

When can ex-ante access regulation be withdrawn?

Patrick Xavier

Curtin University Business School,
Australia

poxavier@gmail.com

Context of presentation/paper

Acknowledgement that some material in presentation/paper draws on report on “Geographically segmented regulation for telecommunications” I recently prepared for the OECD. The report is to be discussed by the OECD during 14-15 December 2009.

My paper today is designed to accord with theme of session. It is still a preliminary draft I am still working on.

Introduction

A widely accepted principle: regulation in telecommunications (as elsewhere) should be minimum necessary.

With competition intensifying in an increasing number of countries, some incumbents (and regulators prompted by these incumbents) are arguing that *ex ante* access regulation can (and should) be withdrawn, including geographically segmented regulatory withdrawal.

Introduction

But when can *ex ante* access regulation (e.g., mandating access to incumbent's networks and network elements by other competing operators) be withdrawn?

More specifically for this paper, what are appropriate criteria and conditions that would support withdrawal/ regulatory forbearance?

As competitive conditions spread, increasingly important question.

Introduction

Question is important not only for developed but also for developing countries. If too much regulation is applied and for too long, this can stifle and/or distort business models.

Even in developing countries, can be some markets (e.g., in densely populated urban areas) with intensifying competition. Should these markets be deregulated? When?

Introduction

This turns out to be a contentious issue with task of ascertaining appropriate conditions for ex ante access deregulation a complex one especially when it includes a forward-looking assessment of whether it would promote competition, investment and long-term interests of end-users.

Introduction

E.g., in August 2008, the Australian Competition and Consumer Commission (ACCC) proposed withdrawal (exemption) of *ex ante* access regulation in a number of regions upon application from Telstra.

But a number of Telstra's competitors appealed to the Australian Competition Tribunal, which, in December 2008, "set aside" the ACCC's decision.

Introduction

However, Telstra appealed Tribunal's decision to Federal Court of Australia and in March 2009 the Court in turn "set aside" Tribunal's decision sending matter back to Tribunal for further consideration. Then in September 2009, ACCC announced Tribunal had reversed its original decision.

Introduction

This paper examines approaches used in EU, Australia, Canada, Portugal, US and some other countries to assess when *ex ante* regulation can be withdrawn or 'forborne'.

Striking the right balance between regulation & business models

Ex-ante access regulation aims to create conditions for improved competition by removing/reducing barriers to entry into the 'enduring' essential facilities controlled by an operator with significant market power (often the incumbent).

Such regulated access aims to prevent the SMP operator from abusing its dominant position.

Striking the right balance between regulation & business models

But widely recognized that regulation has attendant costs. E.g., can constrain operator's flexibility, reduce incentives for cost reduction, investment and innovation.

On other hand, no regulation or premature deregulation risks a dominant operator engaging in anti-competitive conduct detrimental to market and end-users.

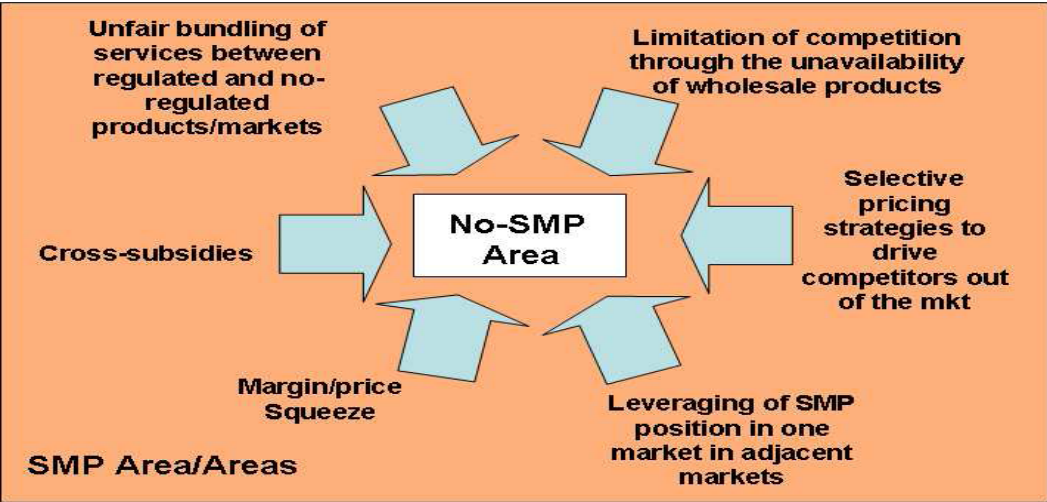
Policy & regulatory challenge is to strike right balance between such competing concerns.

Concerns over premature removal of *ex ante* access regulation

Concerns expressed over premature removal of *ex ante* access regulation include:

- predatory pricing and cross-subsidisation;
- deny, delay, degrade tactics in supply of wholesale services;
- unfair bundling; and
- margin squeeze.

Figure 1. Competition concerns over removal of ex ante access regulation



Concerns over premature removal of *ex ante* access regulation

Such anti-competitive practices can be constrained by regulatory measures.

Unclear to what extent general competition law can adequately contain these practices if *ex ante* regulation is withdrawn.

Even where competition exists, reason for existence of prevailing competition is important consideration in decisions to withdraw regulation.

Concerns over premature removal of *ex ante* access regulation

If regulation played significant role in developing competition, regulator needs to be confident that withdrawal of regulation won't reverse competitive dynamics.

Justification for withdrawing access regulation is questionable if the observed competition pointed to as justifying deregulation, itself depends on the *ex ante* access regulation under threat of being deregulated.

Concerns over premature removal of *ex ante* access regulation

If removal of *ex ante* access regulation reduces competition, it may allow the anti-competitive behaviour that the original *ex ante* access regulations was designed to prevent.

Some examples of approaches used in various countries follow.

Australia

In Australia, Telstra proposed a 'one plus' decision rule to determine which exchanges should be exempt from *ex ante* regulation. Telstra claims presence of one in-place competitor with access at cost-based prices, already demonstrating capacity to serve market, is a constraint on Telstra's pricing behaviour.

Australia

Telstra argues existence in a local exchange area of either: (i) at least one competitor that has established, or is in process of establishing, a fixed alternative such as LLU based DSLAMs, HFC cable or a fibre-based network; or (ii) at least one alternative wireless network, suggests that in this area the customer access bottleneck does not exist.

Australia

Regulator (ACCC) also considers a rule of thumb could be applied. However, a 'three plus' approach -- a market can support four competitors (including Telstra) -- is a more appropriate benchmark for identifying when ex-ante regulation can be withdrawn.

Australia

In August 2008, ACCC decided to exempt Telstra from *ex ante* regulation in 248 exchanges that: (a) had 14,000 or more addressable SIOs connected to a Telstra exchange via an uninterrupted wire through which an end-user might be provided with an LLU-based service; or (b) had 4 or more LLU-based competitors (including Telstra) within the exchange (the 'three plus' rule).

Australia

But ACCC (2008) acknowledged that its approach is complex and somewhat subjective: “The ACCC recognizes that determining the precise scope of the areas to be covered by the exemptions [from *ex ante* access regulation] has been a finely balanced process and has involved a level of judgement.”

Austria

Feb 2008. Regulator, TTK, divides the country into two areas based on following criteria:

(i) the number of large operators present in each of the 1,480 Main Distribution Frames (MDF) operated by TA (incumbent); (ii) the customer density of the MDF area; and (iii) TA's market share in each MDF area.

Austria

Led to following geographic distinction:

- - **Area 1:** includes MDF areas where there are 3 or more large operators and where the MDF serves more than 2,500 households and where TA's market share is below 50%; and
- - **Area 2:** includes all other MDF areas.

Withdrew regulation in Area 1, but maintained in Area 2 including: access, price control, non-discrimination, and cost accounting.

Portugal

In December 2008, regulator (Anacom) notified EC a proposal to deregulate part of wholesale broadband access market where at least three operators and a high number of households with access to cable network, mainly the densely populated urban areas (e.g., Lisbon or Porto).

UK

UK, Ofcom's criteria for considering deregulation of wholesale broadband access market:

- local exchange areas with two or three wholesale providers and forecasts for four or more, but where the exchange serves less than 10,000 premises
- local exchange areas with four or more wholesale providers and forecasts for four or more, but where the exchange serves more than 10,000 premises (69.2% of U.K. premises).

Canada

Canada, CRTC considers forbearance

- for incumbent's business local exchange services, where, in addition to incumbent, at least one independent facilities-based, fixed-line telecommunications service provider that offers local exchange business services in the market and is capable of serving at least 75% of the business local exchange service lines that the incumbent is capable of serving
- for residential markets, at least two service providers in addition to incumbent are required.

Rule of thumb criteria only preliminary

As noted, rule of thumb criteria vary. The reasons for this should receive more attention. Moreover, while commonly applied, and although convenient, should be only a preliminary part of the deregulatory assessment exercise. Indeed, this seems well recognised.

EC: number of operators present in a market not by itself sufficient to identify real differences in competitive conditions. Entry by one firm, or even more than one, of itself, does not establish incumbent can't exercise market power.

European Regulators Group

EC emphasised that more detailed assessment of actual and potential competition required prior to removal of *ex ante* access regulation.

European Regulators Group (ERG 2008) suggests approach that combines number of operators with market share and factors indicating scale economies (such as households covered). But ERG recognizes such factors may be arbitrary and risk leading to errors of judgement. E.g., presence of 3-4 operators in a LLU site does not by itself mean that other operators have access to alternative wholesale services in that specific site.

European Regulators Group

Operators present in a local exchange may be unable to offer wholesale services for technical (e.g., limited collocation space) or economic (economies of scale and scope do not justify wholesale operations) reasons. Also, unbundled local loop operators in a single site may simply not have organization /resources required to offer wholesale services (e.g., staff, billing systems, support systems, operational systems, procedures, etc).

European Regulators Group

Indeed, in many countries, few if any alternative operators are likely to have this ability since their main focus is retail customers. Hence, number of operators in market does not assure that competitive conditions exist, with alternative sources of wholesale broadband access services, etc., available.

Australian Competition Tribunal

Australian Competition Tribunal (2008), too, warned against overdependence on a rule of thumb approach arguing that a fixed rule of thumb to base decisions on deregulation is just a shortcut, screening device that reveals little about market dynamics over time.

The Tribunal suggest a more comprehensive framework.

Box 1: Towards a possible framework for considering readiness for withdrawal of ex ante access regulation

- (a) the total number of addressable SIOs (potential subscribers) in the market;
- (b) number of exchanges in which there is at least one entrant;
- (c) number of entrants;
- (d) total number of addressable SIOs broken down on an exchange by exchange basis;

Box 1: Towards a possible framework for considering readiness for withdrawal of ex ante access regulation

- (e) share of SIOs that entrants have taken from incumbent;
- (f) physical capacity and operational willingness of entrants to take more market share;
- (g) cost and ease of installing new infrastructure; and
- (h) capacity and technology status of each DSLAM in each exchange.

Rule of thumb criteria only preliminary step in assessment process

So, in fact, seems well recognized that rule of thumb criteria only a preliminary part for analysing competitive conditions and that more comprehensive, thorough analysis is required.

However, judging from common use of the approach, seems danger that pressure to simplify complexity of task has and will influence unwarranted retreat into an over-dependence on convenient and easily explained rule of thumb measures.

Conclusion

Conclusion reached: criteria and assessment processes for deciding when to withdraw *ex ante* access regulation are unclear; over-dependence on rule of thumb approaches is risky.

Moreover, risks increase where a forward-looking perspective is adopted that recognises onset of next generation access networks (NGA).

Hence, a cautious approach towards withdrawal of *ex ante* regulation seems sensible.

Conclusion

If de-regulation premature, may be difficult to re-regulate, especially where regulator has lost power to exercise *ex ante* access regulation. Thus, deregulation needs careful consideration and only applied when risk of effective competition being reversed is low.

In present uncertainty over effects of NGA on competition, a cautious approach seems sensible to allow time for market to develop before deciding whether and when to withdraw *ex ante* access regulation. THANK YOU