Flowchart 1:

Historical Example

Question: when does a regulator regulate?

- Based on EU precedents: https://ec.europa.eu/digital-single-market/news/explanatory-note-accompanying-commission-recommendation-relevant-product-and-service-markets.
- Tables provided for illustration only, to aid those seeking to implement 'SMP regulation'. The actual markets exemplified are not real markets but are shown purely in order to provide an example of how the process may work in practice.
- Application of the rules requires access to evidence both for market definition and market analysis:
    - › consumer surveys; market questionnaires
    - › market data: pricing, market shares, quality of service, patterns of consumers switching between different operators.

Three-Criteria test:

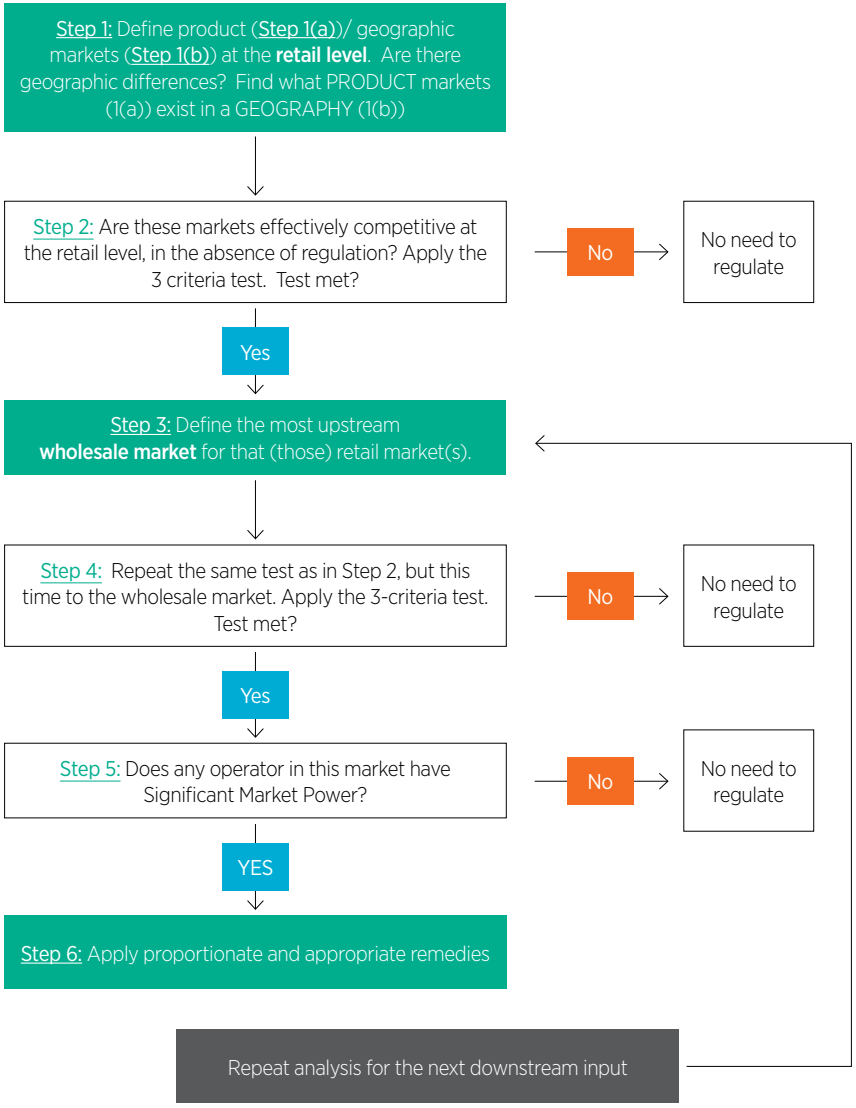
1. The presence of high and non-transitory structural, legal or regulatory barriers to entry in the market.
2. The market structure does not tend towards effective competition within the relevant time horizon (having regard to the state of infrastructure-based and other competition behind the barriers to entry)
3. Competition law alone is insufficient to adequately address the identified market failure(s)

These criteria are applied cumulatively – only if they are all met is a market susceptible to ex ante regulation.

The test applies to overall market characteristics and structure, not to a specific operator (which is the focus of an SMP assessment).

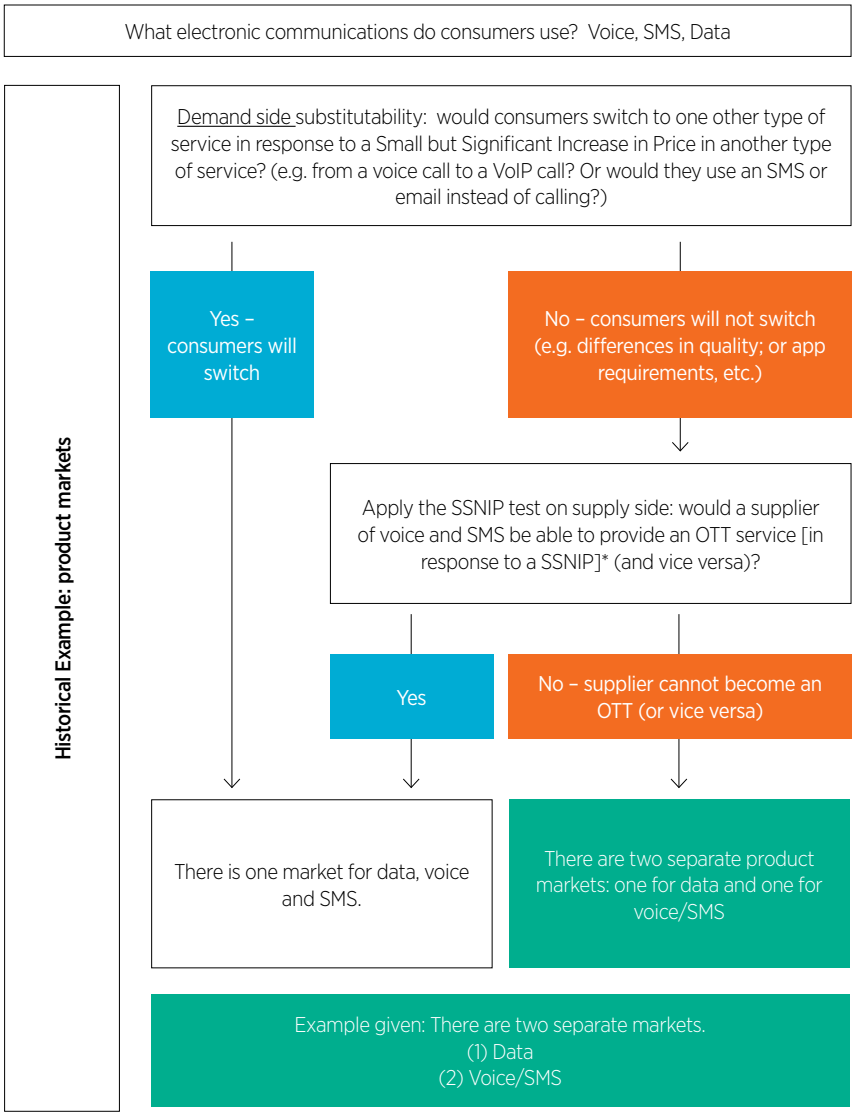
Flowcharts

Overview[1]

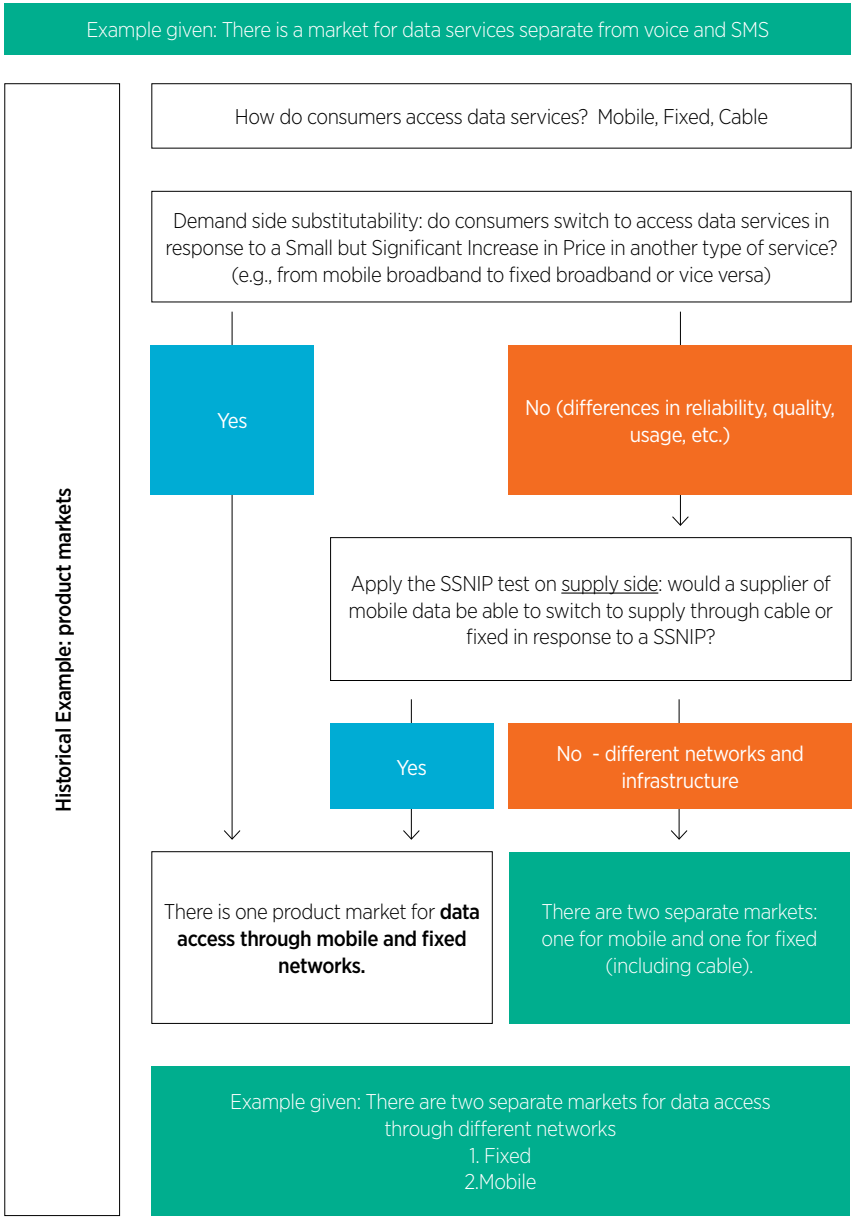


1. COLOUR CODING: In these flowcharts:
   - **Pale blue** denotes a 'yes answer' and in some cases the consequences that derive from such an answer
   - **Orange** denotes a 'no answer' and in some cases the consequences that derive from such an answer
   - **Grey** denotes general information on the way in which SMP analysis is carried out
   - **Green** denotes the choice of an example / the conclusion reached: as the analysis is carried out, we focus on one market at the time and we assume that the analysis has shown that: (i) there is a specific market definition; and (ii) after the analysis, the market as defined requires SMP regulation.

Step 1(a) – Define Product Market at retail level:



Step 1(a) – Define Product Market at retail level (cont'd):



Step 1(a) – Define Product Market at retail level (cont'd):

Example given: Focus on the market for **data access through a fixed location**

Historical Example - Geographic markets

Are there differences depending on type of consumers?
E.g.: Enterprise v Residential?

Demand side substitutability: do enterprise consumers switch to enterprise data services in response to a Small but Significant Increase in Price in residential services (and vice versa)?

Yes

No - enterprises need bandwidth, resilient services, etc.

Apply the SSNIP test on supply side: would a supplier to a residential consumer be able to provide services to an enterprise in response to a SSNIP?

Yes

No

There is one market for data access through a fixed location to all customers.

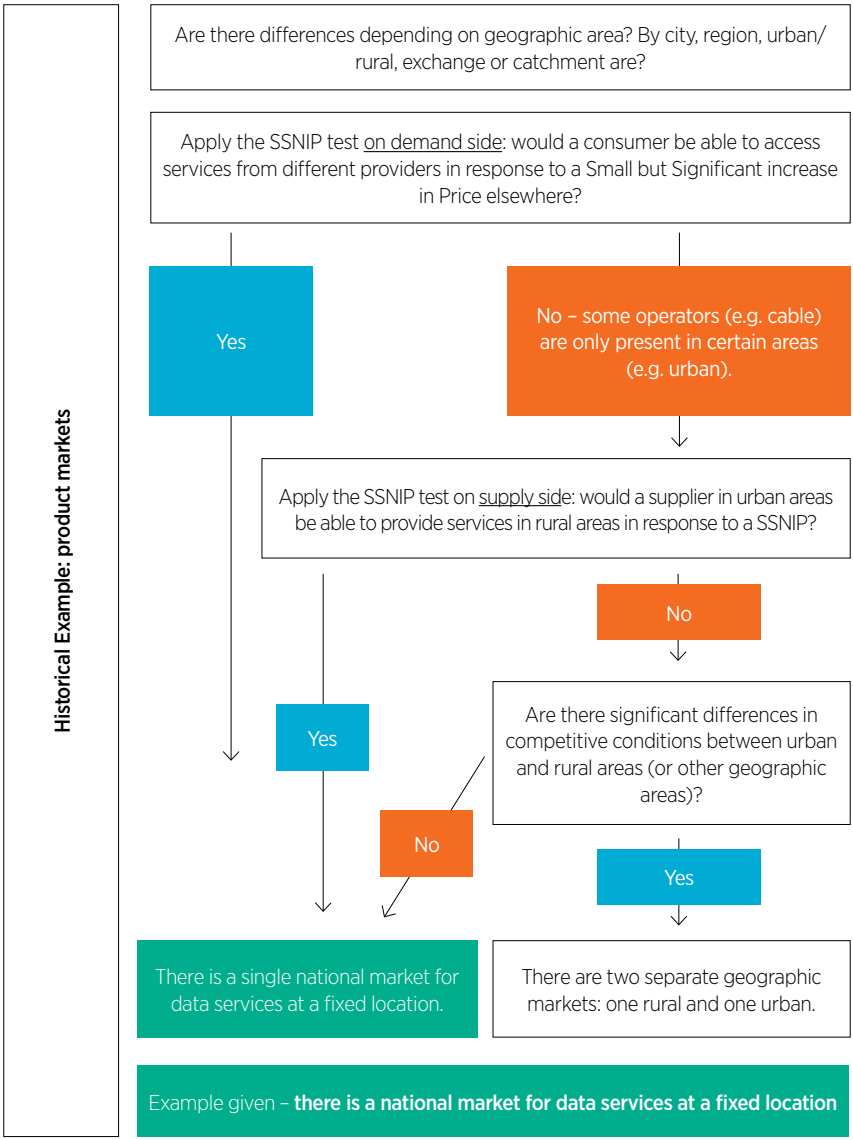
There are two separate markets: one for residential fixed data access customers and one for enterprise customers

Other Questions – *Repeat the same exercise*
Are there other differences by customer (pre-paid and post-paid, high value and low value)?
Are there differences in technology (2G, 3G and 4G for mobile, standard and superfast for fixed)?

Example given – there is one product market for **data access through a fixed location** (includes all types of customers and technologies).

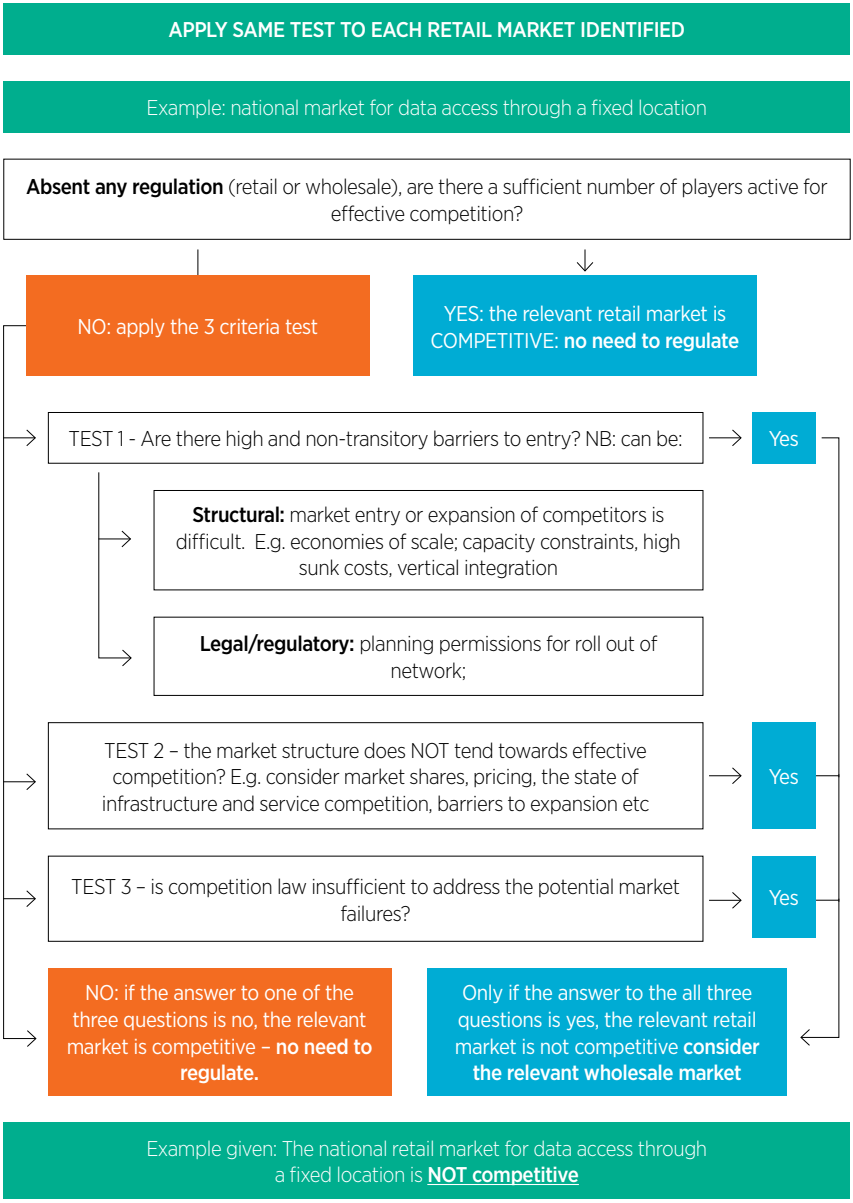
Step 1(b) – Define Geographic Market at retail level:

Example given – there is one product market for data access through a fixed location.



Example given – **there is a national market for data services at a fixed location**

Step 2 – Is it necessary to regulate? Apply 3-criteria test /retail level



Step 1 & 2 Recap (for illustration): historically in member States of the EU:

Historical Example EU – for illustration

In EUROPE traditionally **A RETAIL MARKET** is defined as:

DATA ACCESS AT A FIXED LOCATION (STEP 1)

Applying the three criteria test **(STEP 2)**

Absent regulation, there is not a sufficient number of competitors as typically there is one nation-wide fixed network and no alternative infrastructures (NB: this may be changing with the development of cable and the advent of new alternative infrastructures in certain geographic areas)

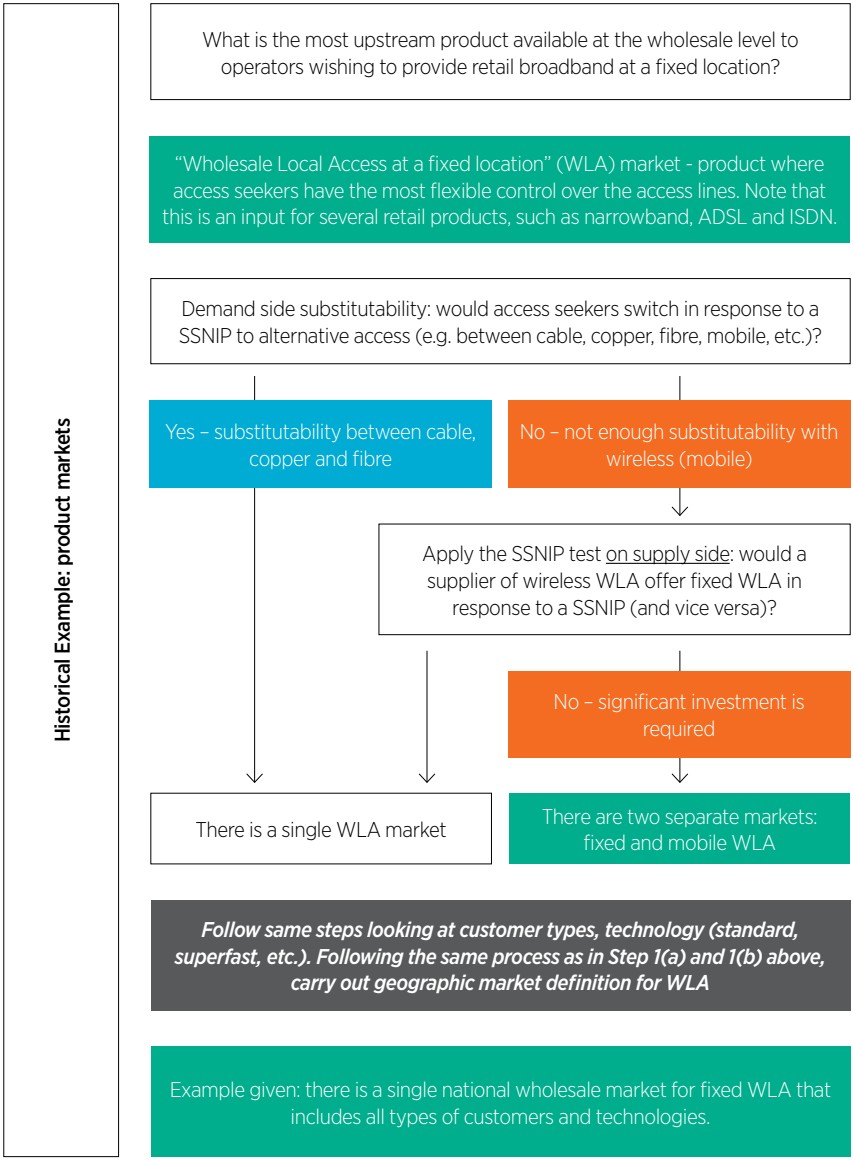
TEST 1: there are high and non-transitory barriers to entry;

TEST 2: the market structure does not tend towards effective competition in the timeframe considered, in the light of the investment required to replicate the fixed infrastructure

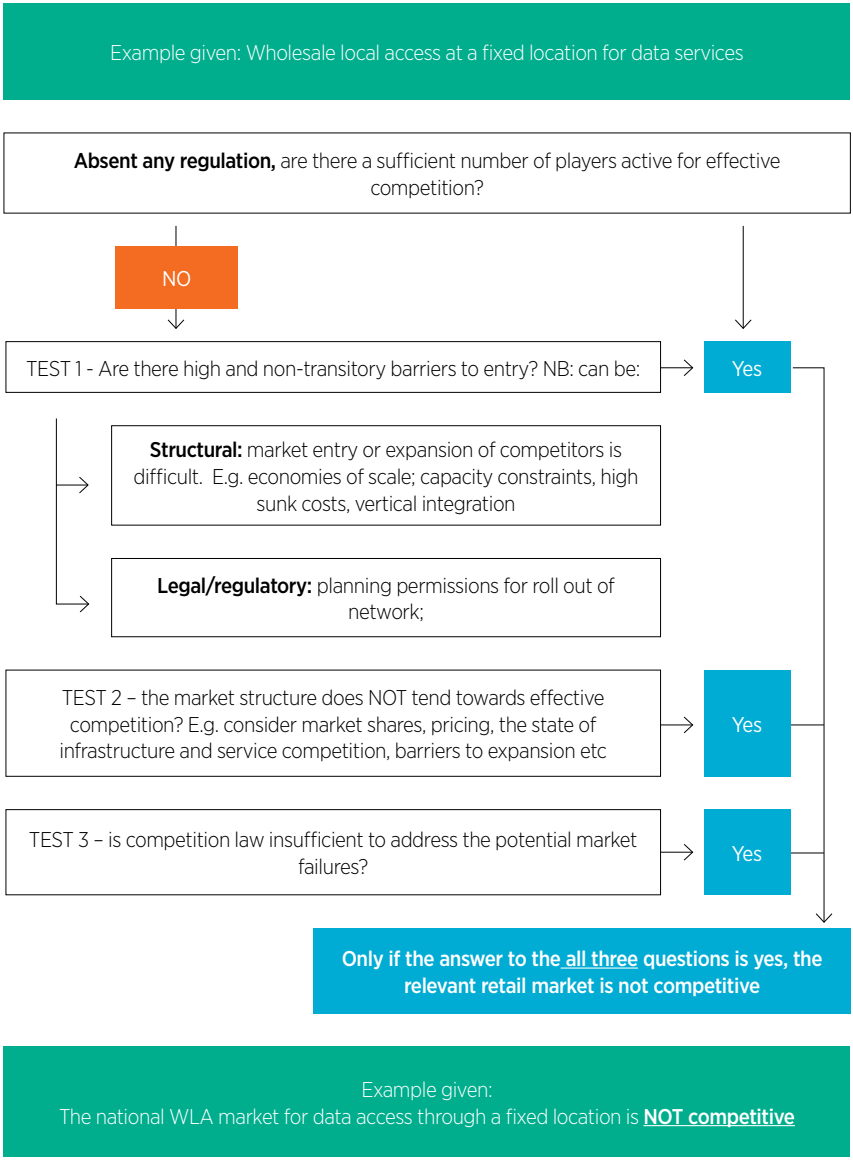
TEST 3: it is considered that competition law is not sufficient given the need to prove a likelihood of consumer harm and in the light of potentially complex technical remedies to be imposed (e.g. local loop unbundling)

CONCLUSION: in the EU, applying the tests, the retail market for data access at a fixed location is not competitive, absent regulation.

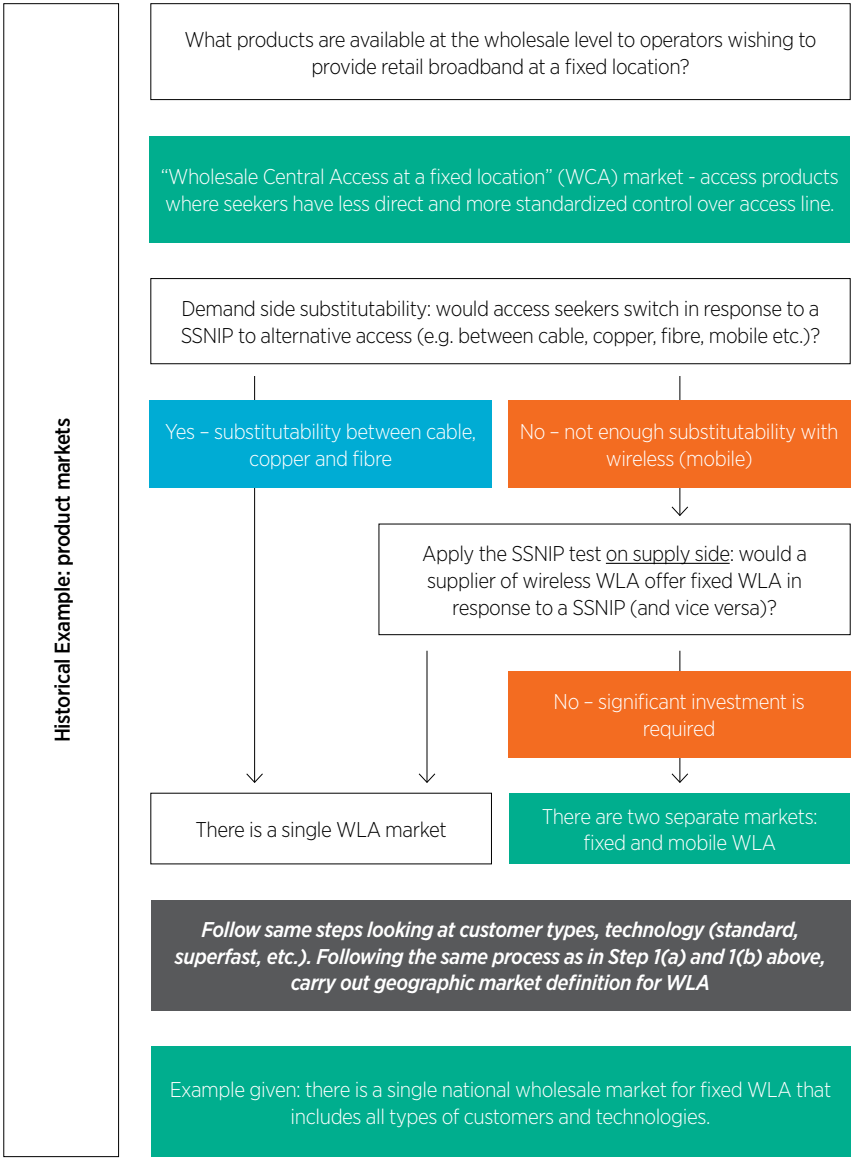
Step 3: Define the most upstream wholesale market(s) for those retail markets that are "not competitive" – repeat the exercise



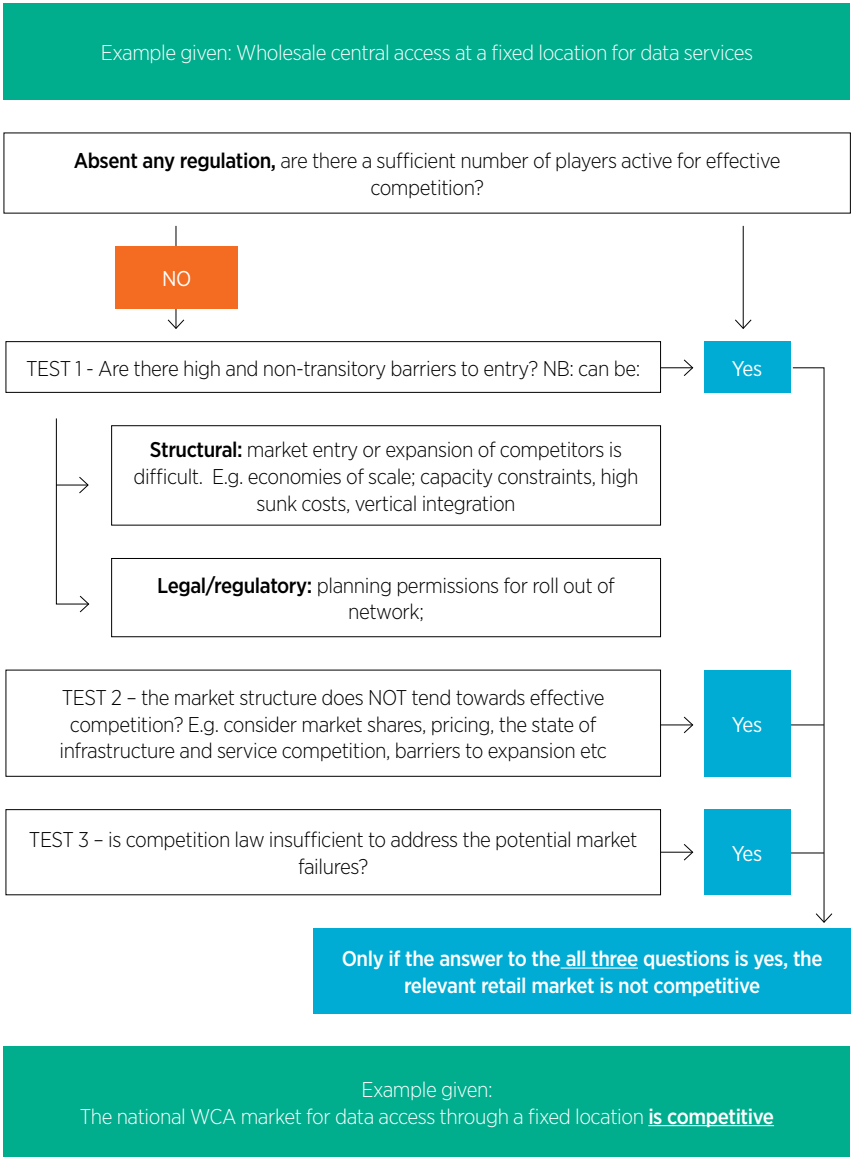
Step 4 – Is it necessary to regulate? Apply 3-criteria test / wholesale level



Repeat Step 3: Define the next downstream market(s) for those retail markets that are "not competitive" – repeat the exercise



Step 4 – Is it necessary to regulate? Apply 3-criteria test / wholesale level



Step 5: Does any operator have Significant Market Power in markets that are not competitive?

Historical Example EU – for illustration

National WLA market for fixed data access has been deemed to be uncompetitive – does an operator have Significant Market Power (SMP)?

Factors to take into account

Market shares (existing and trend) - operators with high and stable (or increasing) market shares – above 50% - are likely to have a dominant position.

Excessive pricing and profitability - operators that generate (unregulated) returns that are consistently above cost of capital are unlikely to be constrained by competition.

Control of infrastructure not easily duplicated – can alternative operators readily develop their own networks to provide fixed WLA?

Barriers to entry and expansion – low entry barriers make it more likely that potential competition will prevent operators from exercising market power. Growth in market demand is sometimes a key factor (entry less likely in declining **markets).**

Product diversification –competitive entry into the supply of a product (or service) can be more difficult if a dominant firm can provide with it a portfolio of related products

Countervailing buyer power – purchasers of WLA may be able to curtail the exercise of market power, for example if they purchase large volumes and can make a credible threat to switch supplier (or self-supply).

These might point towards different conclusions (e.g. low market shares but significant barriers to entry and excessive profits).

Assessment should be based on **overall evidence** and also take a **forward-looking** approach.

Example given: an operator has SMP in the provision of WLA for data at a fixed location

Step 6: Design appropriate and proportionate remedies