

Telecom Rules for the Digital Single Market: What should the Commission do?

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Back in the 1990s, the liberalisation of the telecom sector successfully spurred a wave of investments that gradually modernized and expanded network infrastructures, thus unleashing potential for both incumbents and new entrants, while improving consumers' conditions. Today, data traffic and demand for high-quality Internet access are exponential, but average revenues per customer is falling. With the increased pressure on margins and uncertain return on investment for telecom operators, a new regulatory impulse may help reinvent the industry's revenue model. In pursuit of a level playing field, network operators and digital services providers are calling for a new deal in order to make Europe's infrastructure fit for the 'gigabit society'.

Following a series of public consultations (e.g. on the review of the telecoms regulatory framework, online platforms and broadband), the European Commission is scheduled to adopt revised telecoms rules in September 2016. This seminar, chaired by Colin Blackman, tackled the current thinking on reform of the telecoms regulatory framework. While the first panel looked at how regulation could encourage investment at the network infrastructure layer, the second focused on the application layer.

The role of public policy and regulation in spurring investment

Europe is lagging behind other regions in terms of Internet traffic and high-speed broadband penetration, but also in public telecoms investment per capita. In fact, the EU would need massive investment to build broadband networks able to match rival mobile networks in the U.S. and South Korea.

Following this observation, participants engaged in a discussion upon the role of access regulation, and technological oriented policies in designing future fixed and mobile networks. The European Telecom Network Operator (ETNO) association notably called for more infrastructure-based competition, stressing that, over the past few years, the major source of alternative investments came from the cable industry, a sector exempted from current regulatory obligations, which became a major broadband provider across



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internet players, national regulators and European institutions to enable a constructive discussion on how to achieve a successful transition to a balanced and inclusive information society and exploring more broadly the implications of an hyperconnected society. For more information, please click [here](#).

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Europe. Therefore, more technologically neutral rules were seen as a solution to increase competition and revive private investment in next-generation access (NGA) networks.

With capex levels decreasing from EUR 47 to 40 billion from 2005 to 2009, the EU has invested much less than other countries (e.g. the U.S. or Australia) over the same period. However, participants from the alternative operators thought that the current framework's purpose of putting the internal market and users at the center has delivered important outcomes, both in terms of connectivity and coverage (tripled over 10 years, up to 71%). The European Competitive Telecommunication Association (ECTA) notably recalled that competition in the retail market existed thanks to access regulation at the wholesale level. They also stressed the role of alternative operators in driving both the upgrade in connectivity but also in expanding penetration, stressing that connectivity was certainly key but not enough – take-up is equally important. Therefore, access regulation for the wholesale market was seen as necessary to enable competitors to climb the investment ladder and stimulate upgrading to high-speed infrastructure. They notably argued that infrastructure-based competition was not always economically relevant nor advisable, especially in specific geographical areas.

In pursuing the realization of a gigabit society, participants from the telecom industry argued that heavy-handed regulation was currently disincentivising investments. Instead, public policies should aim at fostering co-investment for the roll-out of future proof networks without prescribing a particular technology. They also stressed the need to leave more space to market mechanisms in the negotiation of long-term wholesale commercial agreements, meaning that NRAs would play a greater role in market oversight instead of strict ex-ante setting of terms and conditions. Similarly, they called for more price flexibility for investors, including value-based pricing, by removing obligations of cost orientation from the NRA's toolbox. On the other hand, alternative competitors saw a risk in giving more flexibility to incumbents, arguing that given their current significant market power across Europe, this would result in leveraging their dominance over many markets.

A level playing field for next generation networks and communications?

While consumers still mix and match fixed, mobile and OTT communication services, evidence nonetheless suggest that, for instance in Germany, landline phones are less and less used, while the number of minutes spent through mobile networks has been stagnating in recent years. SMS messaging has also plummeted, while data volumes in both fixed and mobile networks are exploding.

It was argued that Internet companies, far from free riding, stimulate demand for both mobile Internet access and devices, which also opens up new business potential for telecommunications providers. Regarding the alleged regulatory asymmetries, from the Internet companies' perspective, it was argued that extending regulation to next generation communications would be highly detrimental for European innovation and the blooming app economy. Rather, *ex ante* regulation should be narrowed down to network access bottlenecks. They also stressed the complementarity between network access providers and OTT service providers arguing that content and applications providers were increasingly investing in networks, facilities and equipment, therefore driving up demand for ubiquitous data access and better connectivity (e.g. Google Fiber,

Microsoft and Facebook investing in transatlantic fibre links, increased R&D on connectivity).

The legal framework has not matched the speed of technological changes. Some participants from the telecom sector saw the problem rooted in the definition of electronic communication services in legislation, conceived as obsolete and creating irrelevant boundaries between different types of service providers. Similarly, there is a patchwork of consumer rules that apply differently depending on the nature of the service providers rather than on the service itself. Therefore, in pursuit of a regulatory level playing field, some telecom operators like Orange now favour a more horizontal and service-based approach. They also called for moving as much as possible consumer protection rules to harmonized horizontal law.

On the question of extending sector-specific obligations to OTT service providers, evidence shows considerable tradeoffs. For instance for emergency services, the main one is coverage: emergency call services operate over the 2G network which is extremely broad, while requiring emergency services through mobile applications like Skype is impractical since they rely on 3 and 4G networks which have inferior coverage in most countries.

A regulatory framework fit for the Digital Single Market

In her inspiring keynote speech, Marietje Schaake (Member of the European Parliament) saw, in the aftermath of Brexit, a tremendous need to connect the dots among the different policy streams and EU added values. In particular, she called for a revival of EU leadership through greater promotion of EU core values, and a stronger influence in global politics as well as in innovation. To this purpose, discussions on Internet governance, digital policies and telecom regulation need to overcome traditional cognitive barriers. Convergence between digital and more traditional telecom worlds were praised as necessary to implement a truly internal market for networks and communications in Europe, and requires looking beyond national interests. Seeing increased competition coming from other regions, promoting national interests is the wrong strategy in the pursuit of a competitive knowledge economy. Against the fears that TSM and DSM strategies have been built on national rules instead of merged objectives, policymakers should break path-dependency and look at future-oriented solutions informed by both local needs and global developments.

In concluding, Anthony Whelan (European Commission, DG CNECT) highlighted the delicate tension lying between the need to adopt outcome-based policy objectives, and having a set of tools largely designed to let markets decide on the best solutions to meet these objectives. In acknowledging that some rules need to be refined and streamlined, Whelan nonetheless argued that deregulation was not easily feasible, nor advisable in every area, in particular when the overall cost of abandoning a rule is higher than keeping it. Public authorities are therefore moving cautiously as they do not want to see companies exit or higher prices affecting consumers. While a genuine single market might require less competition-oriented regulatory intervention, Whelan reaffirmed the relevance of the guidelines on market analysis and the assessment of Significant Market Power (SMP) to assess market efficiency. Some adjustment may however be needed to align with recent case law. He also claimed that the Commission had no purpose to

convert or push market operators towards particular business models, albeit strategic orientation should be taken in order to calibrate public support accordingly, which is particularly relevant at the infrastructure level. Whelan finally insisted on the critical need for a long-term and coordinated radio spectrum policy, calling all member states to commit to the initial EU plan in developing the basis for a digitally enabled society.