

PROACTIVE REGULATORY INTERVENTION IN EU COMMUNICATIONS SECTOR AND ITS FORESEEABLE FUTURE

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Abstract

Purpose – to review and provide insights on the issues concerning *ex ante* regulatory approach in EU telecommunications (hereinafter – electronic communications) industry, identify and emphasise benefits, main challenges and further regulatory prospective.

Design/methodology/approach – based on current regulatory framework and analysis of academic literature, author discusses problematic issues related to the needs and further perspectives of proactive regulatory regime in EU electronic communications sector.

Findings – the author reviews special qualities for different regulatory regimes (*ex ante*, *ex post*) and examines them in the context of sharp developments of the industry and EU regulatory policy.

Research limitations/implications –the analysis aims to convey the main understanding on the regulatory specifics of the communications industry, the main features, distinguishing communications industry from the others and foreseeable regulatory perspectives

Practical implications – the core aspect of the paper is to evaluate current regulatory approach of the EU electronic communications sector and assess potential regulatory approaches in the context of making self-sustaining pro-competitive market structure, technological development.

Originality/Value – the paper highlights some significant changes between two regulatory approaches in the light of specific features in EU electronic communications. Author provides his insights on the status and perspectives on application for both regulatory methods. Apparently, these issues have so far been subjected too little academic analysis. As shown in this paper, regulatory policy can have the essential impact on the activities taken by other players. The decision to give an even bigger role to competition rules, do not mean to eliminate sector specifics itself. With this in mind, EU legislators are not able to eliminate proactive regulatory control, thus reducing *ex ante* rules progressively as competition in the market develops and more investments are promoted. However, sectors still requires for at least a minimum level of legislation, retaining the need of both regulatory regimes at least until sector specific qualities will completely abolish need for *ex ante* regulatory intervention.

Keywords: SMP, *ex ante*, *ex post*, proactive control, sector specific features, telecommunications.

Research type: general review, viewpoint.

1. Introduction

Over the last two decades European regulation for electronic communications suffered from various legal forms of legislative regulation. There are different arguments if such regulation goes in the right direction and should go further or not. On the one hand, electronic communications networks are the backbone of information society. The EU's policy framework improves competition, drives innovation, and boosts consumer rights within the European single market (Official EU website, 2013). On the other hand, EU is criticized for heavy bureaucracy and slow decision-making processes. However, after the Single Market was established European telecommunications sector has moved from a tradition of monopolies to privatization and competition.

The main legal forms to promote changes in the market, different legislative instruments were necessary (Regulations, Directives, Decisions, Recommendations, Guidelines, etc.). Moreover, the main legislative packages were designated to liberalise, harmonize national legislations thus increasing competition in the national markets at first and in EU level later on.

Over the last twenty years, EU actions for electronic communications have led to a falling call costs, higher consumer choice and higher standards of the service. That was mainly done by a regulatory framework for electronic communications and as a consequence - promoted competition and consumer rights. Most of these improvements were made by the help of EU legislation and the main approach was *ex ante* regulation.

Critics of the latter view argue that legal obligations led EU legislation to over-regulation and increased cost of regulatory procedures, thus warrant *ex ante* regulation making ordinary competition law insufficient to completely customise neither Significant Market Power (hereinafter SMP), nor other unique features. The main reason for the current application of these both regulatory methods is sectors specific features which are not common in the other sectors.

This paper provides overview of proactive (*ex ante*) and *ex post* regulatory approaches, highlights the interaction between proactive regulatory provisions and EU competition law, discusses current stage and foreseeable direction of the market regulation. The constant shift in approach remains controversial not only because of the change EU regulatory policy, but also because of the communications dynamical nature which leaves no space for application of pure competition law.

This brief analysis emphasizes the linkage between corresponding balance of proactive legal-regulatory impact and self regulation based measures. Indeed, times when the behaviour was shaped exclusively by the proactive regulatory measures can hardly be reflected in the current events. On the other hand, having no governmental power to shape the behaviour and enforce it leaves place for abusive activities of market players. To add, dynamics of technology affects the character of regulatory policy as well, making *ex post* approach insufficient to be the sole method. Nonetheless, the future of electronic communications regulation depends on the ability for lawmakers to embrace a

new model of regulation that uses different tools from the self-regulation led by *ex post* measures and traditional model (statutory regulation).

This paper does not tend to criticise none of the regulatory approaches; rather it aims to illustrate the current tension between *ex ante* and *ex post* regulatory approaches in the sector, the need for balanced solutions to reach behavioural effects on current events and to look further by indicating the potential regulatory regime in the years to come. The emphasis is given to specific features as a dominant source for proactive control.

The objective of this paper is to provide insights on why telecommunications sectors still needs to be regulated and what reasons raised regulatory demands for *ex post* based measures. With this point of departure, competition rules related measures as a source on behavioural controller is given relatively modest attention in the paper.

2. Specific qualities and possible regulatory regimes

2.1 A description of the specific qualities

The electronic communications industry perhaps is the one of the most dynamic segments among those in the EU. One of the main objectives of sector-specific regulation is to ensure an evolution to a self-sustaining pro-competitive market structure in which the firms behave in a competitive manner so that benefits from competition, in terms of lower subject to sector specific regulation (Bourreau and Doğan, 2001).

The current rules which govern the telecoms sector in the EU were agreed in 2002. The European Parliament and the Council of the EU, after two years of discussions, adopted a revised regulatory framework which entered in force on 18 December 2009 (Official EU website). This framework was named in jargon “Telecommunications Package”.¹ The need for such legislation was caused by sector-specific qualities which are not common in other sectors or industries. To disclose specifics of the communications industry, it is truly important to understand what are the main features distinguishing communications industry from the others.

Indeed, unlike the other sectors, some undertakings in electronic communications, in particular, telecommunications sector still enjoys a position of economic strength, thus affording the power to behave to an appreciable extent independently of its competitors, customers and ultimately consumers (Bavasso, 2003). Such economic strength is called Significant Market Power (hereinafter – SMP). According to the concept of previous legislation, it was considered that undertakings (companies) having more than 25% market share are likely have a SMP (dominant position). Pursuant to the current Framework Directive (Recital 25), concept of SMP is redefined and based on the concept of ‘*dominant position*’ developed in general competition law. To add, undertakings with

¹ New regulatory framework is consisted of Framework Directive, Authorisation, Access, Universal Service, Privacy and Electronic Communications, Better lawmaking and Citizens rights Directives, also BEREC Regulation and Radio spectrum Decision.

the *dominant position* will always have *SMP*, but not necessarily *vice versa*. Undertakings having *SMP* are not in a position to abuse their market power to restrict or to distort competition in itself, as this is a matter of Competition authorities to investigate. In other words, existence of *SMP* does not mean that there is no competition, though it may indicate that competition may not be effective.

As it was indicated above, the current concept of *SMP* is based on competition law methodology. This means that undertakings (companies) with more than 40% market share are in most cases to be considered to have a Significant Market Power (dominant position). However, sole market shares do not presume *SMP*. It must be also analysed the other economic characteristics of the markets to determine *SMP*, but market shapers is the most important one. Several Moreover, Commission Recommendation of 2007 aims to ensure that the legal framework keeps up with the changing conditions in the market in order to identify market susceptible to *ex ante* regulation, while Commission Guidelines (2002) identify a range of factors to consider in determining whether the entity has *SMP*.

Indeed, the difference between 2003 and 2007 Recommendations confirms EU policy trends: almost all retail markets and many wholesale markets were deregulated during that time, thus leaving *ex ante* regulation only in the markets where no effective competition was and where competition law remedies were not sufficient to tackle the sector-specific problem. Noticeable that national regulatory authorities (hereinafter *NRA*) might be in position to decide that *ex ante* regulation is still needed in deregulated market. However, *ex-ante* regulation can only be imposed by *NRA*s in certain circumstances. Recommendation provides three criteria assessment to apply to identify markets that are susceptible to *ex ante* regulation (Commission Recommendation, 2007).

The first criterion, as a sector’s specific quality, is high and non-transitory barriers to entry. The second criterion helps to assess undertaking’s increase of market shares in recent years, costs and time consumption and investments needed to enter the market, or increase of the service price, etc.). While the third criterion helps to evaluate *SMP* using the same principles as under the competition law. And according to the European Court of Justice (Case 27/76, *United Brands v Commission*, 1976), an undertaking is unlikely to be determined as a dominant if it does not have *SMP*. Having no proved and justified all of these three criteria *NAR*’s cannot determine undertaking as having *SMP* in the particular market.

2.2 Regulatory regimes: definitions and features

Indeed, Framework Directive directly determine objective to remove sector specific regulation, reducing *ex ante* rules adequately to competition development in the market (Commission Recommendation, 2007).

While being criticised, proactive measures, as an effective regulator, was never rejected. Although technology based nature requires extremely efficient control mechanisms because of their dynamic nature. *Ex ante* is so called proactive regulatory approach based on sector specific regulation. Basically it is imposition of regulation to prevent anticompetitive behaviour before it takes place. This approach can successfully

serve as a transformer of legal obligations with capability to shape the behaviour of market players having SMP, although is capable to interrupt competitions between the market players in the markets, which are fully competitive. This leads to the fact that *ex ante* regulation is only imposed within the EU if the market is found effectively to be uncompetitive following a market analysis (Barendse, 2007). To add, *ex ante* regulation is limited to the entities that have SMP and have potential barriers to fair competition in the market to begin. The need to assess whether the overall benefits of regulation outweigh the costs of regulation is also necessary.

Nevertheless, public interests, harmonisation measures in Single Market and competition based approach reshaped the scope of electronic communications control during the last decade. Co-regulative power was the integral part of this sector, but nowadays command and control legal-regulatory controls cannot be expected to be effective if the environment reacts in ways not consistent with expected results. Thus it raised the need to reach the interaction to balance the weight of power. Some stakeholders and scholars argue that markets in the Recommendation should not be warrant by proactive regulation and regulation shall be withdrawn at all. While the others argue that the Commission should gear all its interventions towards the long-term welfare of the citizens (Streel, 2008).

It is to say that less proactive constrains for undertakings does not necessarily mean less regulation as such. In this respect European Commission recently announced a tender for the study to assess the *ex ante* regulation in electronic communications markets, reflecting the scale and importance of this issue.¹

Ex post is the regulatory regime mainly based on principles governed by competition rules, based on traditional regulation of historical events. It is to say, *ex post* regulation refers to the opposite situation than *ex ante*, where no explicit market intervention is performed. Furthermore, it follows EU regulatory framework main objective - to phase out sector-specific regulation. Nevertheless, the Regulatory Framework for Telecommunications, in force since 2003, introduced a new regulatory approach, basing the sector-specific *ex ante* regulation on the principles of competition law (Szarka, 2003). Furthermore, in the context of EU objectives *ex post* regulatory approach is the dominant and is expected to take the sole position in electronic communications sector. By implementing *ex post* rules it is aimed to foster innovations, further technological development, and welfare of consumers and freedom of conducting business.

Anyway, *ex ante* regulatory measures don't eliminate the scope for *ex post* competition policy and contrary. Basically, both measures currently operate together in the electronic communications sector. Apparently, the current need of both regulatory regimes requires for a minimum level of legislation and effective promotion of competitions at the same time.

¹ The undergoing study *Future electronic communications markets subject to ex-ante regulation (Recommendation on relevant markets)*. SMART 2012/0007.

3. Challenges ahead

Beginning in 1980s and continuing into the 1990s, the telecommunications industry in almost all countries experienced privatization. The privatization of these of these previously large state-owned carriers involved, however, serious problems of remaining monopoly power or market failure (Walden, 2009). However, in the past 10 years new players have challenged incumbent operators, and markets for mobile services have grown tremendously. The development of internet and IP (internet protocol) – based services has the potential to unsettle many established positions in the telecommunications industry and the ICT sector at large (Huigen and Cave, 2008).

Current progress, steep increasing of use of the internet, current stage of innovations, evolving development of technology and technological impact in economic, cultural or even daily life, makes us hopefully believe that great challenges are not climbed over. However, it makes elimination of sector specific regulation in the foreseeable future more challenging.

On the other hand, increase of regulation does not match the de-regulatory rhetoric of the public authorities and sometimes disturb changes. As the electronic communications develop so fast, regulatory policy must satisfy expectations policy predictability for the electronic communications industry. That evidently will promote even greater investments and stimulate competition the market. Doubtless, the major services in foreseeable future will move towards the internet (i.e. voice over IP and etc.), eventually leading to the abolishment of sector specific qualities thus applying mainly the ordinary competition law and basically rolling back of *ex ante* regulatory approach, but in any event, this will take at least a decade to transform the whole industry.

Conclusions

All things considered, it is clear that electronic communications have gone through many phases of development and regulation efforts. From a policy perspective it means that any policy adjustments in the regulatory context cannot solely be debated as one-dimensional changes. Even though EU legislation aims to remove sector specific regulation, it can be only done progressively as competition in the market develops.

However, there are reasonable thoughts in years to come to witness major on-going developments in this field. To add, current progress, steep growth of the use of the internet, current stage of innovations, evolving development of technology and its impact on daily life and business activities, require for at least a minimum level of legislation (or its amendments), retaining the need of both regulatory regimes until sector specific qualities will completely abolish need for *ex ante* regulatory intervention. On the other hand, hands-off approach based on confidence in market mechanisms has already taken a place in current EU legislation and competition policy based *ex post* approach gains more weight in current EU legislation, thus slightly eliminating features which made electronic communications industry specific.

Hopingly EU policy will not stop evolving, thus encouraging further evolution of innovations, development of EU consumer rights protection policies and the rules concerning privacy and data protection, at the same time leaving enough space for the main EU objective in electronic communication field – deregulate the market by adopting *ex post* regulatory approach, based on self-regulation idea.

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