

The Forthcoming EU postal regulation.

What can we learn from the European Electronic Communications Code

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1. Introduction

The postal and telecommunication sectors are parts of the same family – described as a network industry under specific regulatory regimes. In an allegorical comparison, the postal sector is like the older sister for the telecommunication sector. Nevertheless, these siblings certainly play a unique role in one another's lives. Over recent years, the shape of these two markets has constantly been changing, irrespective of countries' regulations and policies.

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Technological telecommunication and electronic communication developments have significantly impacted the postal service, especially in the form of e-commerce (the platformization) or new e-government services (digitalization process). This development has caused dynamic structural changes that are associated with two modern business trends: a slight decrease in the revenue and volumes of traditional letter services, and dynamic growth of courier items (D. Coen and A. Héritier, 2005, p. 21). The COVID-19 pandemic only accelerated this inevitable tendency. Recent developments triggered a discussion about the legal framework of the EU postal market. Therefore, in 2019, the EU Commission announced a consultation for the new postal regulatory framework. Similar processes caused by technological development and a new consumer approach to telecommunication services led to the adoption of the new EU Directive 2018/1972 of 11 December 2018 establishing the European Electronic Communications Code (EECC)², which the EU Member States are obliged to implement by the end of 2020. The new Code represents the first complete overhaul of the regulatory framework for the telecommunications market since 2002. The EECC changes some of the telecommunications market's regulatory principles, in an attempt to adjust this sector to the new times.

The development of the postal sector causes new problems to arise that require new regulatory approaches. The paper aims to discuss the possible effect of the EECC on future postal regulation. Thus, the paper undertakes a critical investigation of the current regulatory framework of the EU postal market in light of the EECC.

Section 2 presents the regulatory development of the two considered markets. Section 3 focuses on the most significant changes introduced by the EECC to the telecommunication regulatory framework that could have an impact on the postal market regulation. Section 4 discusses the current situation in the postal market with a critical investigation of the regulatory framework. The postal framework's three main elements, the USO, competition and regulatory power, and the CEP segment are discussed. Finally, section 5 concludes the paper. The conclusions may provide valuable lessons for the future policy design of the postal markets in the EU and the optimal policy design of pro-market policies.

² Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast)Text with EEA relevance, OJ L 321, 17.12.2018, p. 36–214.

2. From the state monopolies to liberalized markets in the EU

The postal and telecom markets are part of the network industries, like electricity or gas (J. Soares, J. Confraria, et al., 2002). These two markets form the communication sector, which is fundamental to modern societies. In Europe, these sectors were characterized by monopoly (legal) and public ownership until the end of the 20th century. The monopolized postal and telecom markets usually contained one state-owned operator. These operators were often part of the public administration with special exclusive rights on the market (W. Hulsink, 2012, p. 5). As a result, the same operator offered postal and telecom services. In the last three decades, such a situation was put into question. Finally, the liberalization process removed the entry barriers from the markets at the end of the 20th century. The telecom sector was one of the first to be liberalized, and the postal sector was one of the last ones.

In terms of technological and consumer expectations, these two sectors have undergone a comparable change in the past 30 years. The telecom sector has been transformed from analog transmission to digital; from providing fixed telephony to internet access and mobile telephony (M. Cave, Ch. Genakos, et al., 2019, p. 48). The postal market has changed from delivering traditional mail (letters) to delivering parcels, from the postal operator being an analog connector between citizens and the government to a digital public e-service provider. After nearly thirty years of separation, these two markets are coming closer to each other (Gori and Parcu). This rapprochement is now technical, since the same infrastructure is used to perform their service; thus, it is not only formal, i.e. grouped in the same public unit.

It is essential for this study that the regulatory approach adopted for the EU telecommunications markets functions more like a model than as a pattern for postal regulation. The regulatory approach to these two markets has notable differences, especially in the ways of introducing market competition.

a. Telecommunication market

The process of liberalizing telecoms in the EU was similar to that in the US (V. Mayer-Schönberger, M Strasser, 1999, p. 572). The European Commission (EC) initiated the process of liberalizing the telecommunication markets by issuing the Green Paper on the

Development of a Common Market for Telecommunications Service and Equipment in 1987 (R. Klotz, 2009, p. 56-58)³. From the very beginning, the EU regulatory approach to the telecommunication market was based on establishing free competition on the market.

The liberalization of the telecommunication market shifted all legal barriers to entering the market. With this process, sector-specific regulation was introduced. At the outset, the EU lawmakers assumed that competition law could not solve the market's structural obstacles, such as access to the essential facilities owned by the former monopolist. Sector-specific regulation gives the possibility to impose an ex-ante obligation, i.e., cost-oriented access to essential facilities. This regulation is described as pro-competitive (Pera, Pezza, 2016) since it provides a legal toolbox for creating an environment that allows new entrants to enter the market. The application of sector-specific regulation requires a special regulatory body, independent from market players and the government (as long as the state owns telecommunication operators). The next significant breakthrough legislation was the previous regulatory framework from 2002.

The 2002 regulatory framework for the EU telecommunication markets consisted of a set of directives: a common framework directive and four specific directives covering different issues: Access and interconnection, Authorization of electronic communications networks, Universal Services, and Privacy directives⁴. In contrast, in the new framework the traditional term 'telecommunication' has been replaced by the new term 'electronic communications'. There are two cornerstone goals of this regulatory framework: the promotion of competition and access to universal telecommunication services. Market regulation is the instrument for ensuring effective competition on the market by granting alternative operators access to the existing incumbents' networks and services under fair and non-discriminatory conditions (R. Klotz, 2009, p. 89). Universal service is safeguarded by the

³ Towards A Dynamic European Economy, Green Paper on the Development of a Common Market for Telecommunications Service and Equipment; COM (1987) 290 final.

⁴ Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ L 108, 24.4.2002, p. 7); Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorization of electronic communications networks and services (Authorization Directive) (OJ L 108, 24.4.2002, p. 21); Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ L 108, 24.4.2002, p. 33); Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ L 108, 24.4.2002, p. 51); Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).

regulatory measures as well. The accomplishment of these goals required the creation of a harmonized enforcement practice within the EU by the National Regulatory Authorities (NRA) and the EU Commission. The Telecoms Package only introduced minor reforms to the regulatory framework in 2009⁵. The reform focused mainly on an open internet, a single European telecoms market, and high-speed internet connections for all citizens. Nevertheless, the two main regulatory goals, i.e., promoting competition and universal service, did not change. Additionally, the Telecoms Package created the Body of European Regulators for Electronic Communications (BEREC)⁶ as an advisory body consisting of NRAs and EU commission staff⁷.

Nevertheless, the 2002 regulatory framework was under-criticized mainly due to the lack of regulatory vision of the market (P. Larouche, 2003; A. de Streel, 2008 or Ch. Hocepiéd, A. de Streel). However, the main regulatory goals were generally fulfilled⁸, and the telecommunication market has changed fundamentally from the time the liberalization agenda was adopted (W. H. Melody, 2012, p. 232). Thus, the regulatory framework should be assessed positively.

The effects of the regulatory policy and mobile users' habits caused by technological changes are presented in Fig. 1 shows the volume of data transmission (pb) and the dynamics of change in Poland between 2010-2018.

⁵ Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009 (OJ L 321, 17.12.2018, p. 1–35).

⁶ Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (OJ L 337, 18.12.2009, p. 37–69).

⁷ For more about the evolution of the EU regulatory body for telecommunication market, see: M. Thatcher, D. Coen, *Reshaping European regulatory space: An evolutionary analysis*, “West European Politics” 2008, vol. 31, Issue 4.

⁸ EU Commission, Implementation of the EU regulatory framework for electronic communication – 2015, Brussels, 19.6.2015, SWD(2015) 126 final.

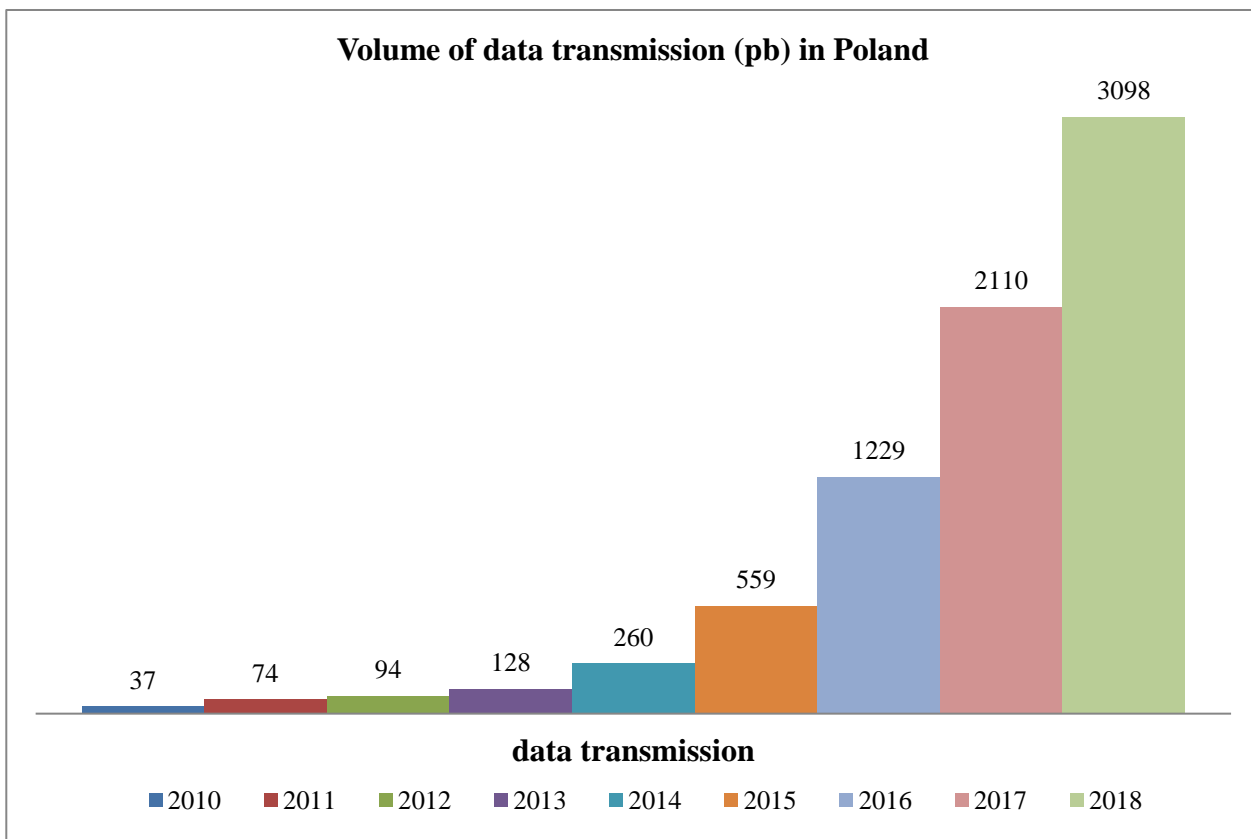


Fig 1 Volume of data transmission (pb) in Poland 2010-2018⁹.

b. Postal market

There is no doubt that the postal service plays a vital role in each society, as an essential instrument of communication and trade. However, before the liberalization process began in Europe, most postal operators were part of the public administration, performing various public duties as a special link between the state (government) and citizens. As a result, the postal service was associated with the state. Thus, postal legislation used to be focused on the state-owned postal operator, which performed special duties and obligations assigned to them by the state.

The recent development of postal services triggered a discussion about the legal framework of the postal markets in the EU, i.e., in terms of the exclusive rights of the incumbent postal operators. Consequently, on 11 June 1992, the Commission presented a Green Paper on the development of the single market for postal services and, on 2 June 1993,

⁹ Source Report on the state of the telecommunications market in Poland in 2018, UKE.

a Communication on the guidelines for the development of Community postal services. Therefore, at the end of the 20th century, some EU countries liberalized their postal markets, such as Sweden, which fully opened its market in 1993 (M.A. Crew and P.R. Kleindorfer, 2008, p. 3). In the next step, the EU adopted the Postal Services Directive 97/67/EC of 15 December 1997¹⁰, which established the first regulatory framework for the European postal services. Market liberalization and a universal service obligation were the major components of the directive (M. Chołodecki and B. Popowska, 2018, p. 8-9). In addition, the directive emphasized that the liberalization of the market must be carried out to secure a proper balance and guarantee the rights of the universal service providers (H. Cremer et al., 2008, p. 23). The directive was amended twice by Directive 2002/39/EC¹¹ and Directive 2008/6/EC¹² (the so-called 3rd Postal Directive). The 3rd Postal Directive introduced the legal basis for accomplishing the internal market for the postal services by providing the last legislative step in the process of gradual market opening. However, most Western EU countries fully implemented the EU postal regulations before the 3rd Postal Directive was introduced. As a result, by 2008, their postal markets had already passed the structural transformation process (A. Pimenta and A.M. Amaral, 2011, p. 61-62). There were two main objectives of the postal directives: liberalization of the market and safeguarding the kind of services that led to establishing the USO. Both of these objectives have been achieved (Hearn). Such a situation indicates the need for evaluating the postal framework¹³.

¹⁰ Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ L 15, 21.1.1998, p. 14–25.

¹¹ Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services, OJ L 176, 5.7.2002, p. 21–25.

¹² Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services, OJ L 52, 27.2.2008, p. 3–20.

¹³ See the documents prepared by the European Regulators Group for Postal Services (ERGP): Response to the Public Consultation on the PSD Evaluation, ERGP PL (20) 27 (2020); ERGP Response to the Digital Services Act (DSA) Public consultation, ERGP (20) 16 (2020); ERGP Report on Postal Definitions, ERGP PL II (20) 7 (2020); ERGP Report on Key Consumer Issues, ERGP PL II (20) 8 (2020); ERGP Opinion on the review of the regulatory framework for postal services, ERGP PL I (19) 12 (2019).

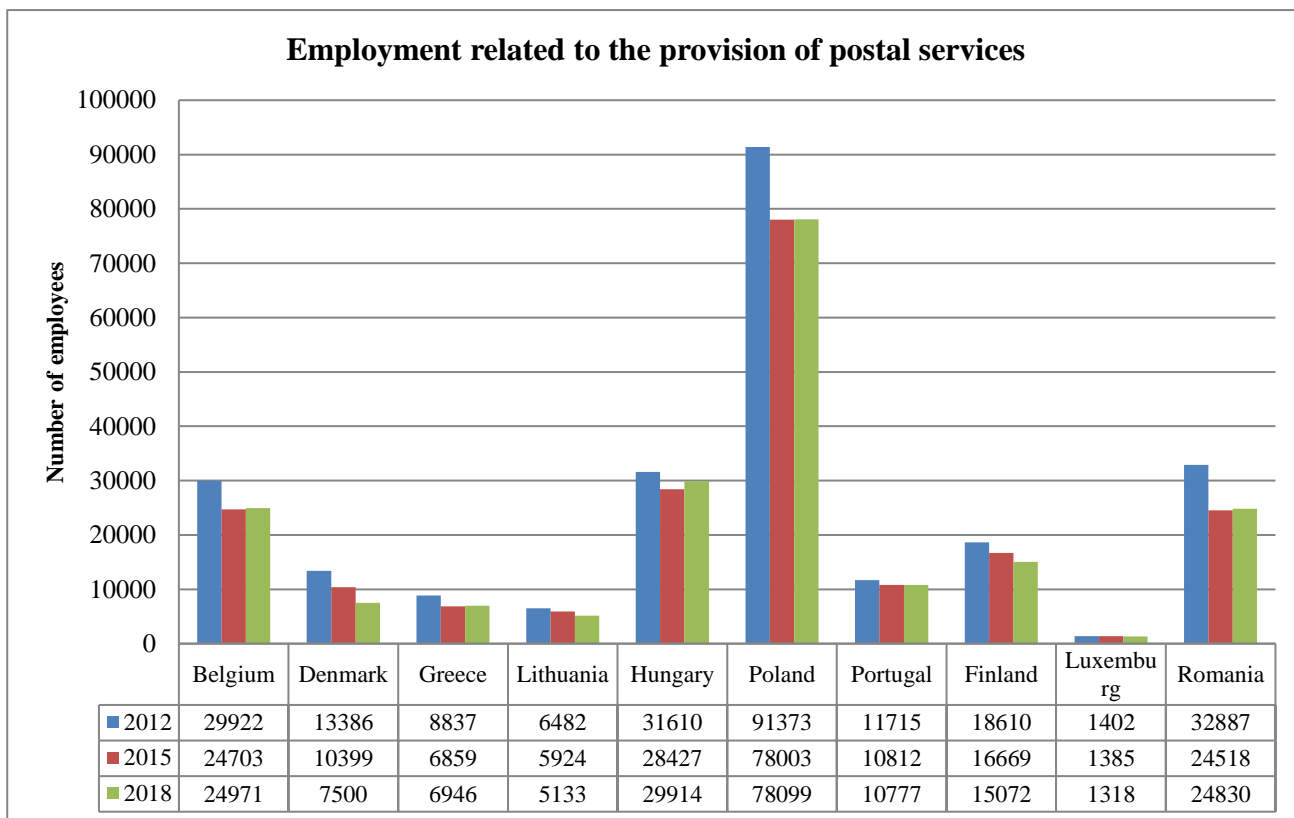


Fig. 2 Persons employed by Universal Service Providers in selected EU countries. It excludes staff working exclusively in other activities (e.g., financial services)¹⁴.

As mentioned above, there are notable differences in the regulatory approaches to the telecom and postal markets. The most significant one is the different strategies safeguarding effective competition in the markets. In particular, there is an almost complete absence of pro-competitive sector-specific regulation on the postal market. Postal NRA is not equipped in the ex-ante regulatory toolbox. Thus, ensuring competition in the postal market is not a goal of the regulatory framework. Instead, the EU lawmakers have limited the Postal Directives to just shifting all the legal barriers to entering the market. Protection of the Universal Service Provider (USP) caused the existence of two main segments of the postal market traditional letter markets operated by the incumbents and courier operators focused on e-commerce.

¹⁴ Source: European Commission - Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW); NIK (Supreme Audit Office), *Restrukturyzacja Poczty Polskiej SA a Dostępność Usług Pocztowych* (KIN-4101-007-00/2014 Nr ewid. 52/2015/P/14/035/KIN).

3. European Electronic Communications Code

The 2002 regulatory regime for electronic communications, composed of five separate directives, was replaced in 2018 by the EECC. Fig. 3 demonstrates the historical process of the EU regulation. This chapter is intended to demonstrate the essential issues that will most probably impact the future postal regulation in the EU. These three issues seem to be common to postal and telecom markets. The new goal defined in the EECC regarding very high capacity networks must be seen as a new issue in the regulatory policy. The very high-capacity networks are intended to shift the telecom market to the next stage of development.

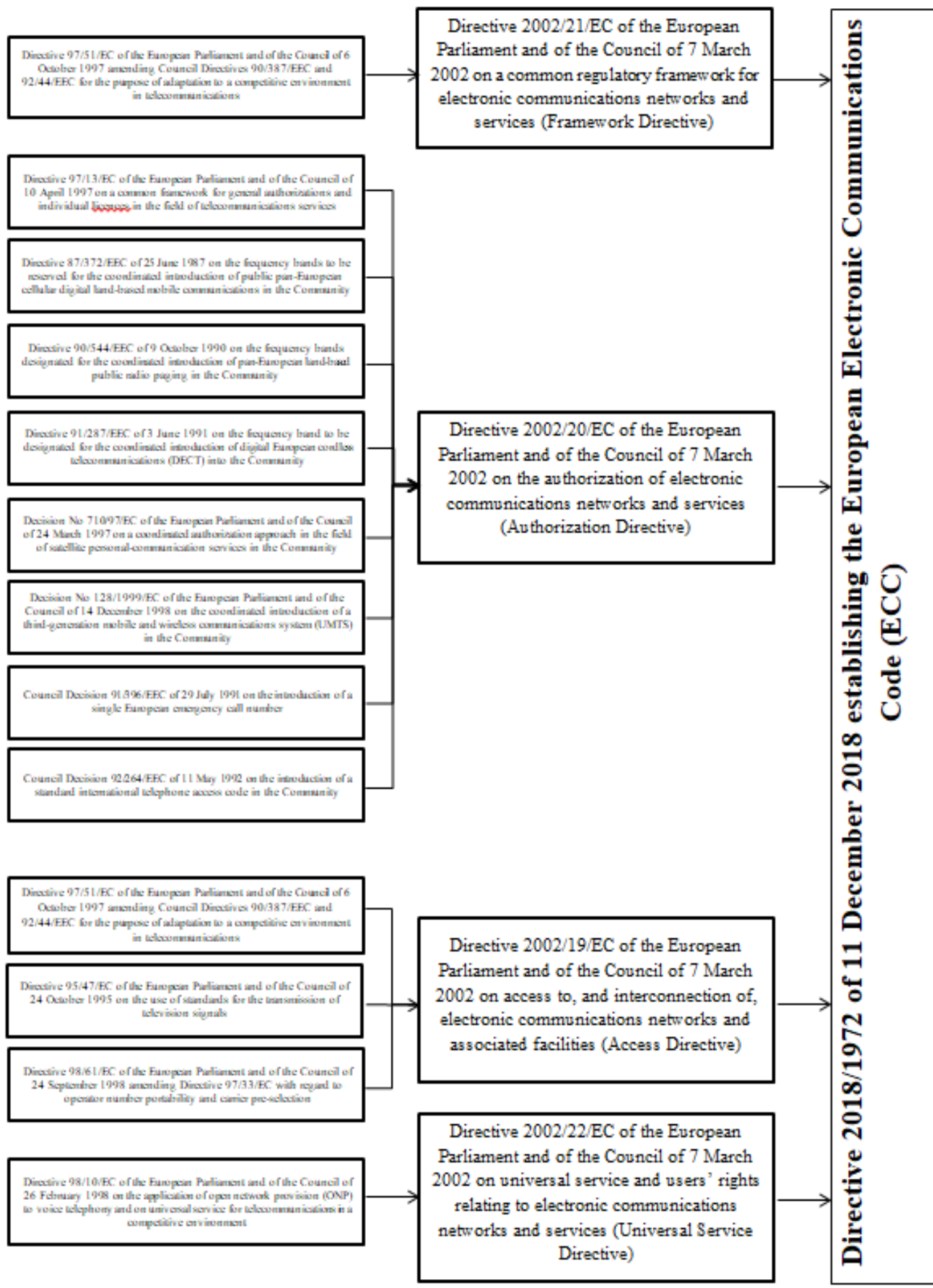


Fig. 3. Historical development of the EU telecommunication regulations.

a. The need for a change – from fixed-telephony to the internet

From the very beginning, the EU regulatory regime focused mainly on promoting competition and access to universal service. However, there was a need for modification in light of technological and market developments. Fig. 3 demonstrates the rapid decline of fixed-telephony subscribers in the EU.

On the telecommunication markets, as underlined in the EECC, one of the key technological changes is converting traditional analog telephone services to the voice communications service based on the internet protocol (IP) technology (no 14 EECC recital). Such a change enabled end-users to choose between a range of competing voice service providers which offer functionally equivalent online services, such as Voice over IP. Thus, EECC states that the definition of electronic communications services should not be purely based on technical parameters but rather build on a functional approach (no 15 EECC recital)¹⁵. This can be seen as one of the essential modifications in the EECC regulatory approach – the functional approach to several definitions. Such a change can accelerate market development, since operators will have more freedom to arrange their services instead of strict, technical regulations.

¹⁵ According to Article. 2.1 an electronic communications network means transmission systems, whether or not it is based on a permanent infrastructure or centralised administration capacity, and, where applicable, switching or routing equipment and other resources, including network elements which are not active, which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including internet) and mobile networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed.

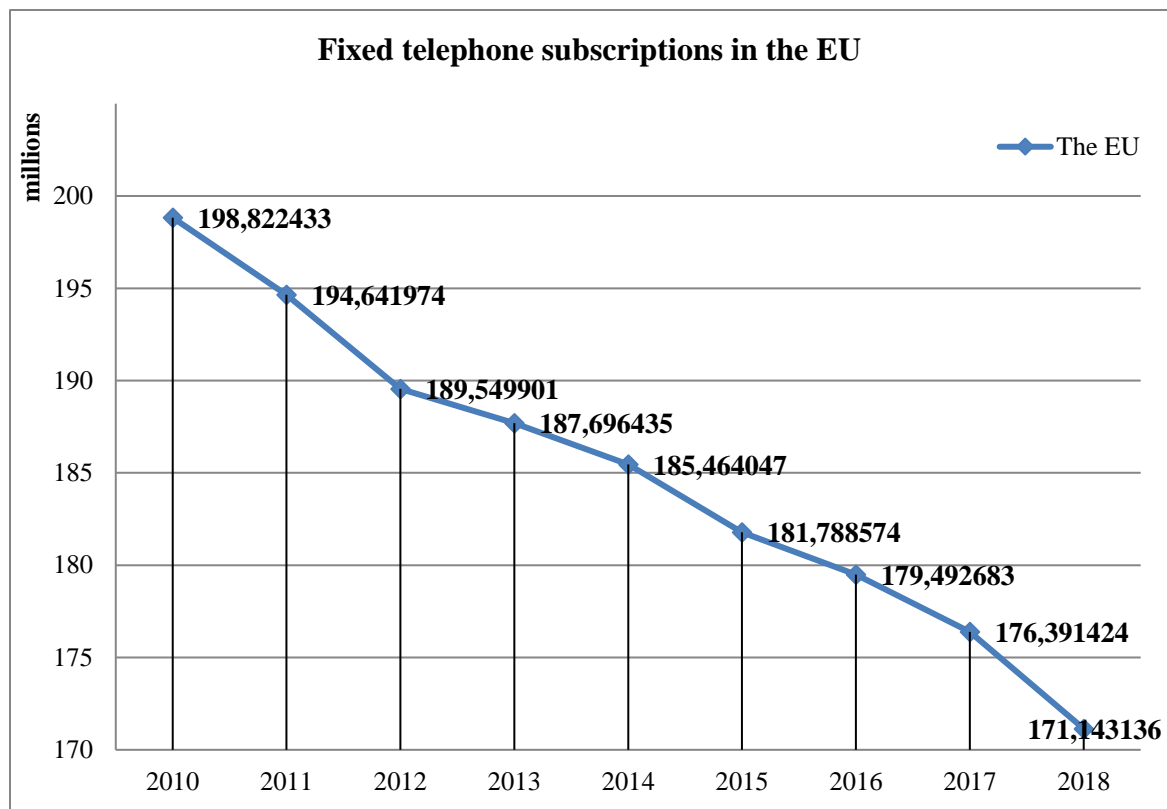


Fig. 4 Fixed telephone subscriptions in the EU 2010-2018.¹⁶

Access to a high-speed internet connection¹⁷ in the EU has been included in the EECC as a central issue of the new regulatory approach. The EECC highlights that access to the internet is essential for economic and social development, participation in public life, social and territorial cohesion. Effective access must be provided to all EU citizens both indoors and outdoors, to the fastest broadband speeds of not less than 30 Mbps by 2020 (no 109 EECC recital). Consequently, the EECC has reshaped regulatory principles by adding to the regulatory framework the connectivity objective besides the existing three primary goals: promoting competition, the internal market, and end-user interests. However, the connectivity objective, which is mainly focused on the development of very high capacity networks, seems to be the most prominent regulatory principle for the EU Member States, the national

¹⁶ Source: The World Bank (<https://data.worldbank.org/indicator/IT.MLT.MAIN?end=2018&locations=EU-1W&stArticle=2010&view=chArticle>) Fixed telephone subscriptions refers to the sum of active number of analogue fixed telephone lines, voice-over-IP (VoIP) subscriptions, fixed wireless local loop (WLL) subscriptions, ISDN voice-channel equivalents and fixed public payphones.

¹⁷ The EECC defines a very high capacity network as either an electronic communications network which consists wholly of optical fibre elements at least up to the distribution point at the serving location, or an electronic communications network which is capable of delivering, under usual peak-time conditions, similar network performance in terms of available downlink and uplink bandwidth, resilience, error-related parameters, and latency and its variation; network performance can be considered similar regardless of whether the end-user experience varies due to the inherently different characteristics of the medium by which the network ultimately connects with the network termination point (Article. 2 p. 2).

regulatory authorities, and other competent authorities. The EECC highlights several times that the connectivity objective now takes a leading place in the EU regulatory policy. An example of this is that, according to the EECC, competition in the telecommunication market is described as the best tool to foster investment in new and existing telecom infrastructure (no 27 EECC recital). The EECC determines four general objectives, and formally none of them has been given primacy:

- 1) Connectivity and access to, and take-up of, very high capacity networks;
- 2) competition, including efficient infrastructure-based competition;
- 3) development of the internal market, which means, for instance, removing obstacles for investment in electronic communications networks, and
- 4) promoting the interests of EU citizens, which means developing very high capacity networks.

Three of them are focused on very high-capacity networks. Thus, very high capacity networks are the main focus of regulatory policy concerning telecom markets in the EU. The other goals seem to only be auxiliary objectives.

Hitherto, the NRAs' duty was to interfere in the economic decisions of the telecoms, mainly through *ex-ante* regulation, to safeguard effective competition on the market, or to establish competitive relations between the incumbents and the new entrants. The objectives of any *ex-ante* regulatory intervention by NRAs to the telecom market are ultimately to produce benefits for end-users in terms of price, quality, and choice. The novelty of the new EU regulatory framework is that the connectivity goal cannot be fulfilled only by the standard *ex-ante* regulatory toolbox and policies known from the previous frameworks. To materialize the very high capacity networks, it is necessary to give appropriate encouragements for investment. According to the EECC, an efficient investment must be made, and competition should be encouraged in tandem to increase economic growth, innovation, and consumer choice (no 26 EECC recital). Acquiring such a goal will be challenging for NRAs, especially in the smaller EU Member States with a significant presence of international telecom operators.

b. Very high capacity networks – a new regulatory obligation

The development of very high-capacity networks appears to be a demanding issue for the NRAs and EU institutions such as the EC or BEREC. Moreover, as discussed above, this new issue is changing regulatory policy priorities on the telecom markets. The biggest question for the competent authorities is how to stimulate the market to transform the telecom infrastructure into very high-capacity networks. Therefore, such development needs a high level of financing activities from the market players i.e., telecom operators (Nałęcz, 2020). NRAs' new regulatory instruments are intended to promote the development of very high capacity networks, including that such development entails capital intensity from the investors. Therefore, only the biggest operators on the market, most likely possessing significant market power (SMP),¹⁸ can efficiently invest in very high-capacity networks.

The NRAs' crucial regulatory instrument for developing very high capacity networks is directed to limited telecom operators which have been designated as having SMP. An undertaking can offer co-investment in very high capacity networks to undertakings of different sizes and financial capacity to become infrastructure co-investors. Such an offer must be made *on fair, reasonable, and non-discriminatory terms* (Article. 76.1 EECC)¹⁹. If at least one co-investor has entered into a co-investment agreement with that undertaking, the NRA can refrain from imposing regulatory obligations on the new very high-capacity

¹⁸ SMP is defined in Article. 63.2 EECC, and means that undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, namely a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.

¹⁹ According to Article. 76 EECC, co-investment agreement must contain several restrictions and shall determine, whether the offer: a) is open at any moment during the lifetime of the network to any provider of electronic communications networks or services; b) would allow other co-investors which are providers of electronic communications networks or services to compete effectively and sustainably in the long term in downstream markets in which the undertaking designated as having significant market power is active, on terms which include: i) fair, reasonable and non-discriminatory terms allowing access to the full capacity of the network to the extent that it is subject to co-investment; ii) flexibility in terms of the value and timing of the participation of each co-investor; | (iii) | the possibility to increase such participation in the future; and iv) reciprocal rights awarded by the co-investors after the deployment of the co-invested infrastructure; c) is made public by the undertaking in a timely manner and, if the undertaking does not have the characteristics listed in Article. 80(1) EECC, at least six months before the start of the deployment of the new network; that period may be prolonged based on national circumstances; d) allows seekers not participating in the co-investment to benefit from the outset from the same quality, speed, conditions and end-user reach as were available before the deployment, accompanied by a mechanism of adaptation over time confirmed by the national regulatory authority in light of developments on the related retail markets, that maintains the incentives to participate in the co-investment; such mechanism shall ensure that access seekers have access to the very high capacity elements of the network at a time, and on the basis of transparent and non-discriminatory terms, which reflect appropriately the degrees of risk incurred by the respective co-investors at different stages of the deployment and take into account the competitive situation in retail markets; e) complies at a minimum with the criteria set out in Annex IV of EECC and is made in good faith. Only a commitment fulfilling all these criteria with the results of the market test give NRAs binding guarantees and shall not impose any additional obligations as regards the elements of the new very high capacity network that are subject to the commitments.

network. The main problem concerns the question of whether the investments made in the new very high capacity networks by SMP operators can be an attractive substitute to the typical regulatory obligation. In other words, can such a change be beneficial for SMP operators and induce them to invest in very high capacity networks? Nevertheless, it is a chance for less ex-ante regulation on the telecoms market.

The EECC presumes that the differential regulatory treatment of the SMP operators must be subject to review in subsequent market analyses and may require adjustments to the regulatory treatment (no. 200 EECC recitals). Such a review must primarily answer the question of whether the regulatory encouragements are effective for developing the new very high-capacity networks. Unfortunately, it is hard to provide an answer, especially in the first years of the EECC implementation.

c. Promoting competition

In the past, telecommunication markets, like most networks industries, were national monopolies. The first step in creating a more competitive environment for the telecommunication market was the demonopolization of state-owned operators. At the same time, the demonopolization of the telecommunication industry needed a comprehensive approach, described as a liberalization and harmonization process. The liberalization of the telecommunication markets in the EU required policymakers to accept one of the possible (existing) legal remedies²⁰. Thus, the legal remedy shall be understood as a corrective measure taken by public authority decisions or court orders following a finding that an undertaking had either engaged in an illegal abuse of market power²¹ or was about to create market power (Geradin, D. and Sidak, J.G., 2003). Generally, legal remedies have a retrospective orientation, which means that a corrective measure is imposed on a subject (undertaking) only after illegal action has been done (*ex-post*). In contrast, legal remedies can have a prospective approach, which allows or even obligates imposing a remedy before any specific finding of illegal conduct (*ex-ante*). Antitrust regulations usually use ex-post

²⁰ For the competence of the EC to abolish all special rights in the telecommunication sector, see Joined Cases 188–190/80 *France, Italy and the UK v Commission* ([1982] ECR 2545) and also Case, C. 202/88 *French Republic v Commission of the European Communities* (Telecommunication Terminal Equipment)[1991] ECR I-1223 (1991).

²¹ The EU competition rules laid down by Article 101 (concerted practices that restrict competition) and Article 102 (abuse of dominant position) of the Treaty on the Functioning of the European Union (TFEU) (formerly Articles 81 and 82 of the treaty establishing the European Community (EC Treaty)).

remedies²², and ex-ante remedies are generally imposed through sector-specific regulations. In the EU, ex-ante remedies were chosen as the most appropriate to create competition in the telecommunication market (sector-specific regulation). This is due to the inability of antitrust regulations (ex-post) to create effective competition in the networks industries (for more detail, see: de Stree, A., 2008 or Buigues, P., 2006). Thus, ex-ante regulatory obligations should only be imposed where there is no effective competition, i.e., in markets where there are one or more undertakings with SMP, and where national and Community competition law remedies are not sufficient to address the problem. A. de Stree accurately points that: "substantive differences between antitrust and sector regulation are that sector regulation mainly deals with unsatisfactory market structures whereas competition law deals with unsatisfactory firms' behaviors, (...)" (de Stree, A., 2008, p. 70). To summarize, ex-ante regulation has been limited to the minimum necessary to meet regulatory policy objectives. This required establishing in the EU Member States a new type of authority responsible for sector-specific regulation for the telecommunication market - NRA²³. Before the liberalization process, the incumbent performed the regulatory and operational functions. This was one of the major obstacles to introducing effective competition on the market.

A single EU regulatory authority for the telecommunication market was never established, due to the lack of legal basis in the EU treaties. Implementation of EU regulatory policy was always decentralized, with the specific power of the EC often described as a super-regulator (Scherer J., 2002). Such a legal model for imposing competition on the telecom market has existed from the very beginning of the EU regulation for this market. As an effect of the foregoing regulatory policies, the telecom markets across the EU are now highly competitive. This is shown in the diagrams below (Figs. 5 A and B), where it is evident that average internet prices in the EU are much lower than in other highly competitive countries (South Korea, as the smallest country in the overview, is an exception). National markets now have several competing operators in most of the market segments. Undoubtedly, such a market condition is a superb achievement of the previous EU regulatory policy. However, the current market situation is much more complex. Thus, competition protection should now be accomplished by new regulatory tools that are more appropriate for the market.

²² Except for the merger control, Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

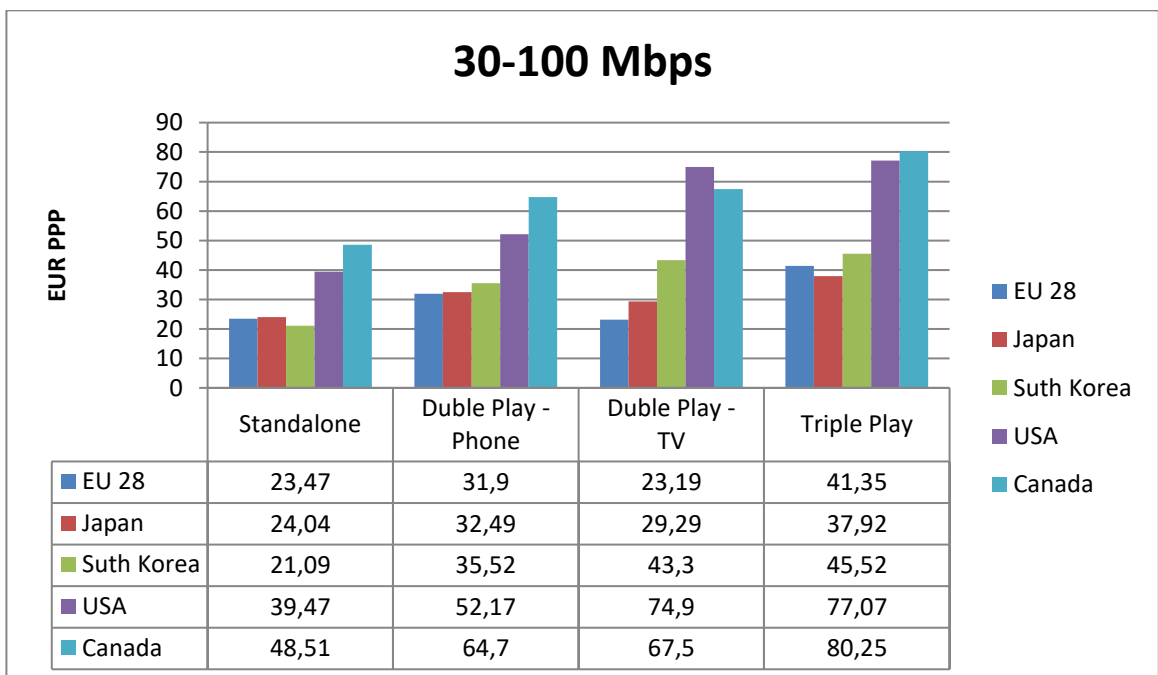
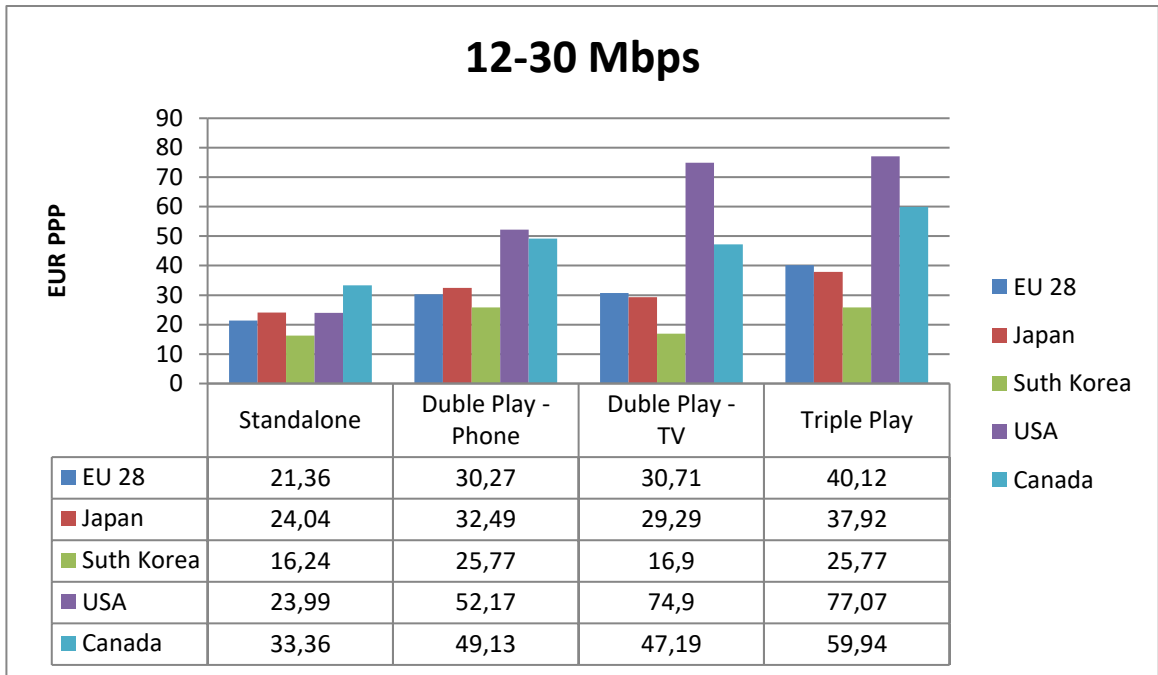
²³ For the first time, the definition of an NRA appeared in Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines (Official Journal L 165, 19/06/1992 P. 0027–0036). According to this regulation, an NRA has been defined as: *the body or bodies in each Member State, legally distinct and functionally independent of the telecommunications organizations, entrusted by that Member State inter alia with the regulatory functions addressed in this Directive.*

Effective competition in the telecom markets is still one of the key regulatory issues. Therefore, the EECC incorporated most of the pro-competition regulatory tools from the previous Framework Directive, i.e., the definition of SMP, the procedure for identifying and defining markets or imposition, amendment, or withdrawal of the regulatory obligations²⁴. The general policy objective for the NRAs is to impose ex-ante regulatory obligations only to the extent 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 (Article. 3 p. 4 (f) EECC).

The EECC's most significant new pro-competitive instrument is a commitments procedure (Article 79 EECC). Undertakings designated as having SMP will have the ability to offer to the NRA commitments regarding conditions for access, co-investment, or both, applicable to their networks. Such an offer for commitments must be sufficiently detailed (including the timing and scope of their implementation and duration). After receiving the offer, the NRA performs a market test, which consists of conducting a public consultation of the interested parties, particularly third parties directly affected by an undertaking designated as having SMP. The NRA is not bound by either the offer or the opinions of the market participants obtained in the market test.

Nevertheless, the preceding practice shows that informal cooperation by NRAs with the market players in regulatory issues is mostly very effective, especially in countries like the UK, Germany, or Sweden. Thus, the commitments procedure must be seen as a step towards the more formal influence of telecom operators on the shape of the regulatory obligations. The change described above made in the EECC is significant and can have a tangible impact on the market. From now on, the shape of ex-ante regulatory obligations can be decided in a dialogue between the regulator and the market.

²⁴ Articles 15-16 of the Framework Directive.



Figs. 5 A and B. The EU 28's lowest prices compared to other countries (expressed in EUR/PPP, VAT included)²⁵. These two charts show that the average prices in the EU are lower than in other highly developed countries.

²⁵ Source: EC, Fixed Broadband Prices in Europe 2018.

d. Universal service

During the era of monopolies, public operators legally guaranteed telecommunication services for customers with social needs (e.g., disabled) or living in rural (peripheral) areas. Public operators, being monopolists, were able to subsidize the financial losses incurred by providing such services from the other profitable segments. With the liberalization process, there were concerns that some customers would not be able to access telecommunication or postal services on a competitive market, or that the cost of services would be unaffordable. This was considered to be one of the negative consequences of the liberalization of the markets²⁶. The reaction to this was to establish the universal service obligation (USO) which was to be provided by one or more telecoms operators in each EU Member State²⁷. Universal service became part of the sector-specific regulation described as *social* or *economic regulation*. Thus, universal service is an essential part of the sector-specific regulation on each network industry. Moreover, access to their services has a civilizational aspect.

Compared to other network markets, telecommunication universal service is subject to the quickest changes. This is due to the rapid technological evolution of this sector. Telephone boxes (telephone booths) are perhaps the best example of universal service's evolution, since they no longer pay for themselves but nevertheless they still survive as an iconic symbol in some countries (mainly the UK). Previous EU regulations strictly regulated the scope of USO as a minimum set of services that must be made available for customers. According to these directives, universal service was made available at the quality specified to all end-users and at an affordable price. More and more countries decided not to designate a universal service provider in recent years because the market ensured universal service with no need for regulatory intervention (the first one was Germany). Therefore, designation of the USP was never a legal obligation in the Universal Service Directive 2002/22/EC.

As can be expected from a directive creating a new regulatory policy, the EECC contains numerous changes in universal service. Accordingly, in the EECC universal service must evolve to reflect advances in technology, market developments, and changes in user demand (no 210 EECC recital). The increasing competition on the market and consumer choice for

²⁶ Towards a competitive Community-wide telecommunications market in 1992: implementing the Green Paper on the development of the common market for telecommunications services and equipment : state of discussions and proposals by the Commission; COM (88) 48 final.

²⁷ In most of the EU countries, there was USO and universal service provider, however, in Germany, there was no universal service obligation (Deutsche Telekom provided a service without any obligation). In Sweden there was a USO but there was no designated universal service provider.

different sources of communications services was another factor that determined the need for modernization in universal service regulations. Thus, the EECC stipulates that affordable adequate broadband internet access is an essential part of USO, in addition to voice communications services (Article 84 EECC). Such access is now crucial for both society and the economy. A modern society like the EU is currently moving to the digital economy and society living online (Stavytskyy et al.). Member States may extend the scope of USO to end-users that are microenterprises and small and medium-sized enterprises, and not-for-profit organizations. This means that USO can now become more "universal", not only limited to customers with special needs. That must be seen as a proper step.

The issue of who should be a universal service provider has been left to the Member States. However, regulatory intervention and the designation of a universal service provider is an exception to be used only when the minimum set of universal service (availability at a fixed location of an adequate broadband internet access service and of voice communications services) cannot be ensured under normal commercial circumstances or through other potential public policy tools. In such a situation, Member States may designate one or more undertakings to guarantee such availability throughout the national territory. Thus, under normal commercial circumstances, the minimum set of universal services shall be provided by the market – and thus different telecoms operators.

The role of NRAs is still essential in ensuring and safeguarding USO. The scope of NRAs' responsibility is: a) monitoring the evolution and level of retail prices (Article 85 EECC); b) tariff options or packages to consumers with a low income or special social needs offered by undertakings (Article 85 EECC); c) calculating the net costs on the compensation request by providers of a broadband internet access service, voice communications services or the continuation of the existing universal service when such services place an unfair burden on providers (Article 89 EECC), and d) the management of the sharing mechanism if the net cost of USO is shared between providers of electronic communications networks and services (Article 90 EECC).

4. Postal market

The postal and delivery industry plays a significant role in the EU economy. This is proved by hard figures showing the number of employment positions, the postal operators' revenues, or the postal contribution in the GDP. Moreover, the extraordinary situation caused by the COVID-19 pandemic showed that the postal industry plays an indispensable role in every society, particularly during lockdowns. The significance of this sector should be seen in its role in modern society. In these terms, the postal market continues to be significant in European social life. Hence, unlike any other network industry, the postal market is rapidly changing, adjusting to contemporary social and public needs.

The EU telecommunication markets are generally comparable, but each postal market remains distinct (not only in the EU). As a result, there are hardly two similar postal markets in the EU. This is one of the fundamental differences between these two network markets. Thus, this suggests that forming the next regulatory framework for the EU postal market can be challenging. In light of this remark, further analysis of the EECC's impact on future postal regulation must be considered.

a. The need for a change – the market transformation

There are two major trends ongoing in the postal market: digitalization and platformization. Digitalization is understood as the e-substitution of public services (e-administration)²⁸, which causes a decline in letter volume but an increase in e-commerce and a rapidly growing parcel market. Platformization is a business model associated with e-commerce that substantially impacts the postal market. Platformization is an integrated business (ecosystem) with a digital marketplace, often offering its products and services. Products are delivered to customers directly throughout their distribution channels (e.g., mainly by Amazon on the international level, and by Allegro in Poland). Fig. 6 illustrates the

²⁸ The e-substitution is caused by Regulation (EU) no 910/2014 of the European Parliament and the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (eIDAS). The eIDAS provides e-administration for registered electronic delivery, allowing sending and receiving data that enjoy a legal presumption of its authenticity and integrity. This tool may be effectively used in courts and administrative proceedings. Such deliveries are analogous to those assigned to the delivery of traditional registered mail. Consequently, many EU countries have witnessed the expansion of IT systems, becoming a modern equivalent of a traditional postal service. However, from the postal law perspective, digitalization is not included in the EU postal regulation, i.e., it is not a part of the universal service obligation, which is based only on the traditional mail service.

platformization model of business, with delivery by the seller without third-party involvement.

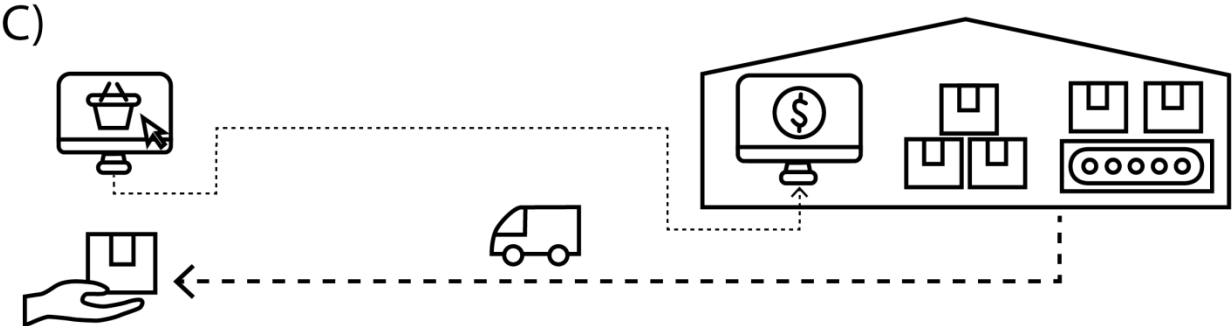


Fig. 6 The diagram illustrates the platformization model of business, with delivery by the seller without third-party involvement.

Digitalization and platformization are the most important new challenges for the postal market. These trends directly affect users by changing their needs and expectations (M. Finger et al). It is unclear how the market (operators) will answer these expectations and how they will adapt to them. It can be assumed that the traditional roles in the postal market performed by postal operators (incumbents) and courier operators are changing, and platforms like Amazon will try to supersede them. There is no doubt that these trends will primarily affect incumbents - universal service providers predominantly active on the traditional segments of the market, like letters. Therefore, this ongoing transformation must be included in the future EU regulatory framework. An example of international regulation adjusting for e-substitution is the Universal Postal Union (UPU). In 2016 at the 26th UPU Congress a new type of postal service was added - electronic postal services, which comprise: electronic postal mail, electronic postal registered mail, electronic postal certification mark, and electronic postal mailbox (Article 17 of the UPU Convention). They are the digital equivalent of the traditional postal services. This part of the UPU Convention is not a mandatory element for the member countries' regulation, but it shows an ongoing trend. Digital communications are increasingly common alternatives for traditional letters, now for the older generations too. At the same time, universal service providers cannot close down the postal letter segment just like that, nevertheless it is shrinking overall.

The literature consensus is that the postal regulatory framework needs to be changed (Romito et al, Hern, Gori et Parcu, or Chołodecki). Without a suitable regulatory response,

current legal institutions like the USO will lose their significance for users and can become more expensive for providers. Therefore, the EECC must be seen as a legal framework for adjusting regulatory institutions and their toolbox to new challenges in the telecommunication market.

b. The shape of the Universal Postal Service

Universal service is part of the services of general economic interest (SGEI). There is no legal definition of the SGEI, but the EU legal documents highlight that the concept of SGEI designates "(...)universal service, continuity, quality of service, affordability, and user and consumer protection"²⁹. SGEI is an "EU legal category that provides an exception to the competition rules for the proportionate pursuit of legitimate public interest goals by private undertakings" (Sauter, 2008, p. 1). The presence of the universal service on the infrastructural markets, like the postal sector, is the consequence of the liberalization process. As was mentioned, when state-owned public operators were monopolists, they were legally obligated to offer some category of services. However, introducing free competition to the market raised concerns that some users could be excluded from access to some unprofitable postal services, or that such services could be unaffordable for users. Thus, the remedy for potential negative consequences was establishing the USO: "In a liberalized market environment, a universal services obligation guarantees that everybody has access to the service at an affordable price and that the service quality is maintained and, where necessary improved"³⁰.

It is no exaggeration to assert that the universal postal service is an essential part of the EU sector-specific regulation. As a result, the main regulatory goal of the NRA is safeguarding the universal service.

Safeguarding the right to universal service for all users is an obligation of all the EU Member States (Article 3 Postal Directive). Currently, the biggest obstacle of the USO is excessively detailed EU regulations. USO comprises the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users (Article 3.1 Postal Directive). Furthermore, the universal service must be guaranteed not less than five working days a week, save in circumstances or geographical conditions deemed exceptional, and it includes as a minimum: one clearance and one delivery to the home,

²⁹ Green paper on services of general interest COM(2003) 270 final, p 15.

³⁰ Green paper on services of general interest COM(2003) 270 final, pp 16-19.

premises, or one delivery to appropriate installations (Article 3.3 Postal Directive). Due to price affordability, USO can be costly (Chołodecki, 2020).

As mentioned above, postal markets in the EU Member States differ from each other significantly. This difference has several grounds. First of all, every postal market has its historical background and unique development path. Factors such as the size of the country, population density, the character of the landscape, the scale of urbanization, users' expectations, and citizens' wealth. All these factors have shaped postal markets. Therefore, it is even hard to categorize (or group) EU postal markets to make some simplifications. As is shown in Fig.11, revenue from mail can vary significantly between some of the presented USPs. Finally, like every element of the postal market, universal service is subject to rapid technological changes. Thus, these factors should strongly indicate future USO regulations'.

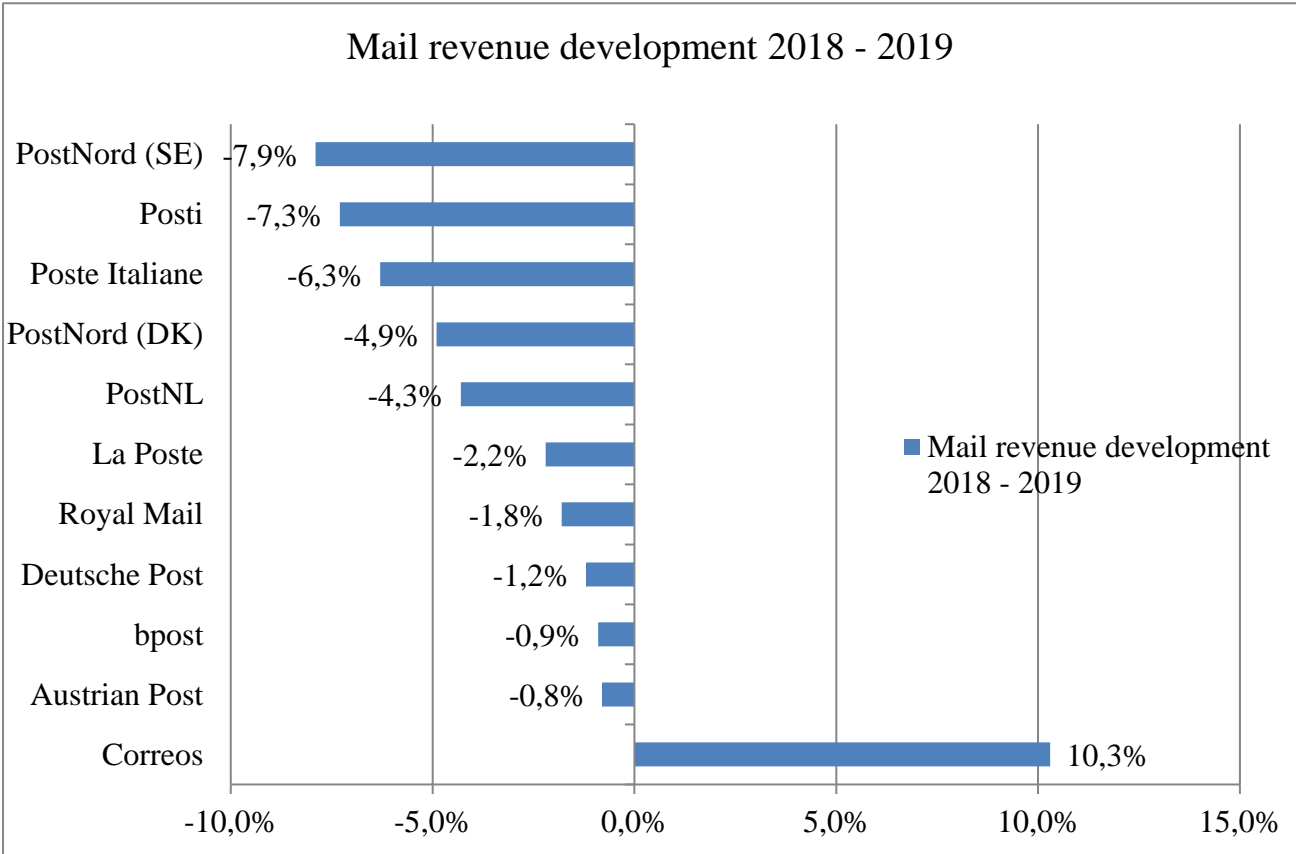


Fig. 7 Mail revenue development 2018 – 2019³¹.

³¹ Source: PostNL, *European Postal Markets 2021 an overview*, p.21. The difference between 2018 and 2019 mail revenues in local currency. The revenues include domestic and cross border activities. PostNL 2019 revenue includes Sandd revenue as from 1-10-2019.

Like in the EEC, universal postal service must evolve to reflect advances in technology, market developments, and changes in user demand. The growing competition from the alternative postal operators (couriers) is an additional factor for the modernization of universal service regulations. Thus, the current shape of the universal postal service should be changed. The EECC implies that universal service will be an element of the next EU regulation, with the SEGI core elements, like being available at the quality specified to all end-users and at an affordable price. The designation of a universal service provider should be an option reserved for NRAs. This is an opportunity especially for smaller countries with advanced digitalization processes. On the telecoms market, the designation of the USP was never a legal obligation, and in some EU countries, the market is providing universal service with no need for regulatory intervention.

The digitalization process described above leads to the digital economy and society living online (Stavytskyy et al.); that is why governments are trying to provide public services in a digitalized form (Gori & Parcu, 2020). The "cost-saving potential for senders" and "the convenience to access, save, and store communication." (Copenhagen Economics, p. 36) are also important factors for digitalization. Therefore, the universality of universal service requires adding digital services to the USO, as UPU did. Romito and co-authors accurately pointed out that "The Incumbent Postal Operator could become the "link" between the communication and delivery markets that are being heavily impacted by digitalization, and physical communication has been more and more displaced by digital communication, while the delivery market has experienced an enhanced role due to digitalization." (p. 61).

Nevertheless, the role of NRAs should still be essential in ensuring and safeguarding the USO on the postal market.

c. Competition and regulatory power

The postal directives have hardly included any NRA pro-competitive sector-specific tools (apparatus)³². As a result, the liberalization process of the EU postal market has been limited to lifting the legal monopoly and other market restrictions. To present possible changes in the EU postal framework, we need to make a simplified characterization of NRAs' existing regulatory toolbox. Thus, the EU postal markets consist of two major segments:

³² The limited access to the postal infrastructure regulated in Article 11a of the Postal Directive can be an exemption.

- Traditional (mail) – is over-regulated with a universal service provider as the focal point of the segment. Competition there is limited due to the shape of the USO and the declining letter volumes to which universal service is devoted. As a result, most of the NRA regulatory power and obligation focused on this segment is only a social regulation to safeguard USO. In addition, the digitalization trend impacts this segment.
- Alternative (CEP) – a free market with very strong competition. Almost complete absence of any regulatory power from the NRA. The segment is focused on the e-commerce parcel market. The out-of-home delivery infrastructure like parcel lockers is another distinctive element of this market. In addition, the platformization trend impacts this segment.

Some European postal undertakings, like Deutsche Post & DHL, Royal Mail & GLS, or La Poste & DPD, are present in both segments, but this does not change the fact that they create (or acquire) separate companies to perform on the alternative segment. In other words, one corporation, which is present on these two postal segments, follows different rules and business models on each of them.

For this part of the study, the most crucial question is why competition does not exist in the traditional segment of the postal market and why it blooms on the alternative one. The answer can be obtained by noticing the telecommunication market and the foundation concepts of liberalization of this market. From the very beginning, the transformation of the telecommunication markets requires a specific legal apparatus necessary to achieve effective competition – sector-specific regulation with ex-ante obligation as a part of the NRA legal toolbox [for more detail, see point 3 b on SMP]. Notably, in most EU Member States, this policy seems effective since the telecommunication markets are highly competitive and the market provides even universal service with no need for regulatory intervention. This raises the question of future policy for both segments of the postal market.

Ex-ante obligations can only achieve effective competition on the infrastructural markets like the postal market, i.e., access to the crucial elements of the infrastructure. According to the EECC, "access" means the making available of facilities or services to another undertaking, under defined conditions, to provide electronic communications services; it covers, among other things: access to network elements and associated facilities, which may involve the connection of equipment, by fixed or non-fixed means (in particular this includes access to the local loop and to facilities and services necessary to provide

services over the local loop); access to physical infrastructure including buildings, ducts, and masts (Article 2.27 EEC). The telecommunication NRA may impose obligations on undertakings to meet reasonable requests for access to, and use of, specific network elements and associated facilities in situations where denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, and would not be in the end-user's interest (Article 73.1 EEC). Thus, the EECC does not limit access to any telecom infrastructure elements and does not exclude any undertakings to gain such access. In contrast, the postal directive grants non-discriminatory access to elements of postal infrastructure or services provided within the scope of the universal service. This access is limited to the postcode system, address database, post office boxes, delivery boxes, information on change of address, re-direction service, and return to sender service (Article 11a Postal Directive). However, this access is strictly connected to the USO. Therefore, the access defined by the postal market is more like a prosthesis rather than an effective pro-competitive tool.

Since liberalization began with postal directive 97/67/EC, the subsequent postal regulations followed the telecommunication framework. The EECC suggests that the following postal regulatory framework will be equipped with a pro-competitive sector-specific regulation similar to the telecommunication framework. Both described segments of the postal market need sector-specific pro-competitive regulations. The traditional segment needs effective competition, especially through allowing access to incumbents' infrastructure, and the alternative segment needs to be able to access competitors' OOH infrastructure.

d. New postal services – CEP

The value of online sales in the EU doubled between 2012 and 2017, from €121 bn to €224 bn³³. Consequently, the Courier, Express and Parcel (CEP) industry, which delivers e-commerce goods, is also growing. The constant growth of e-commerce is now a key factor for the EU postal market. However, delivering parcels requires different infrastructural solutions from distribution centers, due to the greater variety of parcel sizes and shapes, and necessitates the adoption of different delivery solutions, like OOH. In all the EU countries, OOH infrastructure is rapidly developing. The significance can be demonstrated by the number of parcel machines in Poland (11,000), Spain (10,000) and Germany (7,000).

³³ COMMISSION STAFF WORKING DOCUMENTA, European retail sector fit for the 21st century, SWD(2018) 236 final.

Nevertheless, the pick-up and drop-off (PUDO) points have reached the following numbers in Germany (57,000), France (45,000), Great Britain (38,000), and Italy (36,000)³⁴.

Due to technological development and consumer expectations, the telecom regulation evolved from (focusing on) fixed-telephony to high-speed internet access. The postal market is facing comparable evolution from the letter market to CEP. This evolution needs an appropriate response. Therefore, the EECC made some of the crucial definitions in line with a more functional approach rather than a technical one, i.e., the definition of electronic communications services (no 15 EECC recital). This is one of the essential modifications in the EECC regulatory approach.

Following the EECC changes to the regulatory framework, it can be assumed that certain postal definitions will be changed, and a new one will emerge. This is because the CEP market needs new definitions to compose a comprehensive framework. OOH and PUDO need to be defined, with parcel lockers as an element of postal infrastructure. In addition, the platformization of the market must be taken into account to protect consumers. UPU in 2018 pointed out that “it is important to consider the recent trend in some countries to give a wider definition of the postal market in their national regulations which also incorporates digital communications. This interpretation implies a resizing of traditional postal services’ share in this new wider market, thus opening a reflection on the re-definition of the role of postal operators.”

5. Conclusions

Telecommunication regulation has always been a reference point for postal regulation. Despite all the differences, the EU telecom policy has always been one step ahead of the postal regulation. Thus, the newest telecommunication regulation - the EECC - should be seen as a vital sign for future postal service regulation. The EECC was a new step to changing the communication sector in the EU. The regulatory goals established in the new framework have four general objectives: 1) Connectivity and access to, and take-up of, very high capacity networks; 2) infrastructure-based competition; 3) development of the internal market, and 4) promotion of very high capacity networks. Thus, very high capacity networks are now the

³⁴ "Last Mile Experts, *Out-Of-Home Delivery in Europe 2021*.

main area for regulatory policy on the telecom markets in the EU. The analysis of the EECC in light of the current situation on the postal market indicates that the EU's future postal service directive would and should affect three main aspects. The first is the shape of the USO. Universal service should no longer be the most crucial goal of the regulatory framework. The second is the more competitive-oriented framework with sector-specific regulation for the NRA. The regulator needs an appropriate legal toolbox for precise and effective intervention in the market. Significantly, the legal toolbox needs to be equipped with SMP regulations to ensure effective competition in the postal market. Finally, the third is regulatory focus on the growing CEP market as the most crucial part of the postal market. The scope of the postal market and appropriate open definitions are needed.

The postal sector is still the bloodstream of the globe – the change is that these "postal veins" do not transport letters with information (the internet now does this) but goods (e-commerce).

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