



VOLUNTARY COMMITMENTS IN TELECOMS: FLIGHT OF FANCY OR A SAFE STEP TOWARDS DEREGULATION?

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The European communications regulatory framework was introduced almost two decades ago. At its very inception, the intention was to make regulation transitional and, as competition evolves and incumbents no longer possess significant market power (SMP), gradually scale back remedies. By and large, the plan has worked, albeit slowly. The Commission's recommendation for markets susceptible to ex ante regulation includes just two markets, down from 18 in 2004.¹ Most Member States have already lifted price caps and other strict remedies from retail and many of the previously regulated wholesale markets.

That said, certain important markets continue to be regulated across most EU countries (and the UK). In particular, access to the infrastructure underlying broadband connectivity is still mostly subject to variants of regulation based on the identification of a provider with SMP.²

Competitive conditions vary across countries and incumbents' infrastructures are faced with competition from cable TV networks, 4G and 5G mobile networks, as well as competitive fibre rollouts. Further to broadband-related infrastructure, remedies attached to legacy services, such as access to copper-based, fixed voice access, persist in some countries.

Given the ambition to gradually deregulate and encourage competitive investment and innovation, regulators are faced with a trade-off between lifting unwarranted, possibly distorting regulations, while protecting competition and consumers. One way to strike the right balance is through *voluntary commitments* whereby the remedies are more an outcome of a negotiation between the regulator and the incumbent, and less one-way traffic from the former to the latter.

¹ European Commission (2020), Commission updated the Recommendation on Relevant Markets. Documentation available from: <https://digital-strategy.ec.europa.eu/en/news/commission-updated-recommendation-relevant-markets>

² The two markets susceptible to ex ante regulation are the market for wholesale local access and the market for wholesale access to dedicated connectivity.

What are the pros and cons of voluntary commitments and how can they be as effective and efficient as possible?

The first step towards deregulation

There are many notable examples of voluntary commitments.

Almost 15 years ago, BT, the UK incumbent, responded to Ofcom's tightening scrutiny and competition enforcement by functionally separating its network business ("Openreach") from BT's competitive elements. While not always plain sailing, the creation of Openreach has, on the whole, contributed to an increase in competition in broadband and associated bundles of products. Similarly, in 2019, the Danish incumbent Yousee-TDC voluntarily separated the infrastructure elements from the rest of the business.³

In 2018 (reaffirmed in March 2021), Ofcom approved BT's *retail-level* voluntary commitments to ensure reasonable prices of voice-only telephony. This includes, for example, a commitment not to increase prices of a predetermined basket of services by more than the Consumer Price Index (in other words, BT has flexibility over how it prices within the basket).⁴

In the Netherlands, the national incumbent KPN introduced wholesale broadband access offer, typically a core regulated service, on an unregulated basis (labelled as a "commercial offer"). It remains to be seen whether the voluntary offer will be deemed sufficient in the Dutch market, as no SMP regulations currently prevail on broadband access after The Dutch Administrative High Court for Trade and Industry (CBB) annulled the ACM's (joint) SMP decision in 2020.⁵

How to make voluntary commitments work?

There are both benefits and risks that National Regulatory Authorities (NRAs) need to be mindful of when considering the option of accepting voluntary commitments:

1. The result of negotiations between a regulator and the entity being regulated, voluntary commitments can provide the incumbent with additional flexibility in instances where stringent remedies imposed by the regulator would run the risk of distorting pricing and other aspects of product offerings. In principle, any regulator-imposed remedy that goes beyond what is needed to address a defined market failure can have a distortive impact. In practice, this can be manifested through, for example, suboptimally slow migration to advanced technologies if the attractiveness of prolonged use of legacy services is boosted by strict price regulation.
2. Voluntary offers for wholesale access inputs can be effective insofar as they build on the principle of non-discrimination (e.g. '*equivalence of inputs*'). This is central to the separations of BT and TDC, for example. Many incumbents' networks are subject to some form of separation in Europe through the imposition of equivalence of inputs and forms functional separation.

Voluntary commitments should not be seen as a panacea. There are important considerations to make sure the proposed commitments are seen as credible and not as a 'plot to exploit market power' in disguise.

Firstly, there appears to be certain circumstances where voluntary commitments are more likely to succeed. For example, where the regulator's

³ TDC's separation was voluntary after the acquisition by a company controlled by a consortium comprising three of Denmark's largest pension funds and Macquarie Infrastructure and Real Assets.

⁴ Ofcom (2021), *Protecting voice-only landline telephone customers*, Statement. Available from: <https://www.ofcom.org.uk/consultations-and-statements/category-2/protecting-voice-only-landline-customers>

⁵ CBB decision is available from: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:CBB:2020:177>. Copenhagen Economics advised T-Mobile Netherlands in the proceedings leading up to the CBB ruling.

concerns pertain to a subset of vulnerable consumers, fully-fledged SMP regulation may be ‘using a sledgehammer to crack a nut’ with unintended effects on the rest of the market. A targeted voluntary commitment, such as that agreed by Ofcom and BT for fixed legacy services to protect vulnerable consumers, may be sufficient in addressing any concerns of harm.

Secondly, voluntary commitments undoubtedly benefit from monitoring and a clear backstop. In contrast with behavioural remedies in merger and antitrust contexts (which competition authorities are often reluctant to agree upon), a clear advantage in the telecoms sector is the presence of a sector regulator that has the necessary knowledge and established tools to monitor compliance and intervene again if necessary. In other words, the regulatory backstop is key to enabling incentives for commitments to work; commitments do not do away with the need for, and benefit of, having expert regulators in place.

Finally, where voluntary commitments are credible and based on stakeholder buy-in, they can help mitigate the risk of costly and lengthy court processes. This way, they *can* save the industry from years of uncertainty. However, insofar as regulatory decisions to accept commitments (or their compliance) can be challenged in courts, voluntary commitments may not go very far in alleviating regulatory and legal uncertainty.

Indeed, there are a range of contractual and practical factors that need to fall into place for voluntary commitments to succeed. In addition, market testing with competitors and other stakeholders, as well as measures to ensure compliance, are an important part of the governance to ensure voluntary commitments work.

The economic case to say: “I do”

Economic analysis can help to clarify the case for voluntary commitments. Assessing and proposing voluntary commitments respectively, operators and regulators need to articulate how an offer addresses the concerns that underpinned regulation in the first place. Key to such analysis is an understanding of the operator’s incentives and what would happen in the absence of commitments or

regulatory remedies. Based on our experience, economic analysis is key to determining whether or not there is a case for voluntary commitments. Examples of this include:

- Understanding the circumstances under which an operator can, in fact, *profitably* increase retail prices for a subset of consumers, given the competitive constraints the operator faces and other consumer protection safeguards in place.
- Informing whether an incumbent that is potentially facing competition from other networks has an incentive to foreclose “access seekers” by not granting them fair access to wholesale inputs.
- Assessing any unintended consequences of prolonging (non-voluntary) regulation, including any adverse effects on competitors’ incentives to use legacy wholesale products rather than investing in their own infrastructure.

In conclusion, voluntary commitments can work, but they require careful assessment and design. Incumbents that considering offering voluntary commitments should prepare the economic evidence to support their case in detail. Regulators and operators should carefully evaluate the pros and cons of voluntary commitments. This is especially important in terms of prices and how such commitments fit with other obligations under the telecoms’ framework, like cost orientation and non-discrimination, where there are genuine concerns over exclusionary or exploitative competition concerns. However, there is always the option of offering an additional tool to deal with legacy telecoms regulation in a proportionate manner.

Feedback welcome

The thoughts presented above are based on our teams’ extensive experience across projects in this space. The views expressed reflect our own opinion on the significance of this topic for the telecoms sector and for regulatory economics practice. We welcome questions, comments and the opportunity to hear and discuss other points of view.

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