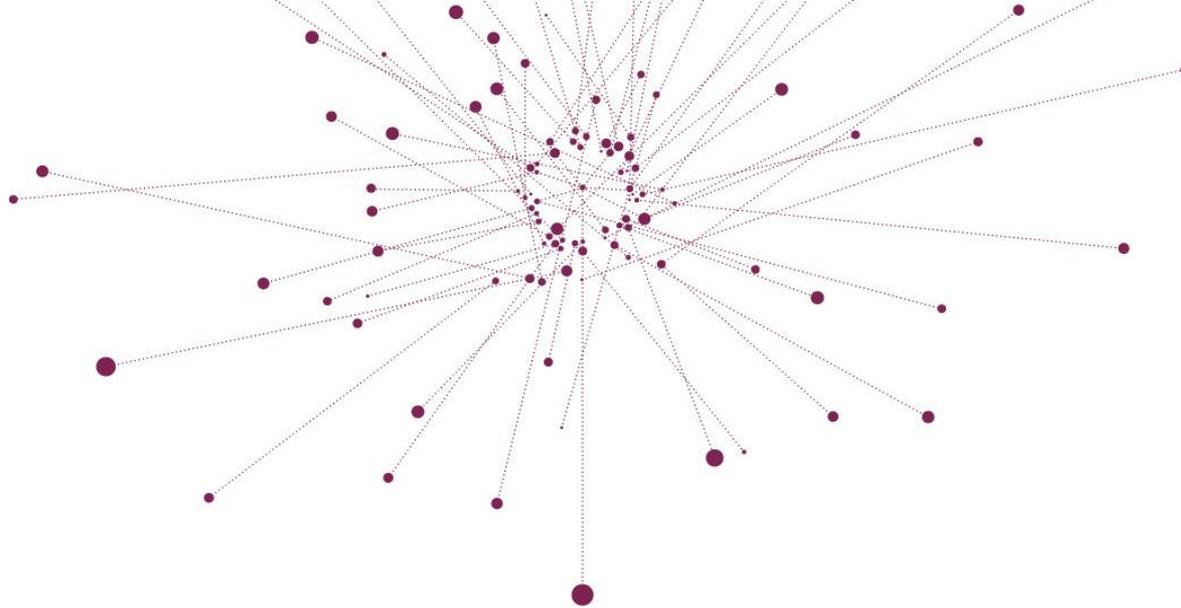
The logo for BEREC (Body of European Regulators for Electronic Communications) features the word "BEREC" in a bold, sans-serif font. The letters "B", "E", "R", and "E" are blue, while the "C" is maroon. A blue curved line starts under the "R" and sweeps under the "C".

- **Starting Point:** ever more oligopolistic market structure in Member States
  - BEREC started work already in 2015
    - By publishing a report on oligopoly analysis and regulation (including a public consultation)
  - BEREC Input to the Electronic Communications Code
    - BEREC high-level Opinion
    - BEREC papers on the review
  - BEREC's input to the consultation of the EC on the SMP Guidelines
  - BEREC closely followed the EC study carried out by WIK
  - BEREC Opinion on draft SMP Guidelines
- BEREC welcomes the constructive dialogue with the EC since start of the public consultation in early 2017

- Opinion on draft SMP Guidelines latest building block in BEREC's work
- BEREC is generally satisfied with the current draft
- BEREC wants to note however that
  - The draft guidelines rely on the existing Framework
    - New review of the guidelines after implementation of the new framework is required
    - Guidance for the interim period would be appreciated
  - Means to deal with tight oligopolies without tacit collusion are still missing

- The BEREC opinion comments on the following specific issues
  - SSNIP-Test
  - Competitive Constraints from OTTs
  - Inter-platform competition
  - Captive users
  - Market share thresholds for single dominance
  - Joint dominance criteria

- BEREC is in general satisfied with the draft Guidelines
- The main concepts are still relevant and still part of the Guidelines
  - e.g. supply- and demand-side substitution, HM-Test, SMP-analysis based on different criteria, etc.
- The treatment of recent developments (e.g. OTTs) and more guidance on joint dominance is also generally welcomed
  - However, NRAs still have no adequate means to deal with tight oligopolies without tacit collusion
- Disclaimer: time for comments was short and therefore additional points may arise in the future



Thank you!

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# ANNEX

## OTTs:

- Draft Guidelines suggests to consider competition from OTTs
  - e.g. Para 36 and 63
- BEREC agrees but asks for a refinement
  - Per definition, OTTs (over the top providers) do not provide access
  - Therefore, they do not generally exercise ‘direct’ competitive pressure on access markets (e.g. markets 3a/3b and 4 from the Recomm.)
  - Considering potential competitive constraints of OTTs at the SMP-assessment stage where OTT services are not included in the market (as suggested in the draft guidelines) may not always be relevant

### Inter-platform competition: Are different technological platforms (e.g. copper and cable) substitutes at the wholesale level?

- Draft Guidelines (para 40) suggest that
  - NRAs should take into account that potential new access seekers do not have switching costs and that
  - artificially inflated switching costs should not be taken into account
- BEREC comments
  - new access seekers should be taken into account only if they are likely to exist and have significant effect on the market
  - BEREC would welcome additional guidance on how to assess whether switching costs are “artificially inflated”

### Single SMP:

- “Old” SMP Guidelines:
  - Market share > 50%: “very large market shares are [...] evidence of the existence of a dominant position”
  - Market share > 40%: “single dominance concerns normally arise”
  - Market share < 25%: “not likely to enjoy a (single) dominant position”
- Draft Guidelines dropped the 25% and 40% thresholds
- BEREC recommends to keep them
  - Thresholds are based on general competition law
  - Have been confirmed by law and commission guidelines
  - NRAs have referred to these thresholds in their decisions

### Joint SMP:

- BEREC welcomes the update of the guidance on collective dominance

### Some comments

- Draft Guidelines suggest to also consider market outcome criteria
  - E.g. prices, profitability, ARPU-levels, etc.
- BEREC opinion: not all factors are applicable in all cases, e.g. if market is already regulated (but useful if market is not regulated)
- Draft Guidelines refer to “common policy” and “same strategy”
- BEREC opinion: Coordinated policy might have different forms (e.g. product differentiation or geographical market allocation)
- Also, retaliation does not necessarily require “identical actions from others” as suggested in the current draft