

Regulation and Competition

EU Telecoms Reform: Towards a Unique and Competitive Market

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"I just want to make the point that the Commission has always acted to defend competition and to reinforce a single telecoms market" ¹

Last December, the EU's regulatory framework for electronic communications (adopted in 2002) was amended and reformed by two new directives and one new regulation ². In Parliament, 510 out of 574 members voted in favour. In the Council, all Member States except Netherlands (abstention) voted in favour. Member States should transpose the new package into national laws before 25th May 2011.

¹ Viviane Reding, 28.10.2010, Speech/10/13, First meeting of the board of regulators of BEREC and the Management Committee of the Office.

² Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services; Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws; Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office.

The reform took nearly two years to be adopted. It clearly announces the completion of the transition from the old regulatory framework of 1998 to the new 2002 framework in all Member States. Hence, the whole sector undoubtedly switches from competitor-oriented regulation (creating market rules favourable to the incomers) to consumer-oriented regulation (creating the conditions of effective competition all over Europe). In this context, Regulation (EC) No 2887/2000 on unbundled access to the local loop becomes unnecessary and has been logically repealed (art. 4 of directive 2009/140/EC).

This reform enforces a new stage of regulation by finalizing the internal market for electronic communications by successfully and consistently applying the framework throughout Europe (1st section), by progressively releasing *ex-ante* sector specific regulation and leaving the market to competition law only (2nd section), and by enhancing consumer rights (3rd section).

Finalizing the European market for electronic communications

Enforcing a true European market for electronic communications continues to be a central issue. The Reform changes the institutional design of regulation in three ways.

Firstly, it introduces the Body of European Regulators for Electronic Communications (BEREC) and the Office. Recital 14 of Regulation (EC) No 1211/2009 states that the goal pursued is in accordance with the principle of subsidiarity (intensified cooperation and coordination of NRAs³ is better achieved at the Community level) and proportionality (the Regulation does not go beyond what is necessary). BEREC institutionalizes rather than replaces the ERG (European Regulators Group) created in 2002. However, it is still not a Community agency and neither does it have legal responsibility. It appears as an exclusive forum for cooperation: among NRAs, between NRAs and the Commission. BEREC will continue the work of the ERG and ensure a consistent application of the EU regulatory framework for electronic communications throughout Europe. It will for instance ensure the development and the dissemination among NRAs of best practices of regulation. BEREC will also serve as a body of reflection, expertise and advice for the European Parliament, the Council and the

³ National Regulatory Authorities.

Commission for electronic commission issues. BEREC could give advice on request or on its own initiative.

The Office is a Community body with legal personality in the sense of article 185 of Council Regulation No 1605/2002. It will provide BEREC with professional and administrative support. It has legal, administrative and financial autonomy.

The tasks of BEREC are fully described in article 3 of Regulation (EC) No 1211/2009. BEREC will notably enter the new procedure of article 7 of the amended Framework Directive. It will deliver opinions on draft measures of NRAs concerning market definitions, the designation of undertakings with significant market power and the imposition of remedies. This new article 7 procedure will give the European Commission the power to scrutinize more closely the regulatory remedies proposed by NRAs. If the Commission considers that a draft measure would create a barrier to the single market (expression of serious doubts), it could issue a recommendation requiring the NRA to amend or withdraw the draft measure.

Secondly, the new Telecom Reform paves the way to more independence of the NRAs. This reinforced independence of the NRAs will help the Commission to ensure a more consistent application of the regulatory framework and more predictability of NRAs' actions throughout Europe. NRAs should be protected by national laws against political pressure or outside actions. The head or the members of the collegiate body should be protected against unfair or political dismissal. In particular, NRAs should have their own budget, high enough to recruit sufficient qualified staff.

Finally, the Reform estimates that current spectrum management, based on administrative and central decisions, is not flexible enough to tackle the rapid development of new technologies. Recital 33 of Directive 2009/140/EC argues: "National borders are increasingly irrelevant in determining radio spectrum use". In this sense, some opportunities of economies of scale are missed, thereby annihilating potential business opportunities. The Reform gives some power to the Commission to promote the development of cross-border services, a first step in the functioning of the internal market. Article 8a of the amended Framework Directive imposes cooperation between NRAs and the Commission for the strategic planning, the coordination and the harmonisation of the use of radio spectrum. For instance, Member States should support "the harmonisation of specific numbers or numbering ranges within the Community where it promotes both the functioning of the internal market and the development of pan-European services. The

Commission may take appropriate technical implementing measures on this matter" (Art. 8b§4, amended Framework Directive).

Competition enforcement: the supply side

The economic belief of the Reform lies in Recitals (23) and (53) of the Directive 2009/140/EC:

"(23) A competitive market provides users with a wide choice of content, applications and services" [...] "(53) Both efficient investment and competition should be encouraged in tandem, in order to increase economic growth, innovation and consumer choice".

This competitive market will be implemented by net neutrality, investments in NGA and functional separation. The Reform imposes net neutrality as a regulatory principle⁴. This principle relies on convergence between telecom and media: this convergence is already a reality in the market but it shows an accelerated pace of development in last few years (especially in broadband access and mobile Internet). Convergence will provide the European consumers with new ubiquitous services and with the freedom to choose the best technology to fulfil its needs.

Convergence will also develop new business opportunities and economic space for innovative firms in the unique market. Convergence together with net neutrality will enforce competition between access infrastructures (inter-modal competition, e.g. between fixed and mobile). Of course, this calls for more harmonization and convergence between fixed and mobile termination rates, so as to ensure fair competition between mobile networks and fixed networks (optical fiber and wireless technology).

Encouraging investment and competition in Next Generation Access (NGA) is a cornerstone of the Reform. NGA will offer innovation opportunities for firms and new services for consumers. The Reform will establish legal certainty for return on investment in NGA and hence preserve incentives to invest. The Reform clearly affirms that a fair return on investment should be taken into account while regulating NGA networks (especially for the sharing of network elements like ducts, masts, manholes, cabinets, etc.): this will give an appropriate reward of risks for investors.

⁴ See Commission Declaration on net neutrality, annexed on Directive 2009/140/EC.

Moreover, the Reform envisages the issue of side-competition. Side-competition refers to a particular form of competition where dominant firms (incumbents) use their power to enter adjacent/lateral markets. This phenomenon is the core of convergence but it can create unfair competitive pressure and competition distortions. The reform provides NRAs with the power to "impose remedies aimed at preventing leverage of significant market power from one market to another closely related market".

The Reform introduces functional separation as a mean to solve competition problems. NRA will have the power to impose functional separation on network operators. While separating communication networks from services branches, NRA will be able to observe internal prices and the existence of margin squeeze. This remedy looks like an atomic weapon and should be applied with parsimony and wisdom: as a last-resort remedy, it should be used as a credible threat.

Competition enforcement: the demand side

Consumer protection will be ensured by creating new rights, better information and by protecting privacy. This part of the Reform aims at taking action on the demand-side of the market. Competition can be enforced by removing obstacles to demand fluidity and increasing demand-side competitive pressure.

The Reform aims at encouraging broadband access for all European consumers and overcoming the digital divide. Member States will be allowed to expand universal service obligations beyond narrow-band Internet (Directive 2009/136/EC). It will not enforce a specific bandwidth but will look for "data rates that are sufficient to permit functional Internet access, taking into account prevailing technologies used by the majority of subscribers and technological feasibility" (art. 4 of the amended Universal Service Directive).

Recital 47 of Directive 2009/136/EC states:

"In order to take full advantage of the competitive environment, consumers should be able to make informed choices and to change providers when it is in their interest. It is essential to ensure that they can do so without being hindered by legal, technical or practical obstacles, including contractual conditions, procedures, charges and so on".

Among others, the Reform imposes conditions to facilitate providers' switching, an initial commitment not exceeding 24 months, a working day for changing fixed or mobile operator while keeping the number (Art. 30 of the amended Universal Service Directive), better information concerning contracts with network and services operators (Art. 20 of the amended Universal Service Directive). Moreover, Article 21 of the amended Universal Service Directive clearly describes the conditions for transparency and publication of information by the network and services operators: this will provide consumers with the ability to compare accurately the offers of diverse operators.

Finally, the Reform takes actions for consumers' protection. Article 1(1) of the amended Directive on privacy and electronic communications states:

"This Directives provides for the harmonisation of the national provisions required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy and confidentiality, with respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and of electronic communication equipment and services in the Community".

For instance, Article 13 of the amended Directive on privacy and electronic communication imposes conditions on unsolicited communications (notably prior consent of consumers, the prohibition of sending e-mails which disguise or conceal the identity of the sender for marketing purposes, etc.).

Final considerations

The Telecom Reform Package really implements a new stage of regulation in Europe. It imposes a new institutional architecture by clearly enforcing a European-centred organization of the regulation process: reinforced independence of ARNs, creation of the BEREC and the Office, new article 7 procedure. However, it still relies heavily on the belief that competition at the national level will guaranty competition at the European level. The whole is not necessarily the sum of the parts: a competitive unique market is not the sum of competitive national markets. The unique market will probably be imposed more efficiently by the development of transboundary services (especially in the mobile sector).

The Reform also works indirectly for economic growth in the European Union by encouraging the roll-out of new infrastructures (NGA). This is

essential because it will create new opportunities for firms and for consumers. However, the deployment of ubiquitous services has a dark side: consumer's protection, privacy and copyrights versus piracy. The balance between these issues is not straightforward and requires more debates and political commitments. As said by Viviane Reding:

"The reality of convergence requires to take a hard look at the still too fragmented copyright system we have today in Europe and ask ourselves whether it is still fit for the purpose in the digital age, or whether it needs to be re-shaped in line with a renewed intellectual property rights strategy".⁵

⁵ Speech/09/551, Convergence in the electronic communications markets : challenges for the EU regulatory policies, CMT's II international meeting: "Regulation in a convergent environment", 23.11.2009, Barcelona.