

SPECIAL BRIEFING

Towards Implementation of the European Union Telecom Code: Ex Ante Reflections

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Introduction

Promoting connectivity to very high capacity networks is one of the objectives of the new EU Telecom Code. The review of the Telecom Framework is one of the pillars of the EU Digital Single Market Strategy. On 21 December 2020, the implementation period of the Telecom Code will elapse. The Telecom Code broadens the scope of regulation and introduces new forms of market regulation in order to pursue the EU connectivity objectives. What does this mean for the concept of ex ante regulation¹ that has been the cornerstone of

telecommunications regulation for more than two decades? And what lessons can be learned from this ex ante regulation framework when looking into the new ex ante tools the European Commission (the Commission) is considering in view of the regulation of other markets within the digital economy?

This article explores the ex ante regulation in the Telecom Code as well as its changed context. The goals and scope of the Telecom Code as well as the main tools for regulation are discussed in the second section. The third section describes the system of ex ante regulation as it has been developed under the Telecom Framework and adjusted in the Telecom Code. The fourth section explains the conditions for imposing ex ante regulations, taking into account the connectivity goals of the Telecom Code. As the context of applying ex ante regulation has also changed due to new forms of market regulations, the fifth section explores what this will mean for the application of ex ante regulation. In the sixth section the proposals for ex ante regulation as a means to regulate other markets of the Digital Economy are evaluated from the perspective of the experience with ex ante regulation in the electronic communications sector.

The Telecom Code

On 20 December 2018, a new Telecom Code entered into force.² The Telecom Code consists in one comprehensive Harmonisation Directive replacing four of the five Directives³ that formed the main body of telecommunications regulation in the EU since 2002.⁴ In 2009, further to a periodic review, all five Directives were amended by the Better Regulation Directive⁵ and the Citizens' Rights Directive,⁶ addressing specific topics such as access and consumer rights but not changing the fundamentals of the Directives. In general, the telecommunications framework based on these Directives (Telecom Framework) focuses on regulating three domains: facilitating access to the market, promoting competition on the markets, as well as safeguarding end-user interests and societal needs.⁷ The first domain relates to the facilitation of access to the market through a light authorisation process, which means that an operator

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¹ The term "ex ante" literally means "before the event" and refers to market intervention by a regulatory body including remedies imposed on one or more providers, such as pricing regulation or obligations to offer wholesale broadband products.

² Directive 2018/1972 establishing the European Electronic Communications Code (Recast) [2018] OJ L321/36 (the Telecom Code).

³ Directive 2002/19 on access to, and interconnection of, electronic communications networks and associated facilities [2002] OJ L108/7 (Access Directive); Directive 2002/20 on the authorisation of electronic communications networks and services [2002] OJ L108/21 (Authorisation Directive); Directive 2002/21 on a common regulatory framework for electronic communications networks and services (Framework Directive) [2002] OJ L108/33; Directive 2002/22 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) [2002] OJ L108/51. Directive 2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L201/37 as amended by Directive 2006/24 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks [2006] OJ L105/54 is not replaced by the Telecom Code.

⁴ On the developments of the EU Telecoms Framework, see M. Cave, C. Genakos and T. Valletti, "The European Framework for Regulating Telecommunications: A 25-year Appraisal" (2019) 55 Rev. Ind. Organ. 47.

⁵ Directive 2009/140 amending Directives 2002/21 on a common regulatory framework for electronic communications networks and services, 2002/19 on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20 on the authorisation of electronic networks and services (Better Regulation Directive) [2009] OJ L337/37.

⁶ Directive 2009/136 amending Directive 2002/22 on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation 2006/2004 on co-operation between national authorities responsible for the enforcement of consumer protection laws [2009] OJ L337/11 (Citizens' Rights Directive).

⁷ With reference to the Telecom Framework and the draft Telecom Code, see the handbook by Andrej Savin, *EU Telecommunications Law* (Cheltenham: Edward Elgar European Law Series, 2018).

must only send a notification to the national regulatory authority (NRA) when accessing national electronic communications markets. Only in the case of scarce resources, such as radio spectrum, are Member States allowed to apply licensing procedures for allocating the rights of use.⁸ The second domain concerns market regulation aimed at safeguarding and promoting competition on electronic communications markets. To this end, the framework consists not only of access and interconnection obligations but also of ex ante market regulations on the basis of which obligations can be imposed on providers with significant market power.⁹ The third domain regards end-user interests and societal needs, such as universal service, and consists in a comprehensive set of detailed end-users regulations¹⁰ as well as data protection rules.¹¹ Specific end-user protection as regards roaming and net neutrality can be found in separate regulations.¹² Next to the three domains, the Directives regulate institutional topics, such as the criteria for NRAs as regards their powers and independence, their supervision costs and processes for consultation and dispute resolution.¹³ A separate regulation on the Body of European Regulators for Electronic Communications (BEREC) has existed since its establishment in 2009.¹⁴

The Telecom Code not only integrated the Directives but also extended the scope and goals of regulation, and added new provisions as tools for pursuing the objectives. As a result of this the Telecom Code is a mixture of old and new provisions, but all of them need to be interpreted in the light of the scope and objectives.¹⁵

Although the wording “telecommunications” had always been—and still is—the common terminology to identify the scope of regulation,¹⁶ the field of law under the Telecoms Framework is to a large extent determined by the definitions of “electronic communications networks” and “electronic communications services”.¹⁷

The key elements in the definitions are the transmission of signals through a variety of infrastructures, such as cable, radio waves, satellites, all with the aim to create a technologically neutral framework.¹⁸ The definitions include the transmission through radio and television as well as cable television networks.¹⁹ Excluded from regulation is the content transmitted by signals, such as the content of internet sites and television programmes, as well as the Information Society services.²⁰ Over-the-top services, as offered by Skype and Google, could be qualified as electronic communications services, but only recently in 2019 the European Court of Justice (ECJ) clarified the scope by applying the criterion that services need to be delivered against a remuneration and that a contractual relationship must exist. The result is that a Skype service, being a voice-over-internet protocol (VoIP) with possibilities to call fixed or mobile numbers, can be qualified as an electronic communications services due to the remuneration and the contract with telecom providers to connect to the public switched telephone network (PSTN).²¹ The provision of a web-based service which does not provide internet access in itself, such as the Gmail service provided by Google, does not consist wholly or mainly in the conveyance of signals through electronic communications networks and therefore does not qualify as electronic communications service.²²

The Telecom Code extended the scope of regulation. The definition of “electronic communications service” is adapted so that it does not only comprise electronic communications services but also includes internet access services and interpersonal communications services. The extension to internet access services aligns the Telecom Code with the Netneutrality Regulation as it copies the definition of internet access services in this Regulation.²³ The extension to interpersonal communications services broadens the scope to services normally provided for

⁸ Framework Directive arts 9–11 in conjunction with the Authorisation Directive.

⁹ Framework Directive arts 14–16 in conjunction with arts 8–13b of the Access Directive.

¹⁰ Framework Directive art.8(4) in conjunction with the Universal Service Directive.

¹¹ Directive on privacy and electronic communications.

¹² Regulation 531/2012 on roaming on public mobile communications networks within the Union (Roaming Regulation) [2012] OJ L172/10; Regulation 2015/2120 laying down measures concerning open internet access and amending Directive 2002/22 on universal service and users’ rights relating to electronic communications networks and services and Regulation 531/2012 on roaming on public mobile communications networks within the Union (Netneutrality Regulation) [2015] OJ L310/1.

¹³ See, for example, Framework Directive arts 3–8 (independency and powers of NRA); arts 20–21 (dispute resolution); Authorisation Directive arts 12–13 (administrative costs).

¹⁴ Regulation 1211/2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office (BEREC Regulation) [2009] OJ L337/1.

¹⁵ In addition to the Telecom Code, a new BEREC Regulation has been adopted, clarifying the role of BEREC also as to the Telecom Code, Regulation 2018/1971 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation 2015/2120 and repealing Regulation 1211/2009 [2018] OJ L321/1.

¹⁶ For this reason, the wording “telecommunications” is used in the publication to identify the field of law.

¹⁷ Framework Directive art.2(a), (c) and (d). In addition to these networks and services, the Framework Directive regulates conditional access systems, advanced digital equipment and application program interfaces, as defined under art.2(f), (o) and (p).

¹⁸ Framework Directive Recital 18, stressing that regulation neither imposes nor discriminates in favour of the use of a particular type technology while not precluding the taking of proportionate steps to promote certain specific services where this is justified (for example, digital television as a means for increasing spectrum efficiency).

¹⁹ Framework Directive art.2(c), as confirmed by *UPC Nederland BV v Gemeente Hilversum* (C-518/12) EU:C:2013:709 at [47]: “Article 2(c) of the Framework Directive must be interpreted as meaning that a service consisting in the supply of a basic cable package, the charge for which includes transmission costs as well as payments to broadcasters and royalties paid to copyright collecting societies in connection with the transmission of programme content, falls within the definition of an ‘electronic communications service’ and, consequently, within the substantive scope both of that directive and of the specific directives constituting the NRF applicable to electronic communications services, in so far as that service entails primarily the transmission of television content on the cable distribution network to the receiving terminal of the final consumer”. In *UPC DTH Sàrl v Nemzeti Média- és Hírközlési Hatóság Elnöksége* (C-475/12) EU:C:2014:285 at [58], the court argued that also the provision of conditional access systems can qualify as the provision of electronic communications services.

²⁰ Framework Directive art.2(c): Information Society services are excluded from the scope. An Information Society service is any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services: Directive 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services [2015] OJ L241/1 art.1(1)(b).

²¹ *Skype Communications Sàrl v Institut belge des services postaux et des télécommunications (IBPT)* (C-142/18) EU:C:2019:460 at [49].

²² *Google LLC v Bundesrepublik Deutschland* (C-193/18) EU:C:2019:498 at [41].

²³ See Netneutrality Regulation art.2(2).

remuneration that enable direct interpersonal and interactive exchange of information via electronic communications networks between a finite number of persons.²⁴ This brings all types of emails, messaging services, or group chats under the scope.²⁵ The Telecom Code distinguishes number-based and number-independent interpersonal communications services.²⁶ The services Gmail or Skype are likely to fall both within the scope of interpersonal communications services but may be qualified differently as Gmail is likely to be number-independent whereas Skype might be a number-dependent service (e.g. in the case of Skype-out). The difference is relevant as only a limited set of provisions in the Telecom Code are applicable to number-independent services.²⁷

The Telecom Code restated the goals of regulation to be observed by NRAs when applying the regulation. The Telecom Framework is aimed at promoting competition, contributing to the internal market and promoting the interests of end-users.²⁸ In pursuing these goals, NRAs need to follow objective, transparent, non-discriminatory and proportional principles for regulation, such as predictable regulation, the promotion of efficient investments and innovation in new and better infrastructures.²⁹ The Telecom Code upholds the three goals of the Telecom Framework, although they have been reformulated.³⁰ However, a new goal to promote connectivity and access to, and take-up of, very high capacity networks, including fixed, mobile and wireless networks is added.³¹ A very high capacity network consists wholly of optical fibre elements or is capable of delivering a similar network performance.³² The goal fits in with the EU Action Plan on the Gigabit Society.³³ The goal on connectivity is also linked with the other goals as it is vital to promote sustainable investment in the development of these new networks, while safeguarding competition, and boosting consumer choice through regulatory predictability and consistency.³⁴ This means that NRAs, in pursuing the goals, even if they had already been part of the Telecom Framework, need to be aware of a new dimension of the goals. In the first place this applies to the regulatory principles, such as the principle to promote efficient investments and innovation in new and enhanced infrastructures when imposing access

obligations and by permitting co-investment arrangements between investors and parties seeking access to diversify the risk of investment.³⁵ In the second place, the new dimension needs to be taken into account when applying the provisions in the Telecom Code. This is obvious for the application of new provisions, such as the obligation to conduct geographical surveys of the coverage and roll-out of broadband networks.³⁶ This is less obvious for the provisions that did not seem to have changed much but need to be applied in view of the new goals and scope of the Telecom Code. It is a challenging task both for Member States to implement the Telecom Code in a coherent way and for NRAs to find a way to best pursue the goals and apply the regulating principles.

Ex ante regulation is one of the regulations developed under the Telecom Framework that had been adapted in the Telecom Code as a means to promote competition. In the Telecom Code, ex ante regulation needs to be applied in view of the new goals, such as promoting efficient investments and innovation in new and enhanced infrastructures as well as co-investments while adhering to the principle to impose ex ante obligations only to the extent to secure effective and sustainable competition in the interest of end-users.³⁷ The Commission also considers the tool of ex ante regulation as a new tool for regulating the digital economy, outside the scope of the Telecom Code. Therefore, the next sections focus on ex ante regulation.

Ex ante regulation framework

Ex ante regulation is a type of sector-specific market regulation aimed at assessing the competition in markets and imposing obligations on providers if necessary to prevent a distortion of the market. The analyses are performed from a forward-looking perspective over a given time horizon. NRAs need to follow a strict procedure in their market assessments and are obliged to notify the draft outcome of the assessment to the Commission before adopting the obligations. An impressive overview of all market consultations to date can be found on the Commission's website.³⁸

²⁴ Telecom Code art.2(5).

²⁵ Telecom Code Recital 17. Linear broadcasting, video on demand, websites, social networks, blogs, or exchange of information between machines are not considered to be interpersonal communications services. A communication channel in online games will fall outside the scope if this communication facility is minor and purely ancillary to another service. Other communications such as WhatsApp, Google Hangouts or iMessage are likely to fall within the scope.

²⁶ Telecom Code art.2(6) and (7). "Number-based" means that the interpersonal communications services connect with publicly assigned numbering resources, namely a number or numbers in national or international numbering plans, or which enables communication with a number or numbers in national or international numbering plans.

²⁷ For example, the title on end-users rights (Pt III Title III arts 98–116) requires close reading as not all end-user rights apply to number-independent interpersonal communications services.

²⁸ Framework Directive art.8(2)–(4). These articles indicate how NRAs can contribute to the goal.

²⁹ Framework Directive art.8(5).

³⁰ Telecom Code art.3(2): competition (b), contribution of internal market (c) and promotion of interests of citizens (d).

³¹ Telecom Code art.3(2)(a).

³² As defined in Telecom Code art.2(2).

³³ Communication on Connectivity for a Competitive Digital Single Market—Towards a European Gigabit Society COM(2016) 587 final.

³⁴ Telecom Code Recital 28 and art.3(2)(d), linking the promotion of the interests of citizens to ensuring connectivity and the widespread availability and take-up of very high capacity networks.

³⁵ Telecom Code art.3(4)(d).

³⁶ Telecom Code art.22.

³⁷ Telecom Code art.3(4)(d) and (f).

³⁸ See "Welcome to CIRCABC" available at: <https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp> [Accessed 7 August 2020]. They are also referred to as "Art. 7 Notices" owing to their legal basis in art.7, 7a and 7b of the Framework Directive.

As ex ante regulation is aimed at promoting competition, this goal may concur with the goals of EU competition law, as can be found in arts 101 and 102 Treaty of the Functioning of the EU (TFEU). For this reason, the Telecom Framework requires NRAs to conduct the three-criteria test to determine whether NRAs are allowed to apply ex ante regulation on a specific market. The three-criteria test consists of three cumulative criteria to be assessed. The first criterion is the presence of high and non-transitory access barriers. The second criterion addresses whether a market structure tends towards effective competition within a relevant time horizon. The third criterion is that the application of competition law alone would not adequately address the market failure(s) concerned.³⁹ Failure to meet any one of the three criteria would indicate that a market should not be identified as susceptible to ex ante regulation.⁴⁰ The Telecom Code codifies the three-criteria test.⁴¹

After having applied the three-criteria test NRAs need to proceed with a strict step-by-step analysis: the first step being the assessment of the relevant markets; the second step consisting in the assessment of competition on the markets and the designation of providers with significant market power (SMP); and the third step leading to the imposition of obligations on the providers with SMP if appropriate and in accordance with the principle of proportionality. The Commission provides tools⁴² for NRAs to carry out the extensive market analyses every three years under the Telecom Framework and every five years under the Telecom Code.⁴³

The first step consists of an assessment of the relevant market in accordance with the principles of EU competition law.⁴⁴ This means that the relevant product market must be defined by assessing the substitution of all products and services, in terms of their objective characteristics, their prices or their intended use, so grouping together all products and services that are used by consumers for the same purpose.⁴⁵ For example, retail product markets for internet access are defined according to the substitution of different forms of internet access for end-users, such as internet access through different types of networks (fibre, coax, copper or mobile).⁴⁶

However, the providers of retail services often depend on services provided by other providers in upstream markets, such as wholesale broadband access or wholesale access to networks.⁴⁷ This means that, for analysing markets in the telecommunications sector, multiple retail and wholesale markets need to be defined and assessed in order to determine whether they are effectively competitive.⁴⁸ The geographical market comprises an area in which the competition conditions are sufficiently homogeneous. Often, it consists in an area covered by a network or by regulatory measures.⁴⁹

The second step consists in assessing the competition on the markets and whether the competition is distorted by providers with SMP. An undertaking is deemed to have SMP if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say, a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.⁵⁰ The criterion matches the definition of a dominant position under art.102 TFEU. Very large market shares held by an undertaking for some time may be an indicator for a dominant position. High market shares alone might not be sufficient, for instance, if the undertaking is gradually losing market shares.⁵¹ Other factors need to be taken into account, such as access barriers and technical and commercial advantages or superiority. Vertical integration meaning that a provider operates on retail markets as well as on wholesale markets, is also a factor to be taken into account.⁵² Although both the definition of the relevant markets and the assessment of SMP are based on principles developed under competition law, the outcome under ex ante regulation and competition law may differ as the concepts are closely linked to the objectives under the relevant policies. The designation of a provider as having SMP in a market defined for the purpose of ex ante regulation does not automatically imply that this provider is also dominant pursuant to art.102 TFEU.⁵³

When the NRA has designated a provider with SMP, the NRA is obliged to impose obligations on the SMP provider as a third step. The obligations must be proportional: the NRA needs to choose the least intrusive

³⁹ Recommendation 2014/710 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21 on a common regulatory framework for electronic communications networks and services [2014] OJ L295/79 (Recommendation Relevant Markets) at [10]–[17].

⁴⁰ Recommendation Relevant Markets, Recital 17.

⁴¹ Telecom Code art.67(1). The three-criteria test is assumed to be met in the case of markets included in the Recommendation Relevant Markets, unless the NRA determines that one or more of the criteria are not met due to specific national circumstances.

⁴² For example, *Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services* C(2018) 2374 final (SMP Guidelines).

⁴³ Framework Directive art.16(6a); Telecom Code art.67(5).

⁴⁴ Recommendation Relevant Markets, Recital 4; SMP Guidelines (2018), para.9.

⁴⁵ SMP Guidelines (2018), para.33.

⁴⁶ SMP Guidelines (2018), para.40 mentions that at retail level technological developments have generally led to inter-platform competition.

⁴⁷ SMP Guidelines (2018), para.40. A SSNIP test, an econometric method, is used to determine whether different wholesale platforms such as copper, fibre and cable are included in a single wholesale market.

⁴⁸ The Recommendation Relevant Markets provides recommendations for the definition of four wholesale markets: see Annex to the Recommendation.

⁴⁹ SMP Guidelines (2018), paras 48–51. Both indicators often lead to national geographic electronic communications markets, although geographical markets can be defined as international (e.g. international roaming services) or local (e.g. in areas with local Fibre-to-the-Home networks) markets.

⁵⁰ Framework Directive art.14(2); Telecom Code art.63(2).

⁵¹ SMP Guidelines (2018), para.56.

⁵² SMP Guidelines (2018), paras 57–58.

⁵³ SMP Guidelines (2018), para.11.

way of addressing the problems identified in the market analysis.⁵⁴ The obligations are only imposed on the SMP provider(s); so it leads to asymmetric regulation. The NRA toolbox exists of obligations described in the Telecom Framework.⁵⁵ For example, the NRA may impose obligations on the SMP provider to provide physical access to networks or virtual access to wholesale or retail services. Ancillary obligations with regard to non-discrimination, transparency and costs may be imposed as well. Obligations at wholesale level are imposed where otherwise one or more retail markets would not likely become effectively competitive. The remedies may be imposed on the relevant market on which the SMP position exists but also on closely related markets. The third step does not rely on a competition law framework and is specifically developed in the context of ex ante regulation. The obligations are related to the different types of competition problem(s) identified on the underlying retail market(s) and are aimed at remedying market failures while at the same time fulfilling the specific objectives of the Telecom Framework. Given this specific scope, it is possible that parallel procedures under ex ante regulation and ex post EU competition law apply.⁵⁶

The Telecom Code pursues the system of ex ante regulation to a large extent. It incorporated the three-criteria test⁵⁷ as well as the three steps of the identifying markets⁵⁸ and providers with SMP⁵⁹ as well as imposing obligations on SMP providers.⁶⁰ The regular cycle of conducting market analyses has changed from three to five years.⁶¹ The forward-looking assessment of the markets needs to be done in the absence of existing ex ante regulation and comprises an analysis of market developments, of all relevant competitive restraints at wholesale and retail level as well as other types of regulation.⁶² The consultation process and notification to the Commission were kept within the Telecom Code although scattered.⁶³ In sum, this means that draft market analysis decisions, with assessment of relevant markets, SMP and proposed obligations, need to be notified to the Commission.⁶⁴ BEREC and NRAs of other Member States get the opportunity to provide their comments in the

consultation period. The Commission has the power to veto the draft market analysis decisions but only as regards the definition of markets or the assessment of the significant market power. This means that, after a negative decision by the Commission on these assessments, the NRA will not have the power to adopt the market decision. The power to veto the draft market decision cannot be exercised as regards the obligations proposed. This means that the NRA has more freedom in deciding which tool is necessary and proportional in order to remedy the market distortion.⁶⁵

Although the main criteria for assessment of ex ante regulation as well as the consultation process did not change in the Telecom Code, new tools have been added in order to provide NRAs with more room to meet the objectives of the Telecom Code.⁶⁶ The Telecom Code extended the regulatory toolbox for NRAs.⁶⁷ New regulatory tools have been included as regards co-investment, access to civil works, and for wholesale-only providers. As with all obligations, these obligations can only be imposed if proportionate, justified in the light of the objectives and after the consultation process has been followed.⁶⁸

The expansion of the toolbox to serve the new goals

An important goal of the Telecom Code is to find a balance between regulation, connectivity and investments. Market regulation should promote efficient investment and innovation in new enhanced infrastructures.⁶⁹ It must take into account the variety of conditions relating to infrastructure, competition, and the circumstances of end-users, and consumers in the various geographical areas.⁷⁰ Ex ante regulations may only be imposed as far as necessary to secure effective and sustainable competition in the interest of end-users, and relax or lift such obligations as soon as that condition is fulfilled.⁷¹ These goals should be observed when designing and applying the remedies to be imposed on providers with SMP. NRAs need to consider the impact of new market developments, such as in relation to commercial agreements, including co-investment agreements, and

⁵⁴ Access Directive art.8(4); Telecom Code art.68(2).

⁵⁵ Framework Directive art.14(3), with reference to arts 9, 10, 11 and 13 of the Access Directive and art.17 of the Universal Service Directive.

⁵⁶ SMP Guidelines (2018), para.12. See for a parallel application of ex ante regulation and art.102 TFEU, *Telefonica SA v European Commission* (C-295/12 P) EU:C:2014:2062; [2014] 5 C.M.L.R. 18; *Slovak Telekom as v European Commission* (T-851/14) EU:T:2018:929; [2014] 4 C.M.L.R. 21.

⁵⁷ Telecom Code art.67(1).

⁵⁸ Telecom Code art.64. However, the markets for fixed voice and mobile voice termination are regulated without ex ante market regulation contrary to its regulation under the Framework Directive. See Telecom Code art.75 on termination rates.

⁵⁹ Telecom Code art.63.

⁶⁰ Telecom Code art.68 in conjunction with arts 69–74, 76 and 80.

⁶¹ Telecom Code art.67(5). A three-year period applies after a revised Recommendation on relevant markets and for markets not previously notified to the Commission. On exceptional basis the five-year period may be extended by up to one year.

⁶² Telecom Code art.67(2).

⁶³ Telecom Code arts 23 (national consultation) and 32 (consultation with Commission, BEREC and NRAs of other Member States).

⁶⁴ Telecom Code art.32.

⁶⁵ Telecom Code arts 32(4) (serious doubts), 32(5) (veto) and art.33 on the procedure for consistent application of remedies.

⁶⁶ Telecom Code art.32(1) in conjunction with art.3.

⁶⁷ Only in exceptional circumstances and after consultation of the Commission and BEREC may an NRA impose other obligations than mentioned in the Telecom Code art.68(3).

⁶⁸ Telecom Code art.68(4).

⁶⁹ Telecom Code art.3(4)(d).

⁷⁰ Telecom Code art.3(4)(e).

⁷¹ Telecom Code art.3(4)(f).

influencing competitive dynamics.⁷² The toolbox of NRAs consists of existing tools in the Framework,⁷³ although sometimes adjusted to reflect the new goals,⁷⁴ and new tools.

The first new tool relates to access to civil engineering.⁷⁵ It is a tool of imposing obligations to meet reasonable requests for access to, and use of, a wide range of civil engineering, such as buildings, building cables, wiring, antennae, towers, supporting constructions, manholes and cabinets. Access to these civil engineering assets is crucial for the successful roll-out of new networks because of the high costs of duplication, and the significant savings that can be made when they can be re-used. Therefore, this access remedy can be imposed as a standalone remedy to be considered before assessing the need to impose any other potential remedies.⁷⁶

The second new tool relates to the possibility to enter into commitments as a result of which the obligations are not imposed or only in an adapted way. The first type of commitment regards the regulatory treatment of new very high capacity network elements consisting of optical fibre elements up to the end-user premises or base station, upon receipt of commitments by the SMP providers.⁷⁷ The commitments may consist of offering co-ownership or long-term risk sharing through co-financing or through purchase agreements, giving rise to specific rights of a structural character by other providers of electronic communications services. Co-investment gives SMP providers the opportunity to invest in, for example, a fibre network while being supported by investments of providers using the fibre network.⁷⁸ This can be done through a joint venture but also by reciprocal or one-way access models.⁷⁹ The arrangements might stimulate investments and accelerate the pace of the development of advanced communications networks being beneficial to the development of the digital economy.⁸⁰ The SMP provider may influence the obligations imposed by arranging its agreements with the third party co-investing in the network in such a way that it meets the requirements as listed in the Telecom Code.⁸¹ One of the requirements is that the arrangement cannot be exclusive for the co-investors and needs to be open to third parties entering the co-investment arrangements at a later stage.

Another requirement is that the co-investment is beneficial for end-users. If the requirements are met, and after a market test, the NRA can declare the co-investment arrangement binding for a period of seven years and refrain from imposing obligations as regards the elements of the new very high capacity network during this period. However, the NRA holds the power to impose obligations further to a market analysis in order to address significant competition problems on specific markets that would otherwise not be addressed.⁸²

Generally, there is more room for offering commitments for access, co-investments or both by SMP providers to the NRA. In addition to the commitment procedure for new very high capacity networks as discussed above, SMP providers may propose co-operative agreements relevant for the assessment of the appropriate and proportionate obligations. Operators that voluntarily separated their vertically integrated companies may provide effective and non-discriminatory access to third parties. If these commitments are fair, reasonable, open, non-discriminatory and meet other requirements, the NRA makes them binding. As a result of this, the commitments will be taken into account when drafting the remedies and may lead to a decision to withdraw obligations.⁸³

The third new tool involves companies that are not active on retail markets—for example, companies operating a fibre network and offering access to internet service providers without providing broadband access services to end-users. Hence, the operator of the fibre network is not engaged in any competition with the internet service providers on its network. In the case of a wholesale-only company, the NRA may decide to only impose non-discrimination and access obligations, against fair and reasonable pricing on these wholesale-only companies.⁸⁴

The fourth new tool is related to the migration from legacy infrastructure.⁸⁵ Promoting investments is not only related to supporting the development of new infrastructures but also to provide room for dismantling legacy networks, such as the copper networks, and to migrate services to comparable services on the new infrastructure. SMP provisions as regards the legacy

⁷² Telecom Code art.68(6).

⁷³ Telecom Code arts 69 (transparency), 70 (non-discrimination), 71 (obligation of accounting separation), 73 (access), 74 (price control and cost-accounting obligations), 77 (functional separation) and 78 (voluntary separation by a vertical integrated undertaking).

⁷⁴ For example, Telecom Code art.73(2), which added (e) and (f) compared to art.12 of the Access Directive in order to reflect investments in very high capacity networks and the risks ((e)) as well as economically infrastructure-based competition and innovative business models that support sustainable competition, such as those based on co-investment in networks ((f)).

⁷⁵ Telecom Code art.72.

⁷⁶ Telecom Code Recital 187.

⁷⁷ Telecom Code art.76 and Recital 199. In exceptional circumstances, for example, when it is technically impracticable to deploy optical fibre elements to the premises, this may also apply to optical fibre elements that are deployed just outside and in the immediate proximity of the end-user's premises.

⁷⁸ See, in the context of the draft Telecom Code, Serge J.H. Gijrath, "Negotiating and Performing Infrastructure Sharing Agreements under the European Electronic Communications Code" (2018) 24 C.T.L.R. 90.

⁷⁹ See *Draft BEREC Guidelines to foster the consistent application of the criteria for consistent application of the criteria for assessing co-investments in new very high capacity network elements (art.76 EECC)*, BoR(20) 113 (12 June 2020), based on art.76(4), explaining, among other things, the model covered by the clause (see para.3.1.5).

⁸⁰ W. Briglauer et al, "Public Policy Targets in EU Broadband Markets" (2017) 41 *Telecommunications Policy* 949, assessing the draft co-invest tool as encouraging investments, although dependent on the conditions.

⁸¹ Telecom Code art.76 in conjunction with 79 and Annex IV of the Code with the criteria for assessing co-investment offers.

⁸² Telecom Code art.76(2).

⁸³ Telecom Code art.68(6).

⁸⁴ Telecom Code art.80. However, if competition problems arise on the downstream markets to the detriment of end-users, other obligations may be imposed on the basis of art.80(4).

⁸⁵ Telecom Code art.81.

networks can be lifted under certain conditions. A prerequisite is the availability of suitable conditions for migration, which means that alternative access products must be made available for service providers in order to serve their end-users with adequate planning and conditions for migration.⁸⁶ Transparency is required if the access to or use of the services and applications will change as a result of the migration.⁸⁷ Also, the migration should be notified in time.⁸⁸

The new toolbox provides for more flexibility for SMP providers to influence the remedies. Some of the new obligations, such as the wholesale only and the co-investment remedies, can be influenced by the providers themselves. This means that the way the providers organise their company or their investments may influence the remedy to be imposed by the NRA. Dependent on how they structure their arrangements with third parties, they may benefit from discontinuing obligations as these may be replaced by commitments in full or in part. Also, the organisation of the company of the provider can influence the set of obligations, especially when the provider is only engaged in wholesale services. The new toolbox needs to be implemented by Member States so that the NRAs have a legal basis for applying them to SMP providers while serving the goals.

In addition to the new tools, current tools have also been adjusted in order to provide for a more flexible framework to support investments, like the assessment of price control systems that need to promote competition and long-term end-user interests related to the deployment and take-up of next-generation networks.⁸⁹ NRAs need to carry out a complex market assessment as they need to assess the new tools, not only stand-alone but also in relation to the SMP framework in place and the existing tools. They need to assess whether the combination of tools results in an optimum balance of promoting investments and competition. A delicate process, that will be evaluated by the Commission and supported by BEREC guidelines⁹⁰ in order to assist the NRAs.

New market regulation promoting the roll-out of networks

The new toolbox in ex ante regulation is not the only amendment in market regulation enacted in order to facilitate and stimulate connectivity, competition and investments in very high capacity networks. The Telecom Code introduces new market regulations beyond the ex ante framework in order to pursue the connectivity goals.⁹¹ Two of these new regulations may be closely related to ex ante regulation.

In the first place, the Telecom Code provides a tool for NRAs or other competent authorities to monitor the roll-out of fibre networks. To that end, telecom providers will be obliged to provide detailed information about the current coverage of their broadband networks as well as their forecasts for rolling out new networks.⁹² On the basis of the information, the NRAs or competent authorities will be able to find the geographical areas in which no roll-out of fibre networks is planned at that time, as a result of which end-users will not benefit from the gigabit society. They may invite providers and public authorities to declare their roll-out intention in those areas that are likely to be excluded from roll-out. The NRA must take the results of the surveys into account when identifying and defining relevant markets for ex ante regulation.⁹³ When the NRA decides that this input results in a deviating market definition, for example, by defining narrow, local, geographical markets, the NRA needs to follow the regular procedure and consult the deviating market definition with the Commission. After concluding that the relevant market is not competitive and SMP exists, remedies may be imposed. However, even when taking into account the new toolbox, no remedies exist to enforce the roll-out of new fibre networks.⁹⁴ The powers of NRAs on the basis of ex ante regulation are limited in this respect. It is more likely that governments will use the results in order to decide whether they are willing to support the roll-out in these specific areas and that they will use this data to substantiate that any public financing of local roll-out projects is compliant with state aid rules.⁹⁵

⁸⁶ Telecom Code art.81(2).

⁸⁷ Telecom Code art.69(1).

⁸⁸ Telecom Code art.81(1).

⁸⁹ Telecom Code art.74(1). Under the Telecom Framework, Recommendation 2013/466 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment [2013] OJ L251/13 provided for a soft law regulatory pricing approach, promoting investments in Next Generation Networks; see M. Bilal Ünver, "Is a fine-tuning approach sufficient for EU NGA policy? A global review around the long-lasting debate" (2015) 39 *Telecommunications Policy* 957.

⁹⁰ See *Draft BEREC Guidelines to foster the consistent application of the criteria for consistent application of the criteria for assessing co-investments in new very high capacity network elements (art.76 EEC)* (2020).

⁹¹ As this article focuses on market regulation, other new provisions in the Telecom Code, such as on radio spectrum, 5G and end-users' interests, will not be discussed.

⁹² Telecom Code art.22.

⁹³ Telecom Code art.64(3).

⁹⁴ Under the Telecom Framework, the ECJ stipulated in *TDC A/S v Teleklagenævnet* (C-556/12) EU:C:2014:2009 that, only in order to meet reasonable requests for access, an obligation may be imposed to install a drop cable not exceeding 30m in length connecting the distribution frame of an access network to the network termination point at the end-user's premises, as long as that obligation is based on the nature of the problem identified, proportionate and justified in the light of the objectives set out in art.8(1) of the Framework Directive. If the NRA requires a SMP provider to install drop cables for the purpose of connecting the end-user to a network, it has to take into account the initial investment made by the operator concerned and the existence of a price control that makes it possible to recover the costs of installation.

⁹⁵ Telecom Code art.22(1)(2), Recital 229 referring to EU State aid rules (arts 106–109 TFEU).

In the second place, the Telecom Code introduces a symmetrical access obligation for network elements that cannot be replicated by other providers.⁹⁶ If so, an access obligation to network elements, such as wiring and cables, inside buildings or up to the first concentration or distribution point, or outside buildings may be imposed on providers or owners of the network elements.⁹⁷ When such access will not resolve the economic or physical barriers to replication, access obligations beyond these points may be imposed, and even an active access obligation, meaning access to services, if justified on technical or economic grounds.⁹⁸ As the access obligations may be imposed on all companies, irrespective of their having SMP or not, they are called symmetrical access obligations. The reason for including the symmetrical access obligations in the Telecom Code is to prevent that providers will be deprived of access to viable alternatives for non-replicable assets, although the imposition of these obligations must be weighed against possible effects as undermining incentives for investments and competition.⁹⁹ The NRAs applying the provisions need to follow the consultation procedure of ex ante regulation, which means that the Commission and BEREC should be informed about the draft decisions and about the review of these decisions.¹⁰⁰ They should also pursue the objectives of the Telecom Code.¹⁰¹ The three-step analysis developed in order to apply ex ante regulation tools, however, does not fit in with the process of imposing symmetric regulation. Markets need to be defined but the market review is different as it is not intended to assess SMP. If the outcome of the analyses indicate that replication faces high and non-transitory physical or economic barriers, leading to important competition problems or market failures at retail level to the detriment of end-users, it could be justified to extend access obligations. It is more likely that such extended access obligations will be necessary if the business case for alternative infrastructure roll-out is riskier, for example, in areas of low population density.¹⁰²

Finding the right balance is crucial, as these obligations may harm local fibre roll-out.¹⁰³ Therefore, wholesale-only companies are exempted if they provide effective alternative access on a commercial basis to a very high

capacity network, on fair, non-discriminatory and reasonable terms and conditions, including price. This is also the case if the imposition of obligations would compromise the economic or financial viability of a new network deployment, in particular by small local projects, such as communities rolling out municipal networks. Said new networks are exempted.¹⁰⁴ The Telecom Code provides that the obligations imposed by NRAs should be consistent.¹⁰⁵ But how this can be achieved exactly is not clear. For example, if the NRA accepts commitments for co-investment under ex ante regulation and at the same time imposes access obligations on the basis of non-replicability, what would be the framework to decide on how these obligations are beneficial to the roll-out of new advanced networks, such as new fibre networks?¹⁰⁶ The question also arises in how far the non-replicability access obligations restricts the role of the three-criteria test in defining when ex ante regulation is justified and when competition law suffices. As the Telecom Code only provides limited insight into the correlation of the different forms of market regulation, Member States are likely to implement the Telecom Code without providing guidance to NRAs on how to achieve the policy goals in a consistent way. This will lead the NRAs to decide on the application of the ex ante framework taking into account the new policy goals and also new market regulation, such as the new non-replicability symmetric framework. Even when they use the current toolbox, the context of applying the regulatory tools will have changed. Also, other competent authorities than the NRAs may be involved in monitoring the roll-out of new fibre networks, and have their role in pursuing the connectivity goals. It might be difficult to apply the market regulation in a coherent and consistent way, when all are pursuing the goals of the Telecom Code. Therefore, when looking at the importance of promoting the competition on the market for internet access and of stimulating the connectivity and development of advanced infrastructures, it is difficult to predict how NRAs will apply the market regulation under the Telecom Code and what their emphasis will be when regulating. Will the new SMP tools become successful as remedies in ex ante regulation, or will the non-SMP obligations become the predominant

⁹⁶ Telecom Code art.61(3).

⁹⁷ Such a point may be a point where cables viewed in the downstream direction are disaggregated (distributed) and viewed in the upstream direction are aggregated (concentrated): see *Draft BEREC Guidelines to foster the consistent application of the criteria for consistent application of the criteria for assessing co-investments in new very high capacity network elements (art.76 EECC) (2020)*, paras 25–30.

⁹⁸ Telecom Code art.61(3) subpara.2.

⁹⁹ Telecom Code Recital 152. It could also strengthen the position of dominant players.

¹⁰⁰ Telecom Code art.61(5).

¹⁰¹ Telecom Code art.61(6).

¹⁰² Telecom Code Recital 154.

¹⁰³ Telecom Code Recital 155. Briglauer et al, “Public Policy Targets in EU Broadband Markets” (2017) 41 *Telecommunications Policy* 949, 960 points out that symmetric regulation gives rise to a substantial extension of regulation, outside the scope of the relevant market concept, with a lack of clarity as regards the scope and serious concerns for the creation of sufficient investments initiatives.

¹⁰⁴ Telecom Code art.61(3) subparas (a) and (b). See *Draft BEREC Guidelines on the Criteria for a Consistent Application of Article 61(3) EECC (2020)*, paras 85–93 (explaining what are new networks, being generally not older than five years) and paras 94–103 (explaining the projects to be considered small).

¹⁰⁵ Telecom Code Recital 152. Consistency is also required with Directive 2014/61 on measures to reduce the cost of deploying high-speed electronic communications networks [2014] OJ L155/1.

¹⁰⁶ The *Draft BEREC Guidelines to foster the consistent application of the criteria for consistent application of the criteria for assessing co-investments in new very high capacity network elements (art.76 EECC) (2020)* mainly focus on explaining the criteria and do not provide much guidance as to how to come to a consistent approach, although they address the inconsistency in terminology. For example, the concept of “new” in “new network” employments differs from the concept of “new” in co-investment schemes as well as from the concept of “significant new investment in the broadband network” in the *Guidelines of the European Commission for the application of state aid rules in relation to the rapid deployment of broadband networks* [2013] OJ C25/1. See *Draft BEREC Guidelines to foster the consistent application of the criteria for consistent application of the criteria for assessing co-investments in new very high capacity network elements (art.76 EECC) (2020)*, paras 91–92, fnn.16–17.

way of regulating the market, as a result of which market regulation will shift away from ex ante regulation? It is too early to draw a conclusion on this yet.

Ex ante regulation considered as a tool for regulating digital economy

While ex ante regulation in the Telecom Code is adapted and new market regulation tools are added to the Telecom Code, the introduction of ex ante regulation is considered as a tool to regulate digital markets. The proposals are aimed at regulating large platforms with significant network effects, and with the possibility to act as gatekeepers. As harmonisation regulation of platforms is limited,¹⁰⁷ the Commission relies on the application of competition law in order to address the concentration of powers and problems as regards the competitiveness of digital markets. However, it is felt that this is not sufficient to remedy potential competition problems.¹⁰⁸ Therefore the Commission is exploring ex ante regulation to regulate digital markets, such as online platforms. The exploration is taken place in two contexts: a sector-specific ex ante regulating tool and a new competition tool.

First, the Commission explores a sector specific ex ante regulation tool in the context of the Digital Services Act package.¹⁰⁹ The tool is aimed at large online platforms acting as gate-keepers, to be determined by a set of criteria such as significant network effects, the size of the user base and/or the ability to leverage data across markets. Applying the tool will lead to a prohibition of certain blacklisted practices as well as the adoption of tailor-made remedies.¹¹⁰ The Commission indicates that, while recognising the many differences,

“experience from the targeted and tailor-made *ex ante* regulation of telecommunications services can serve as an inspiration in this regard, given the similarities from network control and network effects”.¹¹¹

The new competition tool is the second tool the Commission is exploring, complementary to the first tool.¹¹² The Commission provides a rough sketch of four options of designing the new competition tool. The tool could exist as a dominance-dominated tool or a market structure-based tool. The dominance-dominated tool is aimed at addressing concerns arising from unilateral conduct by dominant companies without any prior finding

of an infringement of art.102 TFEU. The market-structure based tool is aimed at identifying and remedying structural competition problems that cannot be addressed (at all or as effectively) under EU competition law. Each alternative may either consist of a horizontal scope, i.e. generally applied across all sectors of the economy, or a limited scope, i.e. only including certain digital or digitally enabled markets.¹¹³

As the Commission refers to the experience in ex ante regulation in the telecom sector, it is valuable to consider to what extent these experiences might be relevant for regulating digital markets. Although the Commission only describes a broad outline of the tools, four general remarks can be made when comparing the ex ante regulation in the telecoms sector with the suggested tools.

In the first place, the ex ante regulation in the telecoms sector has been embedded in a clear set of goals as regards connectivity, competition and investments. The policy goals as regards digital economy are diverse, and yet less explicit and focused, as consultations are still pending.¹¹⁴ This means that the policy context relevant for applying ex ante regulation needs to be more developed to provide the context within which the ex ante regulation can be applied.

In the second place, the ex ante regulation in the Telecom Code consists in the fine-tuned framework of a three-criteria test to define whether ex ante regulation is justified, and if so, a three-step analysis of defining the relevant market, assigning SMP and imposing proportional remedies that support the goals of the Telecom Code. In the proposals for introducing ex ante tools in the digital society, both sector-specific based tools and competition-based tools are proposed without elucidating what the relationship will be. Applying a three-criteria test to define in which cases competition law may suffice, and under which circumstances ex ante regulation will be justified, could be helpful. However, more alignment will be needed when the new competition tool is introduced so that it will be clear under which circumstances the tool will be justified. Following the three steps of investigation under the ex ante regulation in the Telecom Code, the market definition is the starting point of the assessment. Exactly this first step is seen as problematic when assessing digital markets, as in the digital world it is less clear that well-defined markets can be identified.¹¹⁵ Also, the second step of analysing market power and SMP is seen as problematic in digital markets as the current framework, by using market shares, is not

¹⁰⁷ Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L186/57.

¹⁰⁸ J. Crémer, Y.-A. de Montjoye and H. Scheitzer, *Competition Policy for the digital area: Final report* (2019), pp.54–72 available at: <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> [Accessed 9 August 2020].

¹⁰⁹ Communication on Shaping Europe’s digital future COM(2020) 67 final Pt B.

¹¹⁰ Inception Impact Assessment, Digital Service Act Package, “Ex ante regulatory instrument for large online platforms with significant network effects acting as gate-keepers in the European Union’s internal market” (2020), para.3 available at: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers> [Accessed 9 August 2020].

¹¹¹ Inception Impact Assessment, Digital Service Act Package, “Ex ante regulatory instrument for large online platforms with significant network effects acting as gate-keepers in the European Union’s internal market” (2020), para.3b.

¹¹² Inception Impact Assessment, “New Competition Tool (NCT)” available at: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool> [Accessed 9 August 2020].

¹¹³ Inception Impact Assessment, “New Competition Tool (NCT)”, under B, Options 1–4.

¹¹⁴ Cremer et al, *Competition Policy for the digital area* (2019), p.40 are of the opinion that there is no need for a new debate on the goals of EU competition law.

¹¹⁵ Cremer et al, *Competition Policy for the digital area* (2019), p.46.

considered sufficient, given the role of returns to scale, network externalities and data in the digital economy.¹¹⁶ The third step, imposing obligations necessary and proportional to remedy the distortion of competition and pursue the goals of the digital markets, might be difficult if the policy goals are diffuse and not made explicit. The new ex ante remedies on, for example, co-investment provide room for companies to decide on the ways they would like to operate on the market and influence the type of ex ante measures to be imposed. As such they provide companies with incentives to support the goals. It is not clear whether the companies in the digital sectors targeted with the new tools would be given comparable incentives. In view of the abovementioned uncertainties, it is unclear whether the structure of ex ante regulation as developed in the Telecom Framework will be capable of shaping the ex ante regulation framework for digital markets.

In the third place, we noted that the role of ex ante regulation in the Telecom Code might also change, due to the introduction of other types of market regulation in the Telecom Code, such as the symmetric access obligations. There is a tendency to provide regulators with regulatory tools even if SMP does not exist. Or, to put it differently, there is a wish to be flexible to impose obligations if there is a situation of certain market power and a failure of market forces. Ex ante regulation in this sense seems to fill in a gap where markets cannot be strictly defined and a dominant position or SMP may not be substantiated. It is still too early to conclude whether the proposals for these new tools will be market orientated in line with the ex ante regulation in the Telecom Framework or whether they will result in new harmonisation initiatives providing a legal basis to regulate without any market assessment. Compared to the ex ante regulation in the Telecom Code one can conclude that the same wording refers to a different context. Not only is there a lack of policy goals to be taken into account when imposing obligations, but also the defined structure of assessing markets, SMP and obligations is missing, as well as the alignment at EU level after the notification of draft decisions. As the application seems to deviate from the ex ante framework in the Telecom Framework, it is the question whether the envisaged instruments will benefit from the long experience in the telecommunications sector.

Finally, in fourth place, changing the foundations of ex ante regulation and opting for a less market-driven approach of regulation may not only result in a very flattered way of regulating the digital economy but also risks opting for regulating tools lacking the flexibility of being able to adapt to changing market situations. The ability to adapt to changing market situations has been one of the merits of ex ante regulation in the telecommunications sector in the last two decades. The charm of ex ante regulation is that it addresses well-defined markets with a distortion of competition and

contains a system of continuously evaluating the competitiveness of markets and alignment of remedies with both the competitiveness of markets and the goals of the Telecom Code. Although the concept and role of ex ante regulation in the telecom sector might be changing, its merits are being proved and might be useful to consider when developing ex ante tools in other areas of the digital economy.

Conclusion

The Telecom Code aims at offering a new framework for the regulation of electronic communications networks and services pursuing the goals of promoting connectivity, investments, competition and end-user interests. It is an important pillar of regulating the digital economy. The Telecom Code broadens both the objectives for, as well as the scope and tools of regulation. This has its effect on market regulation, more specifically on applying ex ante regulation. The ex ante regulation consists in an elaborated framework for assessing markets, SMP and imposing obligations. Although this system in essence has not changed in the Telecom Code new types of obligations have been designed in order to provide the NRAs with more tools to pursue the renewed goals of the Telecom Code when applying ex ante regulations. SMP providers co-investing in broadband networks or exploiting fibre networks may benefit from more flexible ex ante obligations. However, the Telecom Code also introduced new styles of symmetric market regulation providing NRAs with possibilities to impose access obligations irrespective of SMP.

Member States need to implement the Telecom Code before 21 December 2020. Even if they follow the wording and structure of the Telecom Code closely, which will be likely as a result of the harmonisation goals, NRAs may be faced with a new framework to apply. Applying ex ante regulation in the context of the new goals of the Telecom Code and in a consistent and coherent way with non-SMP regulations, will be a challenge for NRAs. More challenges as regards ex ante regulation will arise. In other markets of the digital economy a need is felt to design regulatory ex ante tools in order to fill in the gaps that exist when these markets will be only regulated on the basis of general competition law. When comparing these new proposals with the ex ante framework developed in the telecommunications sector, the first impression is that they deviate from the essence of ex ante regulation. At first glance, essential concepts, like the three-criteria test and the defined steps on assessing markets as well as the existence of SMP before imposing obligations, do not seem to fit, due to, among other things, the difficulties in assessing digital markets and the market power of online platforms. Even if it were possible to develop a three-criteria test in order to decide when ex ante regulation would be justified, the proposals for a new competition tool will add a new dimension and

¹¹⁶ Cremer et al, *Competition Policy for the digital area* (2019), pp.48–50.

challenge to align the tools of regulation and apply them consistently. The new proposals may learn from the way that ex ante regulation has been applied over the last two decades and as it is being reformed in the Telecom Code:

consisting of clear steps and processes, serving well-formulated goals and with the flexibility to regulate fast-changing markets.

