

LIMITS OF TELECOMMUNICATIONS LEGAL REGULATION

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Abstract. Legal regulation became an important means of state intervention into economy and other fields of businesses. This intervention of state is powerful enough to stimulate or to retard economical and even technical development of telecommunications. Delegated legal regulation constitutes one of the complex instruments and strategies of public administration. As the development of delegated legal regulation demonstrates, in many countries such a form of intervention replaces other forms of state intervention. The more power is granted to certain institution (so called Regulator), the more important becomes the issue of regulation regime. All the reasons mentioned above explains why it is so important to analyze the various forms of legal regulation and to find out which form is useful to the sector and which is not.

Keywords: sector legal regulation, telecommunications legal regulation, regulator, deregulation, self-regulation, co-regulation, legal regulation demand.

INTRODUCTION

There are many different definitions of the word “regulation”. Quite precise, ‘traditional’, definition was presented by dr. Elizabeth Nielsen: “Regulation is the imposition of rules by a government, backed by the use of penalties and the authority of the state, that are intended to change the behavior of individuals or groups. Broader definition: Any technique or approach designed to control, alter or influence behavior” [1].

Delegation of individual state functions to Regulators, and in particular, development of certain normative acts of compulsory nature, is a manifold issue. The starting point, therefore, for any review of regulation must be with policy objectives. Why is there a need for some form of intervention in the market place? What is the mischief we need to deal with? What standards do we need to raise? What policy objective are we pursuing? What is the public good we seek? What do we want the rules to achieve?

Detail specification of legal standards, assurance of their implementation and applications are often charged

to special regulatory institutions, which are established for controlling particular activity of economy [2].

In order to reveal common global tendencies and problems, in this article I summarize the experience of legal regulation and deregulation of such important, strong and developed markets as the USA, European Union and other countries.

In order to capture the benefits of innovation, policy makers must still make aggressive moves to modify the regulator institutional approaches in most countries today. Having determined a precise demand of regulation of telecommunications in an appropriate market, a necessary regulation may be properly selected and the demand for a regulator for a certain period may be determined. The objectives of this paper are: (i) to find historical relation between development of telecommunications (as a market) and legal regulation of this market, (ii) to find what regulation is most efficient for today’s telecommunications, (iii) what are the limits of state administrative regulation and (iv) what principles could be used for defining the most efficient regulation of telecommunications in the future?

Answers to the questions asked in this article are very important for international regulation of telecommunications as well as for regulation of telecommunica-

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tions in single markets (countries or regions). The proper answer to the questions asked in this article can lead to effective regulation of telecommunications.

In the article I am using definition telecommunications as far as I'd like to look narrower into classical not converged with other activities telecommunications to avoid wide debates about convergence in electronic communications.

It is helpful to make the distinction between telecommunications infrastructure and the many types of services (voice telephony, text and email, data, video, internet, etc.) which are delivered by that infrastructure [3]. Mainly I analyzed legal regulation of infrastructure.

I believe that this article will be useful for better understanding of theoretical and practical demand for regulation of telecommunications and for estimation of the demand.

LEGAL REGULATION IN TELECOMMUNICATIONS

Modern telecommunications infrastructure has a substantial impact on economic growth. Based on samples of 47 and 124 countries, Norton (1992) concludes that in economic development "a telecommunications infrastructure ... must be viewed as at least as important as conventional economic forces such as stable money growth, low inflation and an open economy." Roller and Waverman (2001) found that one-third of the economic growth in a group of 21 OECD countries over the 20-year period, 1970-1990, could be attributed to the direct and indirect impact of the telecommunications sector. What does it mean? That means that the legal regulation of this industry has a possibility to influence economic so much and it is very important to find right ways to regulate telecommunications in right manner. Debates about the appropriate level and nature of intervention draw in a wide range of interests – from businesses and their organisations, through consumer organisations and regulatory bodies, to the media, economists, lawyers and ultimately politicians and lawmakers. All interests are likely to be guided by some broad, basic principles, such as those articulated in the *Better Regulation Guide* launched by the UK government in 1998:

Transparency: be open, keep it simple, be user-friendly.

Accountability: to government ministers and parliament, to users, to the public.

Targeting: regulation should focus on the problem, and minimise side-effects.

Consistency: be predictable, people should know where they stand.

Proportionality: fit the remedy to the risk, only regulate when you need to.

Most recent theories of delegation do not ask where delegation should be limited or prohibited and where it cannot be used at all. It is often feared that the control of the state may be lost, and thus the emphasis made on narrow concerns of separate branches, conflicts

of interests, etc. [4] Many authors emphasize the weaknesses of delegated regulation, and, possibly, overestimate them, though political pressure, bureaucratic benefits, ideological priorities or even open corruption are often important factors for regulators while making decisions [5, p. 105].

It would not be fair to say that delegated legal regulation has only weaknesses, because regulator has an opportunity to specialize and to become number one expert in the field under its regulation. Regulator also has special knowledge and thus is able to react to any changes and needs of the market quickly, which is of much importance while acting in such dynamic field of economy as telecommunications.

State regulation of telecommunications sector started in the USA and Canada at the end of the 19th century, but in most countries almost all 20th century networks of telecommunications were controlled by the state such as post offices, railways or highways.

During the last decades of the 20th century many unprecedented changes occurred. Most of previously state controlled operators of telecommunications were privatized and soon there emerged many politicians, who were advocating on competition and deregulation of telecommunications market. This new market-oriented approach was implemented in many countries.

Today's main tendency in most developed countries is deregulation or reduction of unsound regulation. In particular states most traditional regulation of telecommunications forms are seen as more harmful than useful to national infrastructure and services of telecommunications. Activities of regulators are being revised and newly evaluated. In order to regulate telecommunications governments and regulators must firmly warrant that:

- a) there is an objective demand for regulation;
- b) regulation will be the most efficient means to achieve special goals of regulation [6, 2].

Analyzing the theory of legal regulation it is often questioned whether legal regulation and particular regulator is needed. If people were able to choose optimal regulation, they should also be able to use it properly even if there is no particular regulator there [7, p. 92]. Strict regulation burdens expansion of business and has negative impact on market; therefore positive goals achieved by means of regulation in the short run may bring negative results in the long run. Regulation should constantly adapt to current market and influence it so that it would be the best for society, but it is quite complicated issue, because telecommunications market changes rapidly, and regulator has to pay all its attention not only to market regulation, but also to watching changes and needs of the market, modeling its variation and creating promising norms of regulation.

The state must have a properly balanced system to supervise regulator's activities in order to prevent the regulator's practice from moving away from general principles of law and public administration. Therefore state must ensure the presence of the following prerequisites determining application of a specific regulation:

(a) objective demand for regulation, (b) regulation will be the most efficient means to achieve special goals of regulation.

Discussion about the possibility of complete deregulation of telecommunications does not imply that this field must be free of any regulation. Deregulation of telecommunications should be understood as a possibility to regulate telecommunications by applying general social relations regulating instruments which already are in place of the market. Completing an abstract assessment of regulator's activities, the following key directions can be distinguished: promotion of competition and protection of consumers' rights. In nearly all developed countries, these fields are regulated by special legislation, while their supervision is carried out by appropriate inter-branch institutions.

The United States started regulating competition in 1870, after passing Sherman's law which had to prevent market from cartels and monopolies. Afterwards most industrial countries tried to follow the case [8, p. 242]. One may ask: Is this relatively old law of competition cannot regulate telecommunications market efficiently? I think it is possible to use competition laws to regulate all issues of competition law in telecommunications business and there is no need to have specific rules in this field.

Because technology is proceeding at incredible speeds and advanced telecommunications are becoming absolutely crucial to competitive success in more and more industries, it is vital to adopt policies that promote continued development of healthy competition in telecommunications. Therefore, regulatory policies should be optimal.

Here I should mention one more extremely important function of nowadays regulators – distribution of limited resources, for example, radio frequencies, telephone numbers, etc. It is special but not very sophisticated function. There is a widely prevalent attitude that only those fields which rely on limited resources can be licensed, therefore the problem of licensing while reducing regulation could be connected with the distribution of limited resources.

LIBERALIZATION OF TELECOMMUNICATIONS MARKET

Enabling customers to choose among competitive service providers constitutes the most efficient form of "regulation". Proper selection of a necessary market regulation is indispensable; otherwise the state could not perform its functions in the field of telecommunications in a consistent way. In addition, it could not prevent the waste of state resources caused by inefficient regulation, promote competition, develop services, ensure protection of consumers' rights in the market, etc. Regulators should avoid policies that stimulate artificial competition wherein participants exploit regulatory distortions and arbitrage uneconomic pricing schemes.

Such liberalization of telecommunication market was determined by many factors, including:

1. growing understanding that liberalized markets are expanding and will be more open to innovations, and will better satisfy the needs of customers;
2. demand of attracting the private sector's capital in order to expand and improve telecommunication networks, and introduce new services;
3. growing demand for internet services which determined that in many countries the services of data transmission overtook voice transmission services and stimulated the origination of many new providers of such services;
4. growing market of mobile and other wireless services which created alternatives to fixed networks and allowed to enter the telecommunication market new providers of services;
5. development of international telecommunications which is growing rapidly because of transnational and international providers of telecommunication services.

Regulation of telecommunications in European Union was implemented through several important stages – from visions and goals to establishment of competitive market. Actions of the European Union in the field of telecommunications are similar to the actions of other states. Comparing to the USA, Western Europe was late to implement competition in telecommunication market, and this fact was illustrated by low spread of internet comparing to the USA [9]. This delay has its strengths also – after became active later, the market could choose progressive technical solutions and learn from mistakes of its predecessors.

Many countries have emphasized the importance of telecommunications and the society, built on the base of telecommunications both officially and unofficially. European Union has done this in its many documents, for example: "Society of information is the priority of European Union. Informational and communicational technologies are of prime importance for competitiveness of economy, and they will be important for development of economy as a mobilizer of investment" [10]. As for European Union, it is interesting to notice that even in its oldest documents concerning telecommunications, data process and other close fields, there were the same questions emphasized which are also relevant today, especially the promotion of competition [11]. European Union stated its joint position on state monopolies and their regulation in its norms and courts practice [12].

GOALS OF A REGULATOR OF TELECOMMUNICATIONS

The goals of regulator of telecommunications sector can be understood differently in different countries, they also change with time and environment. In many countries telecommunications are still understood as a public service forgetting the fact that the state no longer owns telecommunication networks. In this case the state is concerned about provision of telecommunication ser-

vices regarding national peculiarities and public interests, and therefore hires a regulator.

Widely appreciated goals of a regulator of telecommunications:

1. Promote multipurpose access to main telecommunication services (multipurpose services);
2. Promote the growth of competitive market through: Efficient provision of telecommunications services, good level of services, progressive services and competitive prices;
3. Protect from possible abuse of market power, such as unsound prices and non-competitive behavior of dominant enterprises;
4. Create favorable climate to promote investments into expansion of telecommunication networks;
5. Create public trust on telecommunication market through transparent regulation and licensing processes;
6. Protect customer rights, including the right to privacy;
7. Promote the growth of all customer connections through efficient inter-networks connections agreements;
8. Optimize the use of limited resources, such as radio frequencies, telephone numbers, etc. [13, p. 2].

LEGAL DEREGULATION OF TELECOMMUNICATIONS

Discussing the problems of regulation, a very important question about demarcating public and private relations and their regulation by the norms of public law, rises [14, p. 41]. It is one more field, encouraging thinking if some of the relations, now regulated as public, could not be regulated by the norms of private law. There are some existing theories which state that dividing into public and private relations is relative, and it is more a question of realizing the functions of the state [15, p. 136].

The concept of how many questions at least should be left for a regulator of telecommunication services changes with time. Even in 2000 many experts thought that there are many questions that cannot be answered without regulator, for example: regulation of retail prices, provision of multipurpose services, etc. Now many more experts think that some of those questions can be answered different ways.

Deregulation is expanding rapidly in most regions. This statement can also be confirmed by European Union Framework Directive. One of the main goals of this package was to reduce the degree of unsound regulation. Is the goal achieved in reality, we should decide regarding the practice of regulation of telecommunication sector in the EU countries. Unfortunately, most members of the European Union telecommunication market consider the limits of deregulation as insufficient. EU is evaluating and going to change the regulation.

In many countries there is anticipated an evolutionary movement of deregulation, when regulator refuses detail intervention progressively and becomes more like a competition observation office. One country – New Zealand – resolved it as long ago as 1987, when it decided, with very few exceptions, to regulate its telecommunications industry solely on the basis of its general competition law, the Commercial Act 1986. The New Zealand experience has attracted considerable interest [16, p. 93]. It should be mentioned however, that this experience has also made clear the weaknesses of the lack of special norms, because this lack of special norms made it harder to solve the disputes of operators [17].

In the best case, regulation of telecommunications and other connected markets should reach the state of regulation only regarding to norms of competitive law, but the telecommunication market itself should be more competitive in order to implement this approach.

The principal of minimum essential regulation was introduced into regulation. Choosing one or another means of regulation, the state must justify that this regulation is unavoidable and that the chosen means of regulation will be suitable for reaching previously stated goals. Linda Sender named the principle: “Do less in order to do better” [18].

Summarizing, it can be said that the main purpose of telecommunications regulation optimization is a sound deregulation.

SELF-REGULATION AND CO-REGULATION

The self-regulation of market members should also be an issue of prime importance. The state should promote members of the market to create efficient means of self-regulation. Self-regulation is based upon private initiative; examples of such self-regulation are codes of behavior, approved by individuals or their joint organizations. Such codes or similar documents are not universally compulsory, but separate objects (for example: concerned about their reputation, provision of high quality services) can abide by the requirements stated in the code.

Self-regulation is usually, but not necessarily, a collective activity, involving participants from a market sector who agree to abide by joint rules, much like a club membership. It is also (at least nominally) voluntary, with benefits perceived for those who participate. In practice, as we shall see, the two forms of self-regulation – legal and voluntary – are by no means mutually exclusive or even complete opposites. Moreover, there is often considerable outside pressure to self-regulate. And there are many ways in which independent interests can, and should, have an influence on self-regulatory arrangements.

Strengths of self-regulation: self-regulation is an expeditious means of regulation, self-regulation is not so formal, the change of norms can be more expeditious than the change of the state approved norms, “crosses the state borders” easier, most codes of ethics anticipate

the methods of implementation, self-regulation promotes cooperation, which is the essential condition of self-regulation, opportunity to solve disputes without constraint of states.

The main weakness of self-regulation is the lack of state constraint, although in some relations the objective of keeping a good reputation or other similar objectives have stronger impact on member of the market than the fear of constraint.

Self-regulation and legal regulation are not black-and-white opposites. It is widely accepted that the right balance has to be found between the two. Self-regulation, at its best, can be seen as a co-operation between the regulator, regulated and those in whose interests regulation is made. But for self-regulation to work effectively, there may be a need for a concept of co-regulation which is underpinned by legal regulation.

One more important instrument of regulation of the market is co-regulation. Co-regulation is the negotiation by business and consumer stakeholders under the auspices of public authorities of specific consumer rights and business obligations which thereafter have legal effect. Self-regulation covers voluntary commitments undertaken by businesses in respect of consumer either independently or as part of membership of a trade organization or code of conduct.

In 1998 the Australian government issued a *Policy Framework on Codes of Conduct*. This said that where self-regulation fails, legislative options would be pursued to provide the means for industry to self-regulate effectively. 'Co-regulation' was described as a process where *industry* develops and administers a code and the *government* provides the ability to enforce it through legislative backing. The main roles for the back-up legislation would be to:

- delegate to industry the power to regulate and enforce the code;
- enforce undertakings to comply with the code;
- prescribe the code, but only apply it to those who choose to be bound;
- set out required standards, but provide for an approved code to modify or elaborate them;
- provide a reserve power to make a voluntary code compulsory;
- require the industry to have a code and, in its absence, impose a code; or
- prescribe a mandatory code.

When we are talking about the situation in Lithuania, we don't see any big difference between regulatory legal acts on telecommunications in Lithuania and those in other EU countries. One thing what I'd like to pinpoint when we are talking about self-regulation and co-regulation is that there is very low level of self-regulation and there are no deep traditions of self-regulation in Lithuanian business, including telecommunications. Therefore we need to look for the best practices in foreign countries and to adopt their experience in self-regulation.

CONCLUSIONS

After analysis of some questions, relevant to legal regulation of telecommunications, we can make such conclusions:

Regardless to special regulator's strengths and weaknesses, the state itself should have a properly balanced system for controlling regulator's activities, which should ensure that the practice of regulator would not leave law and rule of the state principles behind.

Choosing one or another means of regulation, the state must justify that this regulation is unavoidable and that the chosen means of regulation will be suitable for reaching previously stated goals.

Demand for telecommunication regulations changes constantly, therefore the regime of regulation should constantly and flexibly adapt to this demand.

Too strict regulation and interference of regulator into business relations have negative outcomes. This interference could be diminished by establishing and (or) promoting self-regulation and co-regulation.

In order to decide by what degree a particular market should be regulated at a particular moment, it is very important to monitor the market's changes and needs; and change the regime appropriately.

Seeking for optimal legal regulation in telecommunications, regulation based on the state administrative methods should diminish (deregulation); and the regulation of the state should be successfully changed to self-regulation and co-regulation, which must be promoted reaching to use its strengths.

Given conclusions can be fully applied to most of developed countries, and less applied to totalitarian states, where telecommunications are fully regulated by the state. Lithuania and other Baltic states not violating EU norms can assign some regulated relations to the members of the market, promote cooperation between states, and reduce the application of expensive state constraint.

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TELEKOMUNIKACIJŲ TEISINIO REGULIAVIMO RIBOS

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S a n t r a u k a

Šiame straipsnyje analizuojama telekomunikacijų reguliavimo poreikio bei masto problematika ir reguliavimo procesai visame pasaulyje. Darbe analizuojama, kaip atsirado šaknis reguliavimas, gilinamasi į klausimus, kam jis reikalingas, ar gali reguliavimas būti žalingas, kokių tikslų ir kaip valstybė siekia tokiu reguliavimu, koks reguliavimo mastas reikalingas, kad būtų efektyviai pasiekti norimi tikslai, kodėl atsirado ir stiprėja dereguliacijos procesai. Taip pat nagrinėjamos kitos aktualios telekomunikacijų problemos, kurių analizė yra labai aktuali tiek tarptautiniam telekomunikacijų reguliavimui, tiek telekomunikacijų reguliavimui atskirose rinkose (valstybėse ar regionuose). Kuo daugiau bus parengta aptariamoms problematikos studijų, tuo aiškiau ir tiksliau mes suvoksime telekomunikacijų reguliavimą ir jo poreikį, tuo lengviau bus atskiroms valstybėms ar tarptautinėms organizacijoms priimti atitinkamus sprendimus telekomunikacijų reguliavimo srityje.

Kad būtų aiškiau atskleistos bendros pasaulinės tendencijos ir problemos, darbe apibendrinama tokių svarbių, stiprių ir išsivysčiusių rinkų kaip Jungtinių Amerikos Valstijų, Europos Sąjungos ir kitų pasaulio šalių reguliavimo ir dereguliacinio patirtis.

Tiksliai žinant telekomunikacijų reguliavimo poreikį atitinkamoje rinkoje, tam tikru laikotarpiu galima tinkamai parinkti reikiamą reguliavimą ir apibrėžti regulatoriaus poreikį. Tinkamas reikiamo rinkai reguliavimo parinkimas būtinas, kad valstybė galėtų nuosekliai realizuoti savo funkcijas telekomunikacijų srityje, nebūtų eikvojami valstybės išteklių neefektyviam telekomunikacijų reguliavimui, rinkoje būtų skatinama konkurencija, plėtojamos paslaugos, užtikrinama vartotojų teisių apsauga. Aptariant reguliavimo poreikį būtina aptarti ir dereguliacijos tendencijas, kurios taip pat atspindi bendrąsias reguliavimo plėtros kryptis. Manau, kad ši studija galės prisidėti prie teorinių ir praktinių telekomunikacijų reguliavimo poreikio suvokimo ir nustatymo. Apibendrintai galima pasakyti, kad tinkamas atsakymas į visus šiame darbe keliamus klausimus gali nurodyti kelią į efektyvų telekomunikacijų reguliavimą.

Pagrindinės sąvokos: telekomunikacijų teisinis reguliavimas, reguliuotojas, dereguliacija, savireguliacija, koreguliacija, teisinio reguliavimo poreikis.

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