Discussion paper of the Netherlands Presidency (1-4-2016)

High-Level meeting on telecom, 20 April 2016
Connecting the Internal Market through Modern Regulation

Introduction

Digital infrastructure has become a prerequisite for the performance and competiveness of Europe's economy due to the ongoing process of digitisation. The current regulatory framework for electronic communication networks and services has helped to promote competition, protect end users and also to contribute to an internal market, albeit to a lesser extent, as confirmed by the Commission's public consultation[1]. The review of the framework, on which negotiations are expected to start in autumn, will need to address many developments: rapidly growing demand for high-quality and reliable fixed and wireless connections; converging fixed and mobile services as users expect services to work seamlessly on both networks; changing competitive dynamics of traditional markets due to new services, and new consumer protection challenges due to technical and commercial developments. The revised framework will need to provide room and the right incentives for all these developments, in order to let digital infrastructure adapt to future needs. Reliable, affordable, high-capacity connectivity may be seen as the overarching objective of the revised framework.

The aim of the review is also to further harmonise rules across the EU in order to enhance regulatory certainty and lower costs of cross border operations, thereby contributing to the Digital Single Market. Yet, the revised framework will also need to continue to be flexible enough to deal with different market circumstances and dynamics in the EU. This creates a plea for providing a toolkit of regulatory options to choose from. This tension between harmonisation and flexibility poses a challenge to find the most appropriate balance.

Effective, future-proof, harmonised and flexible: all examples of conditions that need to be met to reach a good and timely result. Conditions that may differ between themes and between member states. The high-level meeting provides an opportunity to explore these, in anticipation of a legislative proposal by the European Commission.

The debate will be organised along three main themes of the review:

1. Access to fixed communication networks
2. Management of spectrum for mobile communication networks
3. Rules for providers of communication services

Below you find for each theme an introduction and questions for discussion.

[1] https://ec.europa.eu/digital-single-market/en/news/summary-report-public-consultation-evaluation-and-review-regulatory-framework-electronic

1. Access regulation: making access obligations suitable for different types of markets

The current framework has largely met its objective of promoting competition and has helped in generating a high level of investment from the private sector in standard broadband and other copper-based telecom services, resulting in greater choice and value for consumers. However, investment has been uneven across the EU and clear gaps have begun to emerge between and within countries in the path to upgrading broadband networks to provide ultrafast speeds and meet increasingly demanding quality parameters. The framework is not yet fit to deal with these problems. As the sector faces an increasing need for infrastructure investments under a more competitive service environment, this calls for a stable and predictable regulatory framework which promotes efficient competition and spurs investment in high-performance infrastructure.

To analyse the need for regulatory reform, three types of market structures can - broadly speaking - be identified in different geographical areas:

1. Areas with currently only one fixed access infrastructure reaching end customers, but where the socio-economic characteristics make the deployment of another network (and therefore infrastructure competition) possible in the future. In these areas, there should be incentives for alternative operators to roll-out their own infrastructure as close as possible to customer premises, in particular if appropriate access to civil engineering and to other non-replicable assets are guaranteed.
2. Areas with one infrastructure operator, and no viable case for infrastructure competition due to high roll-out costs of infrastructure, for example for reasons of population density, geography, or willingness to pay of the local customer base. The main challenge in these – often rural – areas is to provide incentives to upgrade the current infrastructure or invest in new infrastructure. On top of that, lack of choice and high consumer prices may be issues as a result of reduced competition. Competition is too limited to provide an investment incentive, and SMP regulation is unlikely to solve the network upgrade issues in these areas. Yet SMP regulation can guarantee a certain level of service competition.
3. Areas with two or more overlapping but independently owned fixed infrastructures[2] on a regional or national scale, and therefore 'full infrastructure competition', but limited if any prospects for additional end-to-end players. This market structure poses new challenges. In some markets, joint dominance may be difficult to demonstrate, yet retail competition might still be at risk due to a duopoly or tight oligopoly. These developments together with regulatory experience may call for a revision of the current guidelines on the market analysis and assessment of significant market power. On top of that, the new regulatory framework should provide tools to prevent any anti-competitive outcomes. Consolidation of fixed and mobile companies and the rising importance of quad-play offers make this more urgent, as mobile-only operators depend on access to fixed networks to compete. In other areas, successful roll-out of alternative networks has led to a fragmented playing field with several local operators, which call for a more granular assessment of markets.

It seems that NRAs will need to be able to carry out a proper mapping of infrastructures and/or of investment plans in order to undertake an appropriate and more granular regulatory approach, in light of these broad distinctions between areas.

[2] Here we mean fixed infrastructures reaching end customer premises, or interconnection points close to them (for example to the first distribution point).

Questions for discussion:

1. *How can access regulation incentivise investments in very high capacity networks? Should more focus be put on the assessment of retail competition before regulating wholesale markets? Should commercial agreement be taken into account in regulation?*
2. *What is your preferred method to realise high capacity networks in (often rural) areas with one infrastructure operator and no viable case for infrastructure competition? What innovative access regulation models would you find acceptable in promoting investment in these areas?*
3. *Do you consider that a market structure with two or more fixed networks has a risk of causing consumer harm (less investment, higher prices, lack of product innovation and choice) without some form of access regulation? What access regulation model would you consider acceptable in these markets? What are the conditions to be fulfilled (e.g. symmetry, regulatory certainty)? Could access regulation bring risks to investment incentives in such markets?*

2. Spectrum management: improving consistency and predictability of award procedures and license conditions

Wireless is an increasingly important source of connectivity, especially as users increasingly demand connectivity while "on the move", or mainly use a wireless connection to the fixed-line network. Radio spectrum is a vital building block for the deployment of wireless broadband services. The European Commission stated in its Communication on a Digital Single Market Strategy for Europe: "…national spectrum management results in widely varying conditions (e.g. different licence durations, coverage requirements): the absence of consistent EU-wide objectives and criteria for spectrum assignment at national level creates barriers to entry, hinders competition and reduces predictability for investors across Europe. Therefore, the radio spectrum should be managed by Member States under a more harmonised framework that is consistent with the need for a Digital Single Market."

Negotiations on the Telecoms Single Market proposal showed that Member States are reluctant to transfer competences to the EU on spectrum award procedures, and want to maintain room for adapting licence conditions to national circumstances and preferences. Still, there is a genuine call for more predictability, transparency and level playing field in spectrum management that will not go away. How to reconcile these –seemingly opposing-positions and prevent repeating a clash of ideas in negotiations to come?

With regard to spectrum award procedures, the Radio Spectrum Policy Group (RSPG) recently concluded that auctions remain an important tool in the regulatory toolkit for ensuring efficient use of spectrum[3]. There is no single auction design that can be extrapolated across all Member States without the risk of significantly diminishing overall consumer benefit and economic value. However, there are lessons to be learned in designing and conducting awards, and best practices to be shared. Common to these are clarity, simplicity and regulatory certainty. The RSPG thinks a more consistent approach to spectrum award is the optimal way forward. Work on creating consistency and spreading best practices needs to be further developed. A way to share best practices could, for example, be for RSPG members to play a role in the peer review of spectrum award designs. This could become an input into the normal consultation process that Member States will undergo in preparation for a new award.

Predictability of spectrum awards could also be enhanced, for instance by mandating Member States to periodically publish a long term strategy of spectrum policy and awards, containing spectrum bands to be awarded, timing of the award procedure, renewal conditions and duration of the licences.

Besides sharing best practices and enhancing predictability, formal harmonisation of some elements of spectrum management may be acceptable to member states, such as the timing of the allocation of new frequencies for electronic communications.

With regard to license conditions the RSPG concluded: "it is for Member States individually to consider their national circumstances, since there will be legitimate national priorities reflecting the competitive dynamics of a national market, the need for particular coverage and connectivity or encouraging competition, for example with a new entrant". Stakeholders however complain of a lack of predictability and level playing field due to different license conditions that cannot always be automatically linked to differing national circumstances. One way to enhance predictability for market operators could be to set out various

[3] Radio Spectrum Policy Group (RSPG), report on Efficient Awards and Efficient Use of Spectrum, 2015.

mechanisms (each designed for a specific circumstance) in a "toolbox" of policy options, from which spectrum authorities would choose.

Finally, a reflection is worthwhile on the need, if any, to adapt spectrum management to support the future 5G networks and businesses models. As 5G is likely to be deployed in higher frequency bands, more emphasis might be needed on the use of general authorisations and on a more flexible access to, and use of spectrum. For instance by using tools such as leasing and trading of spectrum and different models for spectrum sharing.

Questions for discussion:

1. *What legislative measures to harmonise spectrum management would you find acceptable?*
2. *How can a convergence of spectrum management be made operational? What mix of legislative and non-legislative components would you prefer?*
3. *What should an enhanced role of the RSPG look like?*
4. *Are there specific elements in spectrum management that need to be adapted to support the successful development of 5G networks in Europe?*

3. Sector specific rules for communication services: protecting end user rights and creating a level playing field

The regulatory framework on electronic communications services and networks was designed for traditional electronic communication services (ECS) such as voice telephony and SMS. Since then, over-the-top (OTT) services have emerged, defined by BEREC[4] as "content, a service or an application that is provided to the end user over the open internet". Some of these OTT-services, such as VoIP and instant messaging, are used by end users as substitutes for traditional ECS. OTT services mostly fall outside the scope of the current regulatory framework for electronic networks and services. This raises questions such as to what extent the telecoms sector still needs sector-specific end-user protection rules, how to best protect end-users' rights and to what extent the new services compete on an equal footing (or "level playing field") with traditional ECS. The review of the regulatory framework provides an opportunity to address these concerns. The fundamental challenge is to ensure end user protection and promote innovation and competition in a flexible, proportionate, technology-neutral and future-proof way, while avoiding any unneccesary regulatory burden.

BEREC provides a categorisation of OTT services that is helpful for the debate:

- OTT-0: OTT services that currently qualify as ECS, given the current definition of ECS (for instance OTT voice with outgoing and incoming access to traditional telephony).
- OTT-1: OTT services that do not qualify as ECS but do potentially compete with ECS (for instance VoIP, instant messaging).
- OTT-2: OTT-services that do not qualify as ECS and do not potentially compete with ECS (e-commerce, video and music streaming, search engines, etc.).

Whereas OTT-0 and OTT-1 are communication services, OTT-2 are clearly not. They will remain outside the scope of the regulatory framework but are relevant because they use electronic communication networks and are sometimes bundled with ECS. To complete the picture; providers of OTT-2 and of OTT-1 services also figure in a related debate on digital platforms. As the current definition of ECS leaves room for interpretation, OTT-0 services would benefit from a clearer definition. Yet, the biggest regulatory challenge is posed by the OTT-1 services.

The level playing field means different things to different stakeholders and the discussion often lacks clarity. If there is understanding that similar rules should apply to equivalent services, it is a prerequisite to assess when different services can be considered to be equivalent. In line with BEREC's approach, services of the same type should preferably be subject to broadly the same regulatory obligations, unless there are good reasons for different regulatory treatment of similar services. The range of services to which any specific obligation applies, should be considered in light of the goals of the obligation and the proportionality of that obligation being applied to any specific service or service type. Such a proportionality assessment should not only apply to any extension of the scope but also to the current scope, in light of the evolution of technology, markets and regulation.

As a consequence, the task in the review is two-fold. Firstly, an assessment whether the existing sector-specific rules are still proportionate and fit for purpose. Secondly, an assessment whether their scope of application, in terms of services covered, is appropriate to achieve the objectives of the remaining sectorial provisions. The assessment of these issues should take into account factors like a dynamic and constantly evolving internet value chain, social benefits, economic costs, competition effects and enforceability of regulation. Overlap with existing horizontal rules in the area of consumer or data protection is another and particular factor to reckon with, because sector-specific rules could possibly be withdrawn if end user rights are effectively safeguarded by horizontal rules.

[4] This paragraph strongly builds on BEREC's Report on OTT services, BoR (16) 35, January 2016.

To allow for the aforementioned proportionality assessment and to remain future-proof in a market in transition regulation may also need to be rearranged. Suggestions have been made to fundamentally re-organise rules, for instance by creating a new digital communication services category, containing both traditional telecom services and OTT services. This category could be set apart from internet acces services and electronic communication networks.

Questions for discussion:

1. *Is there a political objective to review sector-specific rules for telecom services beyond a mere technical analysis of overlap with general rules?*
2. *Which rights of users of communication services are insufficiently guaranteed by general rules and therefore need sector-specific rules? Does that also apply in case communication services are supplied by OTT players?*
3. *Is it necessary and feasible to overhaul the structure of rules, for instance by distinguishing between digital communication services (whether provided by telcos or OTTs) and communication networks?*