

The Future of EU Access and Interconnection Regulation

BITS


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* The views of the author are personal, and do not reflect those of clients



What are the
market / regulatory / policy / institutional
failures we wish to address through an access
regime in light of our overarching starting goal
of “simulating” competition through
the promotion of wholesale relationships?



THE PRESSURE POINTS...

1. Relevant Markets Definition

- New economic literature suggests that the condition precedent to antitrust and regulatory enforcement is passé
- One-way substitution possibilities have grown
- SSNIP test in telecoms is very vulnerable to the “Cellophane Fallacy”
- Converged services products are constantly blurring the outer limits of existing market definitions
- The application of the technology neutrality principle has its limits if access is to be promoted

2. Market Power Analysis

- OTT providers have changed the essence of “Countervailing Bargaining Power” considerations
- “Power over price” is increasingly less of an issue (predation and margin squeezing are most relevant) (although query empirical research conducted post 4-to-3 mobile mergers)
- Are structural and legal entry barriers as pernicious as they once were?
- Collective SMP has proved effectively impossible to apply (except in rare circumstances)
- Symmetric remedies have proliferated, therefore changing market dynamics fundamentally
- Converged offerings are very quickly changing the access dynamic, as greater competition does not necessarily always lead to greater access options
- Measuring indirect pricing constraints is a difficult exercise

3. The Three Criteria Test

- Criteria 1 (entry barriers): How is 150% mobile penetration, the use of multiple SIM-cards and intelligent routing reconcilable with the idea of insurmountable entry barriers?
- Criteria 2 (dynamic competition behind the entry barrier) is increasingly seen as putting the “cart before the horse”: NRAs are conducting a truncated market analysis as a precondition to conducting a full market analysis
- Criteria 3 (the effectiveness of competition rules) excludes merger control remedies and also the possible impact of “Article 9” settlements for behavioural abuses

4. Remedy Selection

- Inappropriate use of Article 5 of the Access Directive, which was never designed to cover traditional wholesale access relationships between competitors
- Differential remedies have worked against the harmonisation goal
- Sub-national markets have worked against the harmonisation goal, and their application generally turns on the role of cable TV networks
- Business *vs.* Consumer & Pan-European *vs.* National Markets are two stubborn lines of resistance that continue to generate regulatory uncertainty
- No veto power for the Commission for remedies has led to an unsatisfactory stand-off between the EC Commission and NRAs (and BEREC)

5. Institutional Issues

- Need for more “no guts, no glory” enforcement by Commission under its “Article 7” procedure
- Disconnect between NRA and EC standards of judicial review (*i.e.*, “on the merits” review *vs.* “manifest error” review)
- No desire for regulatory intervention to trigger separation remedy under the Access Directive
- No inclination for EC to trigger “pan-European” test for market analysis
- Different traditions in “soft law” enforcement among EU Member States
- Increasing tendency of merged regulatory and competition law functions at Member State level / degree of policy integration at EU level
- Tension between “non-discrimination” in licensing context with entry assistance in merger context

6. Commercial Developments

- Growth of numerous bypass possibilities through advent of new technologies
- Voice to data progression, followed by demands for greater enhanced data
- New generations of technology imminent in the form of LTE and 5G (scheduled for 2020), which promote machine-to-machine communications (and greater need for latency)
- Prevalence of “OTT” operators relying on IP interconnect, MVNO status and potential desire to roll out fibre (*e.g.*, Google)
- Commoditisation of voice and simple data communications
- Different patterns of development across the EU Member States, reflected in CATV deployment, LLU take-up, partial success of “ladder of investment” where conditions favourable
- The development of economies of scale, and the impact of regulation on scale and scope phenomena (roaming, call termination)
- The advent of VOIP technology, bridging traditional fixed and mobile access
- Growth in popularity of network sharing arrangements

7. Policy Orientations

- Promotion of goal of “European markets”, despite local consumption patterns and national regulation / enforcement
- Promotion of investment incentives to satisfy 2020 Digital Agenda criteria
- Impetus to consolidation given at the highest EU level
- Perceived need for “stability” in fixed access pricing or even its rise
- Mixed signals for NGA deployment (and different results between urban and rural regions – see Cave & Shortall, 2015)
- Proliferation of MVNO and spectrum remedies in mobile-driven mergers (contrast licensing and spectrum responsibilities at national level)
- Rethinking of EU Roaming pricing reductions until 2018
- More balanced approach to Net Neutrality issues compared to the US (possibility of proportionate differentiation to cater for “specialised services”)



FUTURE SCENARIOS...

1. The Selection of a “hybridized” approach between *ex ante* and *ex post*

➤ There are precedents for such an approach:

- Sector Inquiry procedure under Regulation 1/2003
- *De facto* regulatory policy intrusion through Merger Regulation reviews
- Market investigation procedure under UK Enterprise Act 2002
- Access to Infrastructure Regulation under Part III A of Australia’s Competition and Consumer Act 2010
- Prohibition of ‘Unfair Methods of Competition’ under Section 5 of the US Federal Trade Commission Act
- Remedy implementation precedent in the *Newscorp / Telepiù* Case
(+ precedent for removal of remedies)

2. Proposed Hybrid Approach (I)

- Consider imposition of blanket termination charge for fixed period of 5 years, to be reviewed after that period under a Sectoral Inquiry. Agenda item will be to consider withdrawal of regulation altogether, pre-empted by:
 - removal of termination bottleneck, or
 - use of competition rules if bottleneck remains (monopoly in termination)
 - even in face of mutual bottlenecks, countervailing bargaining power might prevail, and
 - possible incorporation of “bill & keep” arrangements into regulatory structure
- Extend jurisdiction of NRAs to implement access remedies imposed in merger proceedings (changes to the Framework Directive)
 - possibility of 5-year review prompted by regulated party
 - more widespread use of dispute resolution powers of NRAs (see Directive 2014/61/EU)
 - reference to guidelines developed and issued jointly by BEREC and the EC, and
 - possibility of enforcing retail price caps for up to 5 years

2. Proposed Hybrid Approach (II)

- Retain IP Interconnect “best efforts” regime until possible new generation of data access issues arise in context of 5G launch in 2020 (rely on competition law and the understanding that a Quality of Service Interconnect package might not incentivise network deployment)
- Replace current market analyses at Member State level by hybrid approach insofar as remedy overlap exists
- Introduce Sectoral Inquiry at EU level every 3 years to consider development of market failures and consideration of various issues (leading to proposed Decisions) such as:
 - whether access de-regulation should be considered for urban areas (return to ‘race to investment’ scenario)
 - revisiting *ex ante* regulatory obligations
 - bundling practices
 - pan-European multi-site communications needs
 - scope of functional separation remedy
 - extension or limitation of scope of “electronic communications network or service” concept
 - in-house wiring
 - limit State aid only to rural regions
 - availability of alternative networks (energy, rail, water, road)

2. Proposed Hybrid Approach (III)

- Prescribe use of “open” technology for all newly laid fibre
- To the extent that there are no access options available for competitors, consider imposing legislation only insofar as an operator is judged to be an “unavoidable trading partner” in any given region (determined jointly by BEREC and EC) for a 5-year period, subject to review (elements of “gap case” analysis under Merger Regulation)

2. Proposed Hybrid Approach (IV)

➤ Conclusions:

The proposed access system seeks to strike a balance between:

- the encouragement of network-based competition in urban areas, while ensuring an access option in rural areas
- the need to ensure open network architecture for future access against demands for more mandated access options
- a minimisation of *ex ante* regulation, while being responsive to competition law “regulation” through merger reviews and settlements
- flexibility to address emerging market failure problems from upstream or downstream elements of the Internet value chain
- greater legitimacy to access decision-making by virtue of EC / BEREC cooperation at an earlier stage of the regulatory process



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