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The history, basic institutions and theoretical hubs of Hungarian communications market regulation

Abstract

This study systematises and analyses one of the most important instruments of communications competition management in Hungary, “market regulation”, on the basis of public administration theory. In this context, it discusses in detail the basic theoretical issues of communications market regulation and market competition, the conceptual elements of ex ante asymmetric competition management, including the connections between general competition management and special communications competition management. The study systematises the tools of Hungarian communications market regulation, procedure types and the concept of significant market power in communications management on a scientific basis, and discusses the relevant enforcement practice in detail.

Keywords: competition management, communications, market regulation, significant market power.

Introduction

In Hungary, the first step in moving towards competition in the communications market was taken with the partial opening up of the communications market after the change of regime, when the monopoly of Magyar Posta (Hungarian Post Office), the only service provider in the postal and communications sector (performing public authority tasks for a long time), was abolished in respect of certain telecommunications services.

Act LXXII of 1992 on Telecommunications (hereinafter referred to as “Telecommunications Act”) created the possibility for the former monopolistic ser-

vices market to become multi-player. The Telecommunications Act established concessions for the public telephone service, the public mobile radiotelephone service, the national public paging service, as well as the national and regional distribution, broadcasting and related frequency use of public service radio and television programming.¹ This made it possible for others – in addition to public or semi-public actors – to provide such services for a fee and create a multi-player market, anticipating future competition considerations and the need for competition regulation. In the case of these services, however, we cannot yet speak of liberalisation, as the service monopoly (through state control by means of public service providers and concessions) remained with the state. However, telecommunications services other than those listed could be provided by anyone with an official licence, leading to the unfolding of partial liberalisation and the process leading up to liberalisation.²

In addition to licensing and supervisory control tasks, the Telecommunications Inspectorate³ established by the Telecommunications Act had powers which did not constitute regulatory authority but which had the potential to influence the communications markets, such as the preparation of communications standards, concession contracts, conditions for the use of frequency bands and the determination of technical and professional requirements for official inspections and controls.⁴ The scope of the almost regulatory tasks of the Telecommunications Inspectorate, which extended beyond traditional public authority powers, increasingly expanded: from 1997 it received powers not in the capacity of a public authority, such as assessing the operation of the communications and related IT market, informing the Government about the implementation of communications policy, and developing communications policy and communications and information strategy proposals.⁵

The Infocommunications Act introduced the general authorisation that later became a general EU principle in the regulation of the electronic communications sector and is key to liberalisation and market opening, allowing any natural person, legal entity or unincorporated company to provide communications services upon official notification.⁶ The Hungarian legislator thus took a significant step

¹ Section 40 (3) of the Telecommunications Act amending Section 1 (1) (k) of *Act XVI of 1991 on Concessions*.

² N. Beke, *A schematic historical overview of the Hungarian organisational structure of communications management*, [in:] A. Lapsánszky (ed.), *Communications regulation, communications management in Hungary and the European Union*, Budapest: Wolters Kluwer, 2013, p. 721.

³ Section 19 of the Telecommunications Act.

⁴ Section 5 (1) g-h, l) and p) of *Government Decree 142/1993 (X.13) on the foundation of a uniform infocommunications authority and on the amendment of certain legal regulations on communications*.

⁵ Section 3 (3) d-f) of *Government Decree 232/1997 (XII.12) on a uniform infocommunications authority and on the amendment of certain legal regulations on communications*.

⁶ Section 3 (1) of the Infocommunications Act.

towards liberalisation; and the possibility and intention of competition between multiple market participants also entailed the need to perform market regulation tasks.

The Telecommunications Inspectorate established by the Infocommunications Act exercised its exclusive regulatory powers in the communications sector⁷, while the strategic, legislative and sectoral coordination tasks remained within the competence of the Government and the Ministry.⁸ The Communications Arbitration Board, a body with independent authority operating as part of the Telecommunications Inspectorate, handled the market regulation of the Telecommunications Inspectorate as a collegiate body. The establishment of the Communications Arbitration Board created an institutional model in which the electronic communications market regulation tasks are performed by the regulatory body operating independently within the framework of the infocommunications authority, essentially in the role of regulatory authority. This organisational principle has since been reflected in the institutional set-up of the electronic communications sector.

In the course of its market regulation tasks, the Communications Arbitration Board was able to define the principles followed to identify providers with significant market power, which, although guiding for the Arbitration Board only, indirectly influenced and oriented market competition. In its market analysis procedures, the Communications Arbitration Board determined providers with a market share of at least 25% in the markets defined by the Infocommunications Act to be providers with significant market power.⁹ However, the consideration of the Communications Arbitration Board was limited to the determination of significant market power, and providers with significant market power were subject to statutory obligations in view of the existing significant market power under the law. Namely, the Communications Arbitration Board could not impose the obligations or determine the detailed conditions of the obligations; this was only enabled on the basis of subsequent EU directives.

1. Implementation of the EU regulatory framework in Hungary

With the adoption of directives in 2003, the European Union incorporated the basic rules for electronic communications into a single sectoral framework, which

⁷ *Government Decree 248/2001 (XII.18) on the Telecommunications Inspectorate and on fines that can be imposed by the bodies of the Telecommunications Inspectorate.*

⁸ *Informatics Government Commission operating within the Prime Minister's Office, then the Ministry of Informatics and Communications: Government Decree 100/2000 (VI.23) on the tasks related to the implementation of the information society, on the duties and powers of the Government Commissioner for Informatics, and Government Decree 141/2002 (VI.28) on the duties and powers of the Minister of Informatics and Communications.*

⁹ Section 25 of the Infocommunications Act.

brought about significant changes in the regulation of electronic communications. In this context, the Framework Directive¹⁰ defining the general principles of the framework set out the basic organisational requirements and the structure of duties for the national regulatory authorities, and required that the tasks of the electronic communications sector specified by the directives be carried out by competent independent bodies exercising their powers impartially and transparently.¹¹

With the Framework Directive and other elements of the sectoral framework (mainly through the provisions of the Access Directive¹²), sector-specific ex ante asymmetric market regulation and its procedural framework – provisions defining relevant markets, identifying SMP providers and procedural provisions for imposing obligations – became the cornerstones of sectoral market regulation.¹³

The Framework Directive also gave rise to the quasi-regulatory role of the European Commission, as part of which it identified in a recommendation the product and service markets whose characteristics may justify the imposition of obligations under the Access Directive, and it publishes guidelines for market analysis. The Member States' authorities have largely taken the European Commission's recommendation and guidelines into account.¹⁴

Hungary implemented the requirements arising from the EU sectoral regulatory framework through the Electronic Communications Act and its implementing regulations, by means of which it introduced a market analysis procedure that structurally has been in place ever since. The National Infocommunications Authority established by the Electronic Communications Act (hereinafter referred to as: NHH) performed the duties of sectoral regulatory authority as an EU Member State regulatory authority from 2004. The Electronic Communications Act delegated the duties of a market regulatory nature to the NHH's governing body, the NHH Council, which took its decisions in a single-instance administrative authority procedure.

The Electronic Communications Act also introduced the rules of the market analysis procedure, which has remained essentially unchanged ever since, in accordance with the EU regulations. In addition to identifying providers with significant market power, the NHH Council identified the relevant markets, analysed

¹⁰ *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.*

¹¹ Article 3 of the Framework Directive.

¹² *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.* Other sources of law for the framework at directive level include *Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services* and *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.*

¹³ Article 14 and 16 of the Framework Directive; the individual obligations were regulated by Article 8–13 of the Access Directive (later expanded by additional articles).

¹⁴ Article 15 of the Framework Directive.

the competition in the relevant markets, and established obligations for providers with significant market power. Contrary to the Infocommunications Act, the NHH Council could choose from the obligations set out in the Electronic Communications Act; its deliberation covered whether to apply the given obligation, while it determined the content and conditions of each obligation.

2. Structural changes and the creation of the National Media and Infocommunications Authority

The sectoral framework was amended in 2009, the most significant relevant benefit of which is the establishment of the Body of European Regulators for Electronic Communications (hereinafter referred to as: BEREC) and the BEREC Office. At that time, the activities of BEREC were aimed at developing best practices, issuing opinions and resolutions, providing professional assistance, advice and facilitating the exchange of information.

Through the amendment of the Electronic Communications Act¹⁵, the National Media and Infocommunications Authority (hereinafter referred to as: the Authority or the NMHH) was established as the legal successor of the NHH in the summer of 2010, with independent bodies of the President, the Media Council (with separate legal personality) and the Office. The legislator delegated the regulatory and non-regulatory powers of a market regulation nature in the electronic communications sector to the NMHH President. This abolished the solution introduced at the time of the Infocommunications Act, where the regulatory tasks were performed by a board, and the NMHH President became the legal successor of the NHH Council in terms of powers. The significance of this is underlined by the fact that the market analysis, which is the core of market regulation activity, is a cyclical but continuous activity, so its content-based continuity had to be ensured even with the changes in the Hungarian organisation of electronic communications regulation. Thus, in accordance with the objectives and provisions of the EU framework, the individual markets concerned could be regulated continuously by maintaining and amending the obligations contained in the decisions of the NHH Council. At the same time, the organisational structure created in 2010 also meant that the NMHH President, theoretically the narrowest definition of a national regulatory authority, became an independent competent body of the Authority.

In the light of developments in the electronic communications sector as well as EU and global economic trends, a review of the sectoral framework became necessary towards the end of the 2010s, resulting in the adoption of the Code.

¹⁵ *Act LXXXII of 2010 on the Amendment of Certain Acts Regulating the Media and Telecommunications*; this organisational structure was later provided for in *Act CLXXXV of 2010 on Media Services and Mass Communication* that is still in force, and the relevant parts of the *Electronic Communications Act* were repealed.

With the provisions of the Code concerning market regulation, the tasks of Member States regarding market regulation and the objectives and framework of market regulation activity changed. EU communications markets have matured in the almost two decades since the entry into force of the Community sectoral framework, competition facilitating consumer welfare has intensified, and globalisation has brought new challenges in this sector as well. The Code's system of market regulation places greater emphasis than before on the harmonisation of regulation, the differentiation of individual instruments of public authorities and the independent initiatives and cooperation of major market participants in order to regulate the market. Promoting the deployment of high-speed networks and protecting the EU's economic interests in the electronic communications sector are a priority, where new types of services – typically provided by non-European providers – new business models, business and technical solutions force economic and sectoral policy makers to rethink their strategies.

In comparison to before, the frequency of market analyses is decreasing: the market analysis must be performed within five years of the previous identification of providers with significant market power, which can be extended by one year. For markets not previously notified to the European Commission, the deadline is three years from the revision of the recommendation on the relevant markets.¹⁶

EU harmonisation is further enhanced by the fact that the European Commission sets a single maximum mobile termination rate throughout the Union and a single maximum fixed termination rate to be applied to all providers.¹⁷

Following the 2018 review, another significant change in EU sectoral regulation was the emphasis given to the role of BEREC as a result of the harmonisation. Pursuant to the BEREC Regulation¹⁸ adopted at the same time as the Code, national regulatory authorities are required to take into account the guidelines, opinions, recommendations, common positions and best practices adopted by BEREC in their regulatory and supervisory activities and to justify any deviation.¹⁹ The Code also refers to the need for Member States to ensure that national regulatory authorities take these regulators into account to the fullest extent possible, and it mentions this in specific provisions.²⁰ However, according to the BE-

¹⁶ Article 67 of the Code.

¹⁷ Article 75 of the Code.

¹⁸ *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.*

¹⁹ BEREC Regulation, Article 3 (1), Article 4 (1) and (4).

²⁰ Article 10 (2) of the Code, and, for example, the technical parameters for access to network elements operated by others [Article 61 (3) and (7)], the minimum requirements for the reference offer [Article 69 (4)], the very high capacity networks [Article 82], the quality of service of internet access and interpersonal communications services [Article 104 (2)], and the public warning system [Article 110 (2)].

REC Regulation, the relevant guidelines as set out therein should be taken into account even if not covered by the Code.

In addition to the issue of guidelines, BEREC plays a significant role in the future with cross-border legal disputes, the regulation of transnational markets and in the case of disrupted market analysis processes.²¹

The provisions of the Code are transposed into Hungarian law by the relevant NMHH decrees on the basis of the provisions of Act LXXXV of 2020 amending Act C of 2003 on Electronic Communications as regards the obligation to transpose the directive establishing the European Electronic Communications Code (hereinafter referred to as: Implementing Act) as well as the existing and new empowering provisions of the Electronic Communications Act adopted by the Implementing Act.²²

3. Basic institutions of communications market regulation

a) The legal basis of the sectorial regulatory authority in Hungary

The central institution of the regulatory activity related to competition in the electronic communications market is the regulatory authority, which is a multi-faceted and complex category, but by no means a precise concept.

From a functional point of view, the regulatory authority is the authority that carries out regulatory activity. Regulatory activity is a specific form of enforcing the law, which I believe is the only generalisable and uniform attribute of the regulatory authority. Among the specific types of regulatory activity we can highlight market regulation relevant to the study, which at the same time captures the nature of regulatory activity in the most tangible way.

The essence of market regulation as a public authority activity is that it is exercised by the authority through individual decisions which establish the individual obligations of specific customers, but these decisions require an examination of the market as a whole and affect the functioning of the entire market. Furthermore, due to the global-continental nature of the electronic communications sector and the cross-border nature of its technical and economic aspects, market regulation is closely related to the international coordination and processes of the sector. Within the framework of market regulation the authority enjoys wide discretion; this activity is continuous, during which the authority can review the merits of its decisions *ex officio* or make new regulatory decisions. Another essential feature is that market regulation decisions in many cases create additional public authority procedures and define procedure-initiation obligations.

²¹ Articles 27, 65–67 of the Code.

²² The amending provisions of the Implementing Act transposing the Code entered into force on 21 December 2020.

Formally, within the European Union, the national or Member State regulatory authorities in the field of electronic communications refer to the bodies of the Member States vested with regulatory powers related to the sectoral regulation of electronic communications. Member States should ensure that the duties arising from Community legislation are performed by bodies competent in the field of electronic communications. According to the Code – which sets out the duties to be performed by regulatory authorities more broadly than under the previous regulation, the Framework Directive – such specific and explicitly defined duties include *ex ante* market regulation and dispute resolution between undertakings (other duties include: radio spectrum management tasks, ensuring the protection of end-user rights in the electronic communications sector, tasks related to open internet access, assessing the additional burden and net cost of providing universal service, and ensuring number portability). Under the Code, Member States should delegate at least these duties to national regulatory authorities, while Member States may delegate other duties related to electronic communications to national regulatory authorities.²³ So the list is not exhaustive, but it is clear that it is essential to ensure that national regulatory authorities have competence over these duties.

The legislators of the Member States must guarantee the independence of these bodies, the impartial, transparent and timely exercise of their powers, and the availability of adequate resources.²⁴ These basic requirements are justified by the fact that the electronic communications sector, the provision of electronic communications services, the interconnection and development of networks and services fundamentally affect the functioning of the EU economy as a whole, the competitiveness of companies and the well-being of consumers. Therefore, it must be ensured that the regulatory authorities carry out their activities only in accordance with the objectives of the sectoral directives and their regulations, and are not influenced by other aspects and interests. The independence of national regulatory authorities means, on the one hand, that they are legally separate and functionally independent from the operators of communications networks and equipment and the providers of electronic communications services, while on the other hand, that they act independently from any other body in relation to their tasks in the electronic communications sector and shall not be subject to instructions therefrom. In addition to these two basic criteria, the guarantee of independence is that these bodies must be provided with the necessary technical, material and human resources, as well as a separate and public annual budget. However, the independent operation and the exclusion of the possibility of being instructed does not affect the institutional autonomy of the Member States, i.e. it does not mean that national regulatory authorities must be set up separately from other

²³ Article 5 of the Code.

²⁴ Framework Directive, Article 3 (1)–(3a); Code, Article 5 (1), Article 6, Article 8–9.

executive bodies in organisational terms. In the context of independence, Member States should ensure – regardless of whether national regulatory authorities are organised under the direction of other bodies, as part of other bodies or as fully autonomous authorities – that these authorities are able to take decisions that are professionally independent of industry and other public bodies, and have the necessary resources to do so. The general provisions on the appointment, term of office and removal of the heads of the regulatory authorities also serve as a means of regulatory independence.²⁵

However, given that the European Union seeks to harmonise and converge regulation (in both legislative and enforcement terms) in the electronic communications sector, it is necessary not only to ensure the independence and professionalism of the national regulatory authority, but also to ensure that these bodies act in pursuit of EU objectives. Therefore, EU legislation also obliges Member States to make national regulatory authorities actively participate in and contribute to the work of BEREC, to actively support BEREC's objectives of promoting co-ordination and coherence and to take into account the position of said body when adopting market regulatory decisions (for information on BEREC see below).²⁶

In Hungary, the national regulatory authority is the National Media and Information Communications Authority, which is empowered to regulate and supervise the electronic communications sector on the basis of the Media Services and Mass Communication Act and the Electronic Communications Act.

We must also mention here the types of independent regulatory body based on the Fundamental Law, especially since the Hungarian national regulatory authority is also an independent regulatory body. In the Hungarian constitutional system, the designation of this type of body is not based on the above-mentioned functional or formal performance of regulatory authority duties, but on the bodies that are both independent and have legislative powers in connection with their duties. These bodies are established by the Parliament in a cardinal law, they are accountable to the Parliament – and only to the Parliament – and they can form decrees related to their duties defined in the cardinal law.²⁷ According to the regulations in force, such bodies include the Hungarian Energy and Public Utility Regulatory Authority, and the Authority²⁸.

Accordingly, the Authority is not only a regulatory authority in accordance with EU law, but also one of the independent regulatory bodies responsible to the Parliament and endowed with legislative powers. The duties of the Authority, as a national regulatory authority, BEREC and the European Commission related to market regulation are discussed in point 3.

²⁵ Framework Directive, Article 3 (3a); Code, Article 7.

²⁶ Framework Directive, Article 3 (3a)–(3c); Code, Article 10.

²⁷ Article 23 of the Fundamental Law.

²⁸ Section 1 (3) of *Act XLIII of 2010 on Central Public Administration Bodies and on the Legal Status of Government Members and State Secretaries*.

b) Concepts of asymmetric competition and ex ante regulation in the communications sector

In view of the peculiarities and historical development of the electronic communications sector, asymmetric regulation plays a key role in the regulation of the sector, although this role is not exclusive and its significance is declining. Asymmetric regulation, as opposed to symmetric regulation, means when different actors in the same sector are subject to different types and content of regulatory intervention.²⁹

In the electronic communications sector, one aspect of regulatory differentiation is whether the subject of the obligation has significant market power. Certain obligations set out in the Framework Directive, the Access Directive and the Code can only be imposed in the event of significant market power,³⁰ and if the

²⁹ P.T. Lyon, H. Haizou, *Asymmetric Regulation and Incentives for Innovation*, “Industrial and Corporate Change” 1996, no. 4 (4).

³⁰ S. Lee, S. McBride (ed.), *Neo-Liberalism, State Power and Global Governance*, Dordrecht: Springer, 2007, pp. 56, 194; J.A. Gomez-Ibanez, *Regulating Infrastructure: Monopoly, Contracts, and Discretion*, Cambridge: Harvard University Press, 2003, pp. 5–8, 107, 153, 159, 197, 214, 216, 248–249, 252, 253; S. Rosefielde: *Comparative Economic Systems: Culture, Wealth, and Power in the 21st Century*, Malden: Blackwell Publishers Inc., 2002, pp. 29, 185, 262; S.C. Pirrong, *The Economics, Law, and Public Policy of Market Power Manipulation*, Norwell: Kluwer Academic Publishers, 1996, pp. 6, 8, 11–12, 20, 24, 32, 64, 75–76, 235; O. Shy, *The Economics of Network Industries*, Cambridge: Cambridge University Press, 2001, pp. 7, 105–109; J. De, H. Shepherd, G. William (ed.), *Pioneers of Industrial Organization: How the Economics of Competition and Monopoly Took Shape*, Cheltenham Glos: Edward Elgar Publishing Limited, 2007, pp. 3, 7, 9–13, 17, 19–21, 43–44, 65, 68, 72, 86, 100, 119–122, 148–155, 172–176, 195, 237, 239, 255–257, 294; M.M. Lele, *Monopoly Rules*, New York: Crown Publishing Group – Random House, Inc., 2005, pp. 24–25, 44; R. Sherman, *The Regulation of Monopoly*, Cambridge: Cambridge University Press, 1989, pp. 65, 178; D.T. Armentano, *Antitrust and Monopoly: Anatomy of a Policy Failure. (Independent Studies in Political Economy)*, Oakland: The Independent Institute, 1999, pp. 14, 18–22, 24, 33–35, 40–41, 43; L.A. Wrobel, E.M. Pope, M. Eddie, *Understanding Emerging Network Services, Pricing, and Regulation*, Norwood: Artech House Inc., 1995, pp. 1–3, 9–10, 25–26, 30; D. Rodrik: *One Economics, Many Recipes: Globalization, Institutions, and Economic Growth*, New Jersey: Princeton University Press, 2007, pp. 22, 77; Ch.W. Baker, *Monopolies and the People*, BiblioBazaar, 2007, pp. 15–16, 46–57; K. Winkler: *Negotiations with Asymmetrical Distribution of Power: Conclusions from Dispute Resolution in Network Industries*, Heidelberg: Physica-Verlag, 2006, pp. 1–3, 6–7, 11–14, 33, 66, 70, 73–74, 90–91, 130; N. Spulber, A. Sabbaghi, *Economics of Water Resources: From Regulation to Privatization. (Natural Resource Management and Policy)*, Norwell: Kluwer Academic Publishers, 1998, pp. 211, 232, 293, 295; K. Binmore, D. Harbord, *Bargaining over Fixed-to-Mobile Termination Rates: Counter Vailing Buyer Power as a Constraint on Monopoly Power*, “Journal of Competition Law and Economics” 2005, no. 3 (1), pp. 449–472; Ch. Weare, *Interconnections: a Contractual Analysis of the Regulation of Bottleneck Telephone Monopolies*, “Industrial and Corporate Change” 1996, no. 4 (5), pp. 963–992; G.J. Sidak, *A Consumer-Welfare Approach to Network Neutrality Regulation of the Internet*, “Journal of Competition Law and Economics” 2006, no. 3 (2), pp. 349–474; W.H. Page, H. William, *Class certification in the Microsoft indirect purchaser litigation*, “Journal of Competition Law and Economics”

regulatory authority has established the existence of significant market power and has identified the provider with significant market power.

However, it is important to emphasise that symmetric regulation is independent of asymmetric regulation applicable to SMP providers and thus can already be applied in deregulated markets where asymmetric regulatory obligations can no longer be imposed. At present, asymmetric instruments, i.e. instruments dependent on significant market power, play a greater role in the regulation of electronic communications; however, thanks to the burgeoning deregulation process, symmetrical obligations may become increasingly important.³¹

The principles of competition law apply within the scope of the Authority's sectoral regulatory activity; the Authority also applies the basic and methodological approaches to competition assessment developed in competition law, and it also takes into account the general objectives of competition regulation in its regulatory activity. However, compliance with the relevant rules of competition law does not mean the application of specific procedural and substantive law provisions on competition supervision, and in particular it does not mean following ad hoc practices, whether by Hungarian or EU competition authorities. In contrast to ex post interventions of competition supervision, the basic form of regulatory activity in the electronic communications sector is ex ante regulation. Leaving aside the economic specifics of the issue, the difference can be summarised as follows: ex post regulation is aimed at the ex-post investigation and evaluation of anti-competitive market behaviour and, if necessary, at applying appropriate legal consequences, while electronic communications ex ante regulation is based on a comprehensive forward-looking analysis of the examined market. Ex ante regulation investigations focus on a competition problem that is ongoing, will still exist in the future, or may potentially occur in the future. Furthermore, while ex post competition regulation is sector-neutral, i.e. it applies to all sectors, ex ante competition regulation applies to the electronic communications sector, i.e. it is sector-specific. Furthermore, a more attributive difference between these regulatory approaches is that while ex post proceedings are typically initiated by an entity concerned, ex ante investigations are a continuous ex officio activity. Due to the different emphases and goals of the investigations, the procedures can nat-

2005, no. 2 (1), pp. 303–338; D.S. Evans, A.L. Nichols, R. Schmalensee, *United States v. Microsoft: Did Consumers Win?*, “Journal of Competition Law and Economics” 2005, no. 3 (1), pp. 497–539; R.W. Hahn, R.E. Litan, E. Robert, H.J. Singer, *The Economics of “Wireless Net Neutrality”*, “Journal of Competition Law and Economics” 2007, no. 3 (3), pp. 399–451; R. Mason, T. Valletti, M. Tommaso, *Competition in Communication Networks: Pricing and Regulation*, “Oxford Review of Economic Policy” 2001, no. 3 (17), pp. 389–415; H.J. Singer, *The Competitive Effects of a Cable Television Operator’s Refusal to Carry DSL Advertising*, “Journal of Competition Law and Economics” 2006, no. 2 (2), pp. 301–331.

³¹ A. Choma, *Ex ante and ex post regulation*, [in:] A. Lapsánszky (ed.), *Communications regulation, communications management in Hungary and the European Union*, Budapest: Wolters Kluwer, 2013, p. 280.

urally lead to different results. With regard to the relationship between ex post and ex ante regulation, competition problems should be addressed primarily with sector-neutral, ex post instruments, and the application of sector-specific ex ante regulation can only be considered if this is ineffective or insufficient.³²

Whether a given service market needs to be analysed depends on whether there is a so-called ex ante involvement in the given service markets, i.e. whether the given service market can be considered affected by ex ante regulation. The system of criteria for ex ante involvement based on EU regulations is the so-called three criteria test.³³

The three criteria for the test are that

- a) there are high and non-transitory, structural, legal or regulatory barriers to entry;
- b) in the absence of ex ante regulation, conditions of effective competition are not expected within the relevant time horizon, having regard to the state of competition behind the barriers to entry;
- c) the means of competition law alone are insufficient to adequately address the errors and shortcomings of the market.

These criteria must be met together, in the absence of which ex ante involvement cannot be established and sector-specific ex ante regulation cannot be applied in the given market. Given this circumstance, we are talking about three cumulative criteria (rather than three criteria), because the criteria presuppose each other to establish ex ante involvement.

The three-criteria test is aimed at examining the market to determine whether there are persistent deficiencies in market mechanisms that could ultimately harm the interests of consumers. At the forefront of the three cumulative criteria is the general structure and characteristics of the market, and the aim is to identify the markets for which further market analysis, actual market analysis, is required.

Performing the three-criteria test is not equivalent to examining significant market power (which focuses on the behaviour and characteristics of market participants, but if a market is affected by the three criteria, significant market power is likely to be identified in that market).

For ex ante regulation of electronic communications, in the case of the markets recommended for ex ante regulation under the Annex to Commission Rec-

³² Ibidem, p. 275.

³³ The criteria were prescribed by *Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services*, at the time of closing the manuscript, they are included in points 2 and 3 of Recommendation 2014/710/EU. Article 67 (1) of the Code makes the three criteria a general legal obligation, so they will not be provided for in the Recommendation listing the markets recommended for ex ante regulation in the future.

ommendation 2014/710/EU³⁴, one can already assume that ex post regulation is likely to fail, so national regulatory authorities do not need to examine the fulfilment of this condition for these markets.³⁵

4. Hungarian and European market regulation organisations

As outlined above, the national regulatory authority under EU sectoral regulation is the NMHH, which is also an independent regulatory body with legislative powers in relation to its responsibilities in the electronic communications sector.

An essential part of EU regulation on national regulatory authorities is that Member States ensure duties in the electronic communications sector are performed by competent national regulatory authorities, and the Code also lists the mandatory duties of national regulatory authorities. In this context, the Code explicitly mentions the implementation of ex ante market regulation, including the imposition of access and interconnection obligations.³⁶

Based on the Framework Directive, but also in accordance with the Code, the Media Services and Mass Communication Act as the cardinal law defines the Authority's framework of duties in the electronic communications sector. It prescribes that the Authority is to promote the smooth and efficient operation and development of the communications market, to protect the interests of communications operators and users, and to establish and maintain fair and effective competition in the electronic communications sector, and to monitor that the conduct of organisations and individuals engaged in communications activities is in accordance with the law.³⁷ In addition to stipulating duties, the Media Services and Mass Communication Act also states that the competence of a communications authority cannot be taken away from the Authority³⁸; this rule is an extremely strong guarantee of the above requirement of the EU regulation. In respect of these duties, the Media Services and Mass Communication Act also emphasises that the Authority assesses and continuously analyses the operation of the communications and related IT markets, performs market analyses and acts in connection with the fulfilment or breach of certain obligations imposed on the obligated service provider.³⁹ The framework-specific provisions of the Media Ser-

³⁴ *Commission Recommendation of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (2014/710/EU).*

³⁵ Cf. Article 63 (1) of the Code.

³⁶ Article 5 (1) (a) of the Code.

³⁷ Section 109 (5) of the Media Services and Mass Communication Act.

³⁸ Section 109 (7) of the Media Services and Mass Communication Act.

³⁹ Section 110 (b–e) of the Media Services and Mass Communication Act.

vices and Mass Communication Act are filled by the pivotal⁴⁰ rules of competence of the Electronic Communications Act, which establish both regulatory and non-regulatory powers within the framework of market regulation competencies.

The Authority's market regulatory powers can be grouped as follows:

- a) actual market analysis, which includes the definition of the relevant markets, the identification of the SMP providers and the determination of the obligations;⁴¹
- b) procedures for compliance with and breaches of market analysis obligations, including proceedings initiated based on obligations set out in market analysis decisions or initiated ex officio, as well as the monitoring of obligations set out in decisions taken as a result of procedures conducted on the basis of market analysis decisions, and market supervision and general supervision procedures for such purposes⁴²;
- c) procedures in disputes related to the violation or non-fulfilment of market regulation obligations⁴³;
- d) tasks supporting market regulation activities – typically not within the authority's competence – such as holding public hearings if necessary, surveying and analysing the communications and related IT markets in order to establish regulatory decisions and regulatory methodologies⁴⁴.

Market regulation activities are placed under the authority of the President by law. Thus, the authority responsible for actual market regulation, the national regulatory authority in the strictest sense, is the President as an independent competent body of the Authority. This way, the Hungarian legal provisions provide specific priority organisational conditions for the performance of market regulation tasks, as they ensure the framework of market regulation activities within the competence and organisational structure of the Authority.

a) BEREC as the EU's "professional workshop" on market regulation

BEREC was established under the afore-mentioned 2009 Regulation⁴⁵ as a consultative body for the national regulatory authorities of the EU Member States. It carried out its activities as part of the electronic communications framework, and according to the 2009 regulations its role was limited to the development of best practices, issuing opinions and resolutions, providing professional assistance, advising and facilitating the exchange of information. However, the

⁴⁰ Section 186/A of the Electronic Communications Act.

⁴¹ Section 10 (1) 5 of the Electronic Communications Act.

⁴² Section 10 (1) 6 of the Electronic Communications Act.

⁴³ Section 10 (1) 7 of the Electronic Communications Act.

⁴⁴ Section 10 (1) 2–4 of the Electronic Communications Act.

⁴⁵ *Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office.*

fact that this organisation with a ‘veto’ over Member States’ ex ante market regulation decisions also acted as a sectoral advisory body to the European Commission already predicted that its professional position would be important not only in the orientation of regulatory issues. Over time, BEREC has increasingly supported single EU regulatory action, not only through legislation and directives but also through specific regulatory enforcement solutions.

The 2009 Regulation was replaced in 2018 by the new BEREC Regulation⁴⁶, which placed the organisation at the centre of EU communications regulation, with national regulatory authorities explicitly required to take into account the resolutions adopted within the scope of the Code.

The BEREC Regulation, which is directly effective and applicable, lists the areas in which BEREC issues resolutions – by way of example but striving to be as exhaustive as possible – while it also provides for their mandatory consideration.⁴⁷

The regulatory duties defined in the BEREC Regulation can be divided as follows:

- a) assist and advise national regulatory authorities, the European Parliament, the Council and the European Commission directly, cooperate with national regulatory authorities and the Commission on electronic communications issues, assist the European Commission in preparing legislative proposals in the field of electronic communications;⁴⁸
- b) issue opinions and guidelines in accordance with the Code, the Roaming Regulation⁴⁹ and Regulation 2015/2120⁵⁰, and with a view to ensuring consistency in the regulation of electronic communications and consistent decisions by national regulatory authorities, in particular for regulatory issues affecting multiple Member States or with a cross-border element;⁵¹
- c) perform the duties directly assigned to BEREC’s EU regulatory competence, including participating in matters affecting its market regulation and compe-

⁴⁶ *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.*

⁴⁷ According to Article 4 (4) of the BEREC Regulation: “NRAs and the Commission shall take the utmost account of any guideline, opinion, recommendation, common position and best practices adopted by BEREC with the aim of ensuring the consistent implementation of the regulatory framework for electronic communications within the scope referred to in Article 3(1). Where an NRA deviates from the guidelines referred to in point (e) of paragraph 1, it shall provide the reasons therefor.”

⁴⁸ BEREC Regulation, Article 4 (1), points a)–b) and f).

⁴⁹ *Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union.*

⁵⁰ *Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union.*

⁵¹ BEREC Regulation, Article 4 (1), points c)–e).

tition powers in relation to radio spectrum, in accordance with the Code; conduct analyses of potential transnational markets and transnational end-user needs in accordance with the Code; collecting and disclosing information related to the Roaming Regulation; and reporting on technical issues within its remit;⁵²

- d) indirectly assist the regulatory activities of national regulatory authorities, coordinating their activities and cooperation, thus issuing recommendations and common positions to encourage a more consistent and effective implementation of the regulatory framework for electronic communications in order to implement a more consistent and effective sectoral regulatory framework; disseminate national best regulatory practices; compile databases; evaluate needs for regulatory innovation, coordinate regulatory innovation by national regulatory authorities; promote the modernisation and standardisation of data collection at the national level and the disclosure of data.⁵³

National regulatory authorities, including the Authority, are required to take the utmost account of any guidelines issued for the purpose of “consistent implementation” under the Roaming Regulation and Regulation 2015/2120 and the Code. The Code also provides for specific guidelines on certain regulatory issues, for which it also typically states that Member State authorities are required to take the guidelines into account, in some cases “in full”, in others “to a large extent” or “as far as possible”. However, based on a combined interpretation of the BEREC Regulation and the Code, irrespective of the overlaps, duplications and repetitions of the two pieces of legislation, it can be concluded that NRAs are obliged to take into account all resolutions issued under the Code and the two EU Regulations referred to.

BEREC is composed of the Board of Regulators and working groups. The Board of Regulators comprises one member per Member State, with one vote per member. The members are delegated by the national regulatory authorities, who are selected from among the head of the national regulatory authority, the members of its governing body, or replacements of those persons. The Board of Regulators may set up working groups with experts from national regulatory authorities and the European Commission on expert tasks related to BEREC’s regulatory tasks.⁵⁴ The Agency for Support for BEREC (in short and for the purposes of the BEREC Regulation: BEREC Office) provides professional and administrative support for BEREC, and carries out management and administrative tasks related to BEREC’s activities. The Riga-based BEREC Office is an EU body with separate legal personality.⁵⁵

⁵² BEREC Regulation, Article 4 (1), points g)-j).

⁵³ BEREC Regulation, Article 4 (1), points k)-n).

⁵⁴ Articles 6–7, 13 of the BEREC Regulation.

⁵⁵ Articles 1–2, 5 of the BEREC Regulation.

b) Communications market regulatory powers of the European Commission

The role of the European Commission in the context of market regulation in the electronic communications sector is extremely strong, and broader than other competences covered by EU regulation. This is because there is also greater harmonisation in the electronic communications sector, which stems both from the multinational and cross-border nature of the activities of providers and users in the electronic communications sector, and from the fact that it is a key sector with a direct and indirect impact on the functioning of the EU economy as a whole, the competitiveness of the single market and EU economic operators, and ultimately the well-being of all European citizens. The European Commission is assisted by the Communications Committee in its electronic communications activities.⁵⁶

The primary task of the European Commission in the context of market regulation is to adopt recommendations on relevant product and service markets. Such recommendations identify electronic communications markets whose attributes may justify the imposition of regulatory obligations. The Commission includes a product and service market in its recommendation if, on the basis of EU trends, it considers that the three cumulative criteria⁵⁷ of the Code are met. The European Commission also publishes guidelines on market analysis and the identification of significant market power in accordance with the relevant principles of competition law.⁵⁸

The European Commission's recommendations are among the non-binding regulations in the hierarchy of EU law, but the Authority is obliged to take them into account as far as possible in the regulation of the electronic communications sector, in accordance with the Code. If the Authority deviates from a recommendation that must be taken into account, it must notify the European Commission stating the reasons for this.⁵⁹

The European Commission also has duties that directly determine the regulation of Member States.

National regulatory authorities must publish draft market analysis measures and their justification, make them available to the European Commission, BEREC and the national regulatory authorities of the other Member States, and inform the European Commission accordingly, which may comment on the draft measure within one month. In certain cases, this period can be extended by a further two months, during which time the national regulatory authority may not adopt its decision. This is the rule of procedure:

- in the case of regulating a market not covered by the recommendation of the European Commission, or if

⁵⁶ Article 118 of the Code.

⁵⁷ For an explanation, see point 8.2.

⁵⁸ Article 64 (1)–(2) of the Code.

⁵⁹ Section 24 (2) of the Electronic Communications Act; cf. Section 4 of the Implementing Act.

- it is questionable whether an undertaking with independent or joint significant market power should be identified by the national regulatory authority and the measure by the Member State would affect trade between Member States, and
- doubts arise as to the compatibility of the measure with EU law.

The European Commission may take a decision requiring the national regulatory authority concerned to withdraw the draft measure or to withdraw its previous reservations. If the European Commission has decided to withdraw the draft, the national regulatory authority shall amend or withdraw it within six months. In the event of an amendment, the draft must be notified again to the European Commission.⁶⁰

In exceptional circumstances, where a national regulatory authority wishes to impose access or interconnection obligations other than those in the Code on undertakings identified as having significant market power, it must submit a request to that effect to the European Commission. The European Commission shall take a decision authorising the national regulatory authority to adopt or reject such a measure, taking into account the opinion of BEREC.⁶¹

The Code strengthens the European Commission's direct regulatory action. In this context, it allows the European Commission to set, by means of a delegated act, a single maximum Union-wide mobile and fixed termination rate, which shall be reviewed every five years in light of the opinion of BEREC. If the European Commission does not set the rate, national regulatory authorities may carry out a market analysis of the call termination markets to assess the need for obligations. National regulatory authorities should closely monitor and ensure compliance with termination rates applied by providers throughout the Union.⁶² In the procedure for identifying transnational markets⁶³ covered by the Code, the European Commission may identify transnational markets, taking into account the analysis carried out by BEREC and after consulting stakeholders. In such a case, the national regulatory authorities concerned shall carry out the market analysis in cooperation with each other and decide in a coordinated manner to impose, maintain, amend or withdraw regulatory obligations. The national regulatory authorities concerned shall jointly notify the Commission of their draft market analysis and regulatory obligation measures.⁶⁴

Introduced by the Framework Directive, the powers of the European Commission with regard to the functional separation obligation remain under the

⁶⁰ Article 32 of the Code.

⁶¹ Article 68 of the Code.

⁶² Article 75 of the Code.

⁶³ Pursuant to Article 2 (3) of the Code, transnational markets means “markets identified in accordance with Article 65, which cover the Union or a substantial part thereof located in more than one Member State”.

⁶⁴ Article 65 of the Code.

Code. If it intends to impose such an obligation, the national regulatory authority must submit an application to the Commission, which shall take a decision on the draft measure. Following the decision of the European Commission, the national regulatory authority carries out a coordinated analysis of the different markets related to the access network and decides whether to impose, maintain, amend or withdraw obligations.⁶⁵

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⁶⁵ Article 13a of the Framework Directive, Article 77 of the Code.

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Historia, podstawowe instytucje i teoretyczne ośrodki węgierskiego rynku telekomunikacyjnego

Streszczenie

Niniejsze opracowanie systematyzuje i analizuje jeden z najważniejszych instrumentów zarządzania konkurencją w dziedzinie łączności na Węgrzech – „regulację rynku” – na podstawie teorii administracji publicznej. W tym kontekście szczegółowo omawia podstawowe zagadnienia teoretyczne dotyczące regulacji rynku łączności i konkurencji rynkowej, elementy koncepcyjne zarządzania konkurencją asymetryczną *ex ante*, w tym powiązania między ogólnym zarządzaniem konkurencją a specjalnym zarządzaniem konkurencją w zakresie łączności. Studium systematyzuje narzędzia węgierskiej regulacji rynku łączności, rodzaje procedur i koncepcję znaczącej siły rynkowej w zarządzaniu łącznością w oparciu o podstawy naukowe, a także dokładnie omawia odpowiednią praktykę wykonawczą.

Słowa kluczowe: zarządzanie konkurencją, komunikacja, regulacja rynku, znacząca pozycja rynkowa.