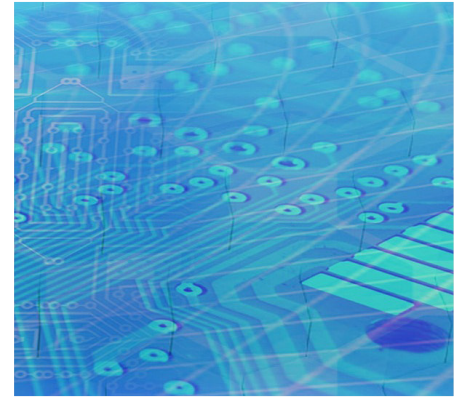


Competition, Co-investment and Network Build

Are regulatory holidays back in fashion?



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The legislative process on the draft Electronic Communications Code has become the battleground for those in favour of regulatory holidays as the best way of promoting investment. The article examines the contrasting positions taken by different parties in the debate.

On 22 September, the Presidency released its amended version of the much debated ECC. The new text revealed once again that regulatory holidays and deregulation in telecoms markets are back in vogue. That text suggested that those who argue for regulatory holidays as the driver of investment in telecoms markets had won the favour of one key branch of Brussel's policy makers. The Parliamentary Committee on Industry, Research and Energy (ITRE) voted on 2 October however to support an alternative text which offers hope for those who oppose regulatory holidays. This article explores the differences in the versions of the text and what they might mean in practice.

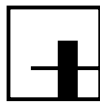
The original 2016 text of the ECC included proposals in Article 74 for a mandated regulatory holiday. National Regulatory Authorities (NRAs) were required not to impose obligations on new network elements that were part of a market on which it was otherwise imposing SMP regulation if those network elements were open to co-investment (i.e. investment by more than one operator). Importantly no specified time period for the regulatory holiday was included in the original text.

BEREC's Opposition

Following its 2016 publication, Article 74 was the subject

of a strident critique by BEREC. BEREC's criticisms were aimed both at the policy behind the co-investment provisions and their wording. On the policy front, BEREC noted that given that co-investment models had been pursued in France, Spain and Portugal (and Italy can now be added to that list) under the existing telecoms framework, it was difficult to see why specific new provisions were required. BEREC also questioned why the Commission was preferring co-investment models over other models and its preferred option was that Article 74 be deleted.

BEREC's fall-back position was that if the Commission wanted to signal 'openness' to co-investment there should be a strong reworking of the Article, starting with the key proviso that NRAs should be given the power to offer a regulatory holiday, but should not be mandated to provide one. In addition BEREC suggested that clarification was required on what would constitute the "new network elements" that would attract forbearance. BEREC also argued it was not enough for a co-investment offer to be made and that in order to address potential gaming by an SMP operator, there must be at least one instance of an offer being taken up. In addition, NRAs should be able to consider all the relevant circumstances, such as how the co-investment was structured, who was taking up the offer etc. before allowing such a holiday.



An extended holiday

The September text from the Presidency not only ignored many of BEREC's comments but in fact the scope of the regulatory holiday was radically widened. NRA's continue to be obliged to not impose obligations on new network elements where the co-investment criteria are met. Where this occurs, the Presidency text has added a clause stipulating that the NRA cannot review this earlier than seven years after the initial assessment was made thereby mandating not just a regulatory holiday but a clearly mandated seven year regulatory holiday.

Additionally, although the Presidency text has added a provision that seems intended to allow NRA's to ignore the stipulation for a regulatory holiday and impose regulatory obligations in exceptional circumstances, the convoluted wording of this paragraph with its references to "duly justified circumstances" and "significant competition problems on specific downstream markets" suggests that this exception is unlikely to be always helpful to NRAs, or to competitors who would be required to challenge an NRA's decision to grant a regulatory holiday.

The presidency's aims

The introduction to the Presidency text indicates that the revised drafting is intended to achieve three objectives. The first is stimulating investment, the second is to allow NRAs to prevent gaming and the third is to provide adequate safeguards. Whether these will be achieved through the revised text is, however, debatable.

For example, in line with the original text the deployment of the new network elements must be open to co-investment offers (i.e. defined terms as to how investors could invest in the deployment at different times and different levels of commitment over the life of the project) and these co-investment offers must be in line with a series of criteria set out in Annex VI of the draft ECC.

However, new text has been added to the Presidency version which only requires that such co-investment offers are made public at least six months before the marketing of end user services based on the new network elements. This timeframe for offers to be made public however seems potentially too short to encourage meaningful co-investment given the need for co-investors to pre-plan their financing and strategy.

In respect of gaming, in order to address the risk of SMP operators gaming the provision by setting out co-investment offers that would be either unworkable or unattractive in practice to other operators, the Presidency text requires that NRAs shall not only consider whether the co-investment offer is compliant with the criteria set out in Annex VI but also whether it is made in good faith. The NRA may also request commitments from the SMP

operator including changes to the co-investment offer and they may also conduct a market test by consulting stakeholders on the offered terms and allowing them to provide a counter offer.

Despite this, whilst the number of procedural hoops through which an SMP operator must jump has been increased, the substantive hoop which had been added in by the rapporteur (i.e. actually having to have one co-investment agreement entered into) has been removed. The explanatory note to the Presidency text suggests that this requirement was too high a bar for network operators given that they did not have control of what other operators did and that the risk of gaming could be better addressed by the new requirements set out above including the explicit requirement on NRAs to consider the good faith of the offer.

How an NRA is supposed to assess whether an offer is made in good faith is unclear. Will this involve the use of information requests to try and discover 'smoking gun' emails? Or is this just a tick box exercise, tick yes if this offer was made in good faith? How this is applied in practice and whether the assessment can be overturned on a retrospective basis will be key.

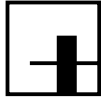
The ITRE compromise

In contrast to the Presidency text, the October compromise text voted on in the ITRE does pick up the BEREC recommendation that an NRA should be able to choose to offer a regulatory holiday but should not be obliged to impose one. In addition, the compromise text reinstates the requirement that at least one co-investment agreement has been concluded. The other additions of the Presidency text dealing with the additional hoops and the requirement to assess good faith are also removed.

The future of the ECC

Following the vote of the ITRE on the compromise text there will now be further negotiations with the Council and the Commission on which version of the text will finally be adopted. Operators will be lobbying hard and watching with interest to see whether regulatory holidays and the roll back of regulation remains in fashion throughout the final steps of the process.

The outcome of this process is extremely important in the UK in the context of the Government's desire to have 10 million FTTP premises within the UK by 2025 and ongoing planning by industry players who are intending to play in this new space. Given that it looks more likely now that the UK will be seeking at least a two year transition period post March 2019 from the European Union, it is likely that the initial FTTP developments that are built in the next few years could be subject to these new rules.



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If one takes into account Openreach's recently announced co-investment deal with Grosvenor for FTTP which it is suggested may only be the first of many co-investment deals by them, the importance of these provisions to the UK's future FTTP landscape are considerable. If the provisions are not right there is a real risk that competition in FTTP may be stifled to the detriment of end users, consumers and the UK as a whole.

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