



FUTURE OF EUROPE OBSERVER

EU Regulation and its complexities.

This issue of the Future of Europe Observer explores some of the complex questions surrounding regulation within the EU internal market. The regulation of network industries, including the need to balance legal issues concerning the improvement of competition and the protection of the rights of individuals are examined. ZEI Alumni Juan Carlos Iniesta Corbacho, Pagona Tsormpatzoudi and Senior Fellow Nils Lemberg survey European regulation in the fields of mobile roaming, postal services and in regard to the draft Data Protection Regulation.

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Future of Europe Observer

accompanies the debate on governance and regulation in the European Union. Authors are ZEI Scholars, Master of European Studies Fellows and Alumni.

Vol. 3 No. 2 June 2015

Mobile Roaming: The Market is functioning

By Juan Carlos Iniesta Corbacho

Roaming occurs when a subscriber of a Mobile Network Operator (MNO) is able to access communications services while being connected to a different MNO's network, and may happen both nationally (e.g. when two MNOs share networks in one country) or internationally.

The institutions of the EU are currently discussing a new regulation for intra EU roaming business, based on the European Commission's legislative proposal on the "Connected Continent"¹ in order to achieve a Single Market. This includes several aspects of the telecommunications industry such as spectrum, authorisations, consumer protection, net neutrality and roaming. With a high probability, only the latter two will be addressed in the final text passed by the co-legislators European Parliament and European Council, as the other topics are either highly sensitive for member states (spectrum) or will be further tackled in the upcoming Framework Review (consumer protection or authorisations).

The new text will be the fourth legislative regime adopted to

regulate roaming.

Roaming is in broad terms regulated in the following aspects:

1. Retail: Maximum Rates to be charged to consumers by MNO per unit (minutes, SMS or Megabytes).
2. Wholesale: Maximum Rates to be applied between operators (the visited network charges the home network according to the usage made by the customer when in roaming) per unit (minutes, SMS or Megabytes).
3. Access obligations to the visited network when a home network or a Mobile Virtual Operator (MVNO) request that roaming shall be enabled between both entities.
4. Decoupling obligations.
5. Others: anti bill shock measures, welcome SMS, etc.

Over time, the scope of numbers 1 and 2 have been expanded (e.g. data) and the price caps have been reduced (since 2007 by more than 60% in retail and above 80% in wholesale). Numbers 3 and 4 were added in the last regulation known as Roaming III.

Roaming III tried to boost competition (although it was already a competitive market) by introducing decoupling obligations. This means that whenever a customer decides to choose an Alternative Roaming Provider (ARP), the MNO is obliged to allow that and needs to cooperate with the ARP. The ARP would be responsible for managing the relationship with the customer, who keeps the same SIM card and phone number. However, it would still require the support of the MNO as the latter still is responsible for the relationship with the visited network and potentially for any platforms needed. Other decoupling mechanisms were also adopted such as the Local Break-Out (LBO) by which a customer could contract and use a local mobile network only for data services in the visited country without any change being required to their handset, other than minor configurations.

These obligations required extensive investments by MNOs in technical and billing capabilities in order to be compliant. The adoption of the regulation was in 2012, and decoupling obligations entered into force in July 2014 (MNOs had to already comply 6 months in advance to ensure that decoupling was possible if a customer requested it on July 1st). As the regulatory text is not specific enough, the Body of European Regulators for Electronic Communications (BEREC) Guidelines² were necessary to provide details on how certain requirements were to be understood or defined. These Guidelines were not completely published until July 2013. Even before that, officials of the European Commission advocated for the end of roaming.³

As a consequence of the uncertainty, any incentive to invest in a new business (to become an ARP or an LBO, based on the obligations established in Roaming III) disappeared. The decoupling boat sank even before leaving the port.

There is no doubt that roaming is under competitive pressure within the industry and under pressure from players outside the industry

(e.g. WiFi, local SIMs) on the retail side. On the wholesale side, there are at least 3 operators in each member state, competing with each other to attract the traffic and wholesale revenues from Foreign Network Operators, ensuring that there is a competitive price formation in each market. This is possible, among other reasons, thanks to the ability to steer traffic generated by own customers towards the preferred MNO in a country. As a result of competitive wholesale prices, small players are also able to provide the lowest retail roaming prices or Roam-Like-at-Home like offers.⁴

Vice President Andrus Ansip:

“I am deeply disappointed, because we promised to abolish roaming charges. In the year 2006, Viviane Reding made this proposal already. Neelie Kroes continued with this process. Now Günther Oettinger and me, we are dealing with those issues. Now it is really time to abolish roaming surcharges.”

The question is: if the market is already going in this direction, why is it necessary to regulate? Some might be tempted to answer that such regulation just reaffirms what the market is already achieving and therefore causes no harm. But this assumption is dangerous.

The biggest problem would not be the additional investments required to again comply with a new regulatory framework and not even the loss incurred by insufficient revenues to cover real costs associated with roaming (e.g. investment in touristy areas to ensure that coverage and capacity are sufficient for instance in Southern European coastal areas;).

A bigger threat would be the risk of arbitrage. This means the risk of an operator in a small size country (therefore with a small network to maintain and less spectrum investment required) flooding the rest of member states with its SIM cards to be used by anyone locally as wholesale roaming charges would be cheaper than investing in a formal network. All in a moment when Europe requires large-scale investments to continue to deploy 4G networks.

In any case, the European Union should ensure that the market continues to function as such, that innovation is rewarded, that there is a level playing field and that investments are protected, since they are the only means to ensure that our continent regains a competitive advantage once

consumers – enterprises and citizens – can make use of the best telecommunications services.



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3. Neelie Kroes on May 30th 2013 to the EP: “I want you to be able to go back to your constituents and say that you were able to end mobile roaming costs”. <http://www.euractiv.com/infosociety/commission-moves-abolish-roaming-news-528144>
5. E.g. Retail proposition launched by Free in France in 2013 or Feel-at-Home proposition by Three Group. http://www.iliad.fr/en/presse/2014/CP_040214_Eng.pdf

Cross-Border Postal Services in Europe - A Liberalized Market?

By Nils H. Lemberg

With the 3rd Postal Directive (2008/6/EC), the EU required all member states to fully open their respective national postal markets, by 2013 at the latest. While this meant the abolition of reserved areas for incumbents who provide the universal service, it must be noted that the last reservations covered only letter post services and, since the 2nd postal directive in 2002, excluded outgoing cross-border letter post services. Still, the full liberalization of a formerly state-run sector does not necessarily lead to a (single) common market for the respective services in the EU. Thus, the EU Commission has closely monitored progress in this regard and in 2012 issued the so-called “Green Paper – An integrated parcel delivery market for the growth of e-commerce in the EU”. In this paper the Commission concluded among other things that cross-border parcel delivery would remain one of the key challenges for consumers and e-retailers. Besides the lack of transparency, the paper identified high prices for cross-border parcel deliveries to be one (if not the most) important barrier to effective competition among e-retailers. They also stand in the way of the completion of an internal postal market and the universal service aim of affordable prices for all users. The Commission estimated prices for cross-border delivery to be regularly twice as high as domestic ones and this situation has not changed

significantly since then. Following the ‘Green Paper’, “A Roadmap for completing the single market for parcel delivery – Build trust in delivery services and encourage online sales” (Roadmap) was published at the end of 2013, leaving steps like the increase of interoperability among postal service providers to the industry but stressing that further (regulatory) steps would be possible. Just this May, the EU Commission has started (again) a public consultation on cross-border parcel delivery, with high prices being among the top concerns.

As an example, Deutsche Post prices for sending a parcel to the Netherlands compared to a domestic shipment are 129% higher, while sending a letter costs only 29% more. Competitor Hermes’ prices display an even larger difference (219%). Consequently, the Commission assumes that certain mechanisms prevent prices from dropping to a level that could be achieved in a truly competitive single market.

In both, the ‘Green Paper’ and the ‘Roadmap’, the fact that postal service markets were and are traditionally organized as national or domestic markets, which is partly due to their characteristic as a network industry, was given as an explanation for the identified problems. However, it might not have been stressed enough that this traditional separation into domestic markets is also reinforced

by international organizations and agreements like the Universal Postal Union (UPU) or the REIMS agreements (Remuneration of Mandatory Deliveries of Cross-border Mails). While agreements within the UPU are between different countries, the rules, duties to deliver, and terms of remuneration apply to the designated (postal) operators of the respective country only. Without the (direct) involvement of governments, the same is true for Europe-wide REIMS agreements. With the re-notification of the REIMS II Agreement in 2003, participation in the REIMS system was opened to third-party postal operators that are not entrusted with the fulfilment of a universal service obligation. Still, so far only one non-universal service provider has ever entered into this post network (today regulated by the REIMS V agreement). Additionally, all of the rules, treaties or agreements have in common that each national operator has an obligation towards all other designated operators or parties of the agreement to deliver their cross-border mail (letters and/or parcels) within its territory at generally agreed or set rates. While such an obligation is,

Jean-Claude Juncker :

“Jobs, growth and investment will only return to Europe if we create the right regulatory environment and promote a climate of entrepreneurship and job creation. We must not stifle innovation and competitiveness with too prescriptive and too detailed regulations.”

Political Guidelines for the European Commission

on the one hand, necessary to ensure delivery of international mail across borders, it may also lead to market distortions. Keeping in mind that at least in the EU, the designated operators for the UPU or the REIMS members are normally the incumbents, the incentives for entering into another incumbent’s market are low. Not only is it expensive to build up own infrastructure, but the pressure to do so is low, too. With pre-set or negotiated rates and a duty to deliver, the incumbents can offer cross-border mail services without difficulties. At the same time, they do not risk the geographic segmentation of markets or the possible competition of operators from neighboring countries entering their markets. Even though this geographic segmentation of markets might be neither an understanding nor a concerted

practice between the undertakings involved, it still constitutes a considerable obstacle to the emergence of more effective competition in a single market. And without more integrated operators or cross-border postal networks, the problems will remain. In this regard, the setting of common standards for parcel services or handling/tracking IT-infrastructure (another initiative at EU level) might help to interconnect networks efficiently and thus build a single European network or market for postal services.

Last but not least, the pre-set rates that are being paid among the entrusted postal operators for the handling of cross-border mail, especially the UPU rates for letter post items, the so called terminal dues, and for parcel post items, the so called inward land rates, act as a default for any (possible) bilateral agreement between the incumbents. As many studies (e.g. by the UPU Postal Operations Council in 2014) have shown already, these rates are not cost-oriented as they do not represent the main cost factor: the handling fees for last mile delivery of comparable domestic postal items. Instead, rates for international cross-border parcel services deviate from the respective (full) domestic prices significantly, sometimes by more than +357% or -95%, leading to further

New ZEI Discussion Paper C 229/2015

Kun Hu: Innovations of the European Central Bank in the Context of Financial and Monetary Integration: A Chinese Assessment

The paper explores financial and monetary integration in the Eurozone and reviews the reasons, specific performance and impact of changes in the European Central Bank’s decision-making mechanisms. The purpose of which is to deepen and expand understanding in academic circles of the European economy and the European Economic and Monetary Union, as well as their development trends.



competitive distortions.

Still, possible future steps by the EU Commission are hardly predictable. The recent public consultation on cross-border parcel services must also be seen in connection with the e-commerce sector inquiry by DG Competition, as well as the general digital agenda. Thus, further action by the Commission depends on the outcome of said inquiry and consultation process. Besides the standardization efforts, additional regulation would be most likely to significantly lower prices for cross-border mail services, despite the general trend towards deregulation within the EU. One could argue that the rates for the handling of inbound cross-border mail services are comparable to interconnection or roaming fees. Despite all the differences between postal and telecommunication networks, some similarities remain, like the fact that the provision of a network is generally associated with high (fixed) costs, while the delivery of one additional piece of mail or the termination

of another phone call does not add to these costs significantly. Supposing that the regulation of cross-border postal services would make it onto the Commission's agenda, there could possibly be some more lessons to be learnt from the successful regulation of the telecommunications industries.

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1st German Postal-law Conference



ZEI Director Christian Koenig and panel participants at the 1st German Postal-law conference.

of Bonn, representatives of the German Federal Cartel Office, the Federal Network Agency and the Monopolies Commission exchanged opinions in an informal atmosphere. Bringing together practitioners with academic researchers, the format was very well received by the participants and therefore met with the organiser's expectations. The concept of the conference, together with the event venue located where the German Federal Cartel Office, the Federal Network Agency, the Monopolies Commission as well as the Headquarters of the Deutsche Post are all seated meant that the 1st German Postal-law conference was a successful start to a series of conferences.

On the 4th of March 2015 the 1st German Postal-law conference was held at the Center for European Integration Studies (ZEI) of the Rheinische Friedrich-Wilhelms Universität Bonn. Experienced academics and practitioners gave statements about current challenges in the field of postal market regulation, which was followed by a lively round of discussion moderated by the Director of ZEI Prof. Dr. Christian Koenig LL.M. Throughout the day the participants which included lawyers, business representatives, legal scholars of the University

A legal perspective on Privacy by Design

By Pagona Tsormpatzoudi

The information society has brought with it challenges for individuals' data protection and privacy, which in recent years have been extensively discussed in policy and legal fora, especially in the context of data protection reform. Such challenges are associated with the fact that users of ICT products and services are often not in a position to take relevant (security) measures in order to protect their own or other persons' personal data.¹ Data protection reform was perceived as a way to strengthen the rights of individuals.

In this context, improving the enforcement of the legal framework and addressing personal data protection risks in a timely manner became necessary. Otherwise it might be too late and economically too cumbersome to repair the harm already done.² Both the Article 29 Data Protection Working Party and the European Data Protection Supervisor underlined that privacy should be taken into account at the earliest possible stage when developing an IT system. Privacy by design was the concept which focused on addressing this priority and thus, according to them, should be recognised as a general principle and be articulated in provisions of specific legal instruments.

This is how Privacy by Design, a technical concept which was born by engineers, was introduced by the European Commission into the Draft General Data Protection Regulation. From a

legal perspective, Privacy by Design is an approach that helps enforce privacy rules and ensures that new technologies, products or services do not create new privacy concerns but protect individuals' privacy.³ In its essence it intends to identify and mitigate privacy risks from the very beginning, when the means for the processing of data are determined and throughout the lifecycle of the processing.⁴

Privacy by Design as a legal principle is not new in Europe. Even though not explicitly worded, the intention of the legislator to use technology in order to help enforce privacy and data protection principles appears in the Data Protection Directive 95/46/EC. Article 17 of the Directive provides that the data controller has to take technical and organizational measures both at the stage of the design of the system as well as at the time of the processing of personal data.⁵ Departing from this notion, Privacy by Design would represent an extension of existing rules on data security and the general principle of accountability.⁶ The goal was to enforce the implementation of technical and organisational measures which would empower the user and would re-build trust in ICT. In that sense, it would fulfil the objectives of the Commission in proposing the Draft General Data Protection Regulation to strengthen the rights of individuals.

ZEI-MEDAC Workshop: Challenges of migration

As part of the ongoing cooperation between ZEI and MEDAC, a roundtable was held on the 6th of May at ZEI. Together with young diplomats from the European neighborhood, conducting post-graduate studies at the Mediterranean Academy of Diplomatic Studies (MEDAC) in Malta, the ZEI Class of 2015 exchanged ideas and experiences from both sides of the Mediterranean and beyond, at a time of unprecedented challenges in the region. Presentations and discussion touched upon different subjects such as migration, intercultural relations, the European Neighborhood Policy and the current situation and challenges in the Euro-Mediterranean relations. The young diplomats currently studying in Malta were accompanied by MEDAC director Prof. Dr. Stephen Calleya, Dr. Monika Wohlfeld and Dr. Omar Grech. ZEI's own Master Fellows "Class of 2015" attended with ZEI director Prof. Dr. Ludger Kühnhardt.



ZEI Director Ludger Kühnhardt with MEDAC and ZEI students

The recent Proposal for a Draft General Data Protection Regulation, introduces in Recital 61 and Article 23 data protection by design and by default⁷ (and not privacy by design and by default) mainly because of the scope of the particular legal instrument which is to protect fundamental rights of individuals, but in particular the right to data protection (Article 1). According to the European Parliament, data protection by design requires that data protection should be embedded within the entire life cycle of the technology, from very early design stage, right through to its ultimate deployment, use and final disposal.⁸

The Council in its report of December 2014 did not agree with this approach and replaced the definition with a non-exhaustive list of technical measures which can help the implementation of the principle. It reads: “In order to be able to demonstrate compliance with this Regulation, the [data] controller should adopt internal policies and implement appropriate measures, which meet in particular the principles of data protection by design and data protection by default. Such measures could consist inter alia of minimising the processing of personal data, (...) pseudonymising personal data as soon as possible, transparency with regard to the functions and processing of personal data, enabling the data subject to monitor the data processing, enabling the controller to create and improve security features”.⁹

The above list focuses on technical data protection by design measures. However, it should be noted that the principle should not be approached narrowly as merely introducing technical requirements for system developers. Embedding as many data protection requirements as possible into the design of systems, in the sense of strictly automating compliance with the legal framework may not be sufficient.¹⁰ The concept should be rather understood as a mindset, reflecting the idea of respecting privacy at the technical and organisational level. As Ann Cavoukian has observed, Privacy by Design should be based on a trilogy of elements: information

systems, accountable business practices and physical design.¹¹ In this sense privacy should become a business value and penetrate the culture of an organisation. It should thus drive choices regarding technical design and data processing but also strategy development and management decisions.¹²

Vice-President Andrus Ansip and Commissioner Věra Jourová:
“Ensuring trust will allow the European Digital Single Market to live up to its full potential. Protecting personal data, is a fundamental right for everyone in the EU.”

While the discussions on the proposed data protection regulation are still on-going, one may identify some challenges in the way the principle is currently worded

in the draft. While the emphasis is on technical data protection by design measures, it remains unclear what concrete obligations it entails for data controllers and under what conditions it can be deemed that it has been implemented. Further, in relation to the actors that should be involved in its implementation, the data controller seems mainly responsible for implementing the principle. However, given the fact that sometimes there are actors outside the data processing lifecycle whose actions have an impact on the way the principle will be implemented, the Council’s report has identified technology producers as playing an important role. It particularly mentions that technology producers should be encouraged to take into account the right to take protection (Recital 61 of the Council’s Report of December 2014). While this seems to be more a recommendation, rather than an obligation, it remains to be seen how the role and interaction between different relevant actors will take place in practice.

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Acknowledgements: This research has been partially funded by the European Commission FP7 project PRIPARE (PReparing Industry to Privacy-by-design by supporting its Application in Research) under Grant Agreement No: 610613

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IMPRINT

ISSN: 2196-1409
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The Future of Europe Observer is published three times a year. Authors are responsible for the views expressed in their contributions.

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