

Seven Deadly
Sins of
Electronic
Communications
Regulation in
Ireland

DILLON  EUSTACE

DUBLIN CORK BOSTON NEW YORK TOKYO

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Introduction

The utopian internal market where obstacles to the provision of electronic communications services are eliminated is attractive. Consumers benefit from choice and quality for effectively priced communications services while electronic communications providers enjoy fairer competition and greater legal certainty.

EU internal market rhetoric offers much. Electronic communications providers are tantalized by promises of effective free movement, regulatory barrier elimination and fairer competition. True, some success has been achieved. Certain inter-state barriers to market integration have been reduced. But, the current legal framework for pan-European electronic communications networks suffers from serious design defects. Flawed national administrative and regulatory practices continue to frustrate providers, retard competition and fetter competitiveness at national, EU and international levels. Operators continue to face significant obstacles to cross-border electronic communication service provision. Burdensome and defective regulatory frameworks generate legal uncertainty and raise unnecessary costs for business. Inefficient national administrative procedures continue to hinder growth.

Europe's regulatory framework for electronic communications is bedeviled by seven deadly sins. Their cost should be assessed financially in terms of provider revenue lost and international competitiveness undermined. On the international stage, the effectiveness of the EU regulatory framework must be measured objectively against the extent to which EU legislation allows, facilitates or even requires Member States to establish and/or maintain dubious regulatory practices at the cost of commercial efficiency.

Sin 1: Contemporaneous *ex ante* regulation & *ex post* competition management

The contemporaneous application to the same sector of *ex ante* regulation and *ex post* competition rules is wrong. It breeds legal uncertainty and imposes unnecessary resource burdens on electronic communications providers.

It is not fair that undertakings in regulated sectors are obliged to do business while being subject to two sets of competition management requirements, those of the regulators and those of the general competition authorities. When compared to their US counterparts, EU electronic communications providers are at a distinct disadvantage. US sector regulation (as a rule of thumb) precludes application of all anti-trust rules in markets supervised by the national telecommunications regulator. Network and service markets falling within the regulatory competence of the Federal Communications Commission (“FCC”) are immune from the enforcement jurisdiction of the competent US anti-trust enforcers, the Department of Justice and the Federal Trade Commission (“FTC”).

Under the US Telecommunications Act, 1996 only when the FCC declares a particular market (over which it held regulatory competence) competitive can that market revert to the sphere of competence of the Department of Justice and/or the FTC. FCC regulated providers can allocate resources efficiently to pursue business plans and implement regulatory compliance strategies within the well-defined walls of the applicable telecommunications legislation. US providers enjoy legal certainty. So long as US providers satisfy FCC requirements, they remain insulated from the enforcement activities of the US anti-trust authorities.

Ireland (as also the EU) relies on three models to manage competition in the market place: merger regulation, *ex ante* sector regulation and *ex post* competition enforcement. Merger regulation is the system providing for *ex ante* control of *market structures* by a competent state authority which is designed to prevent or disable the future development of anti-competitive *behaviour* within those pre-defined market structures. *Ex ante* sector regulation is the framework for regulation of (anti-) competitive *behaviour* by a competent state authority according to specific rules pre-defined in legislation and having regard to pre-defined *market structures*. *Ex post* competition enforcement is a regime for *ex post* punishment of anti-competitive *behaviour*, which has already occurred within relevant *market structures* defined *ex post* by a competent state authority. Active in the Irish electronic communications sector at the same time, the Competition Authority enforces national merger

rules and *ex post* competition laws while the EC Commission enforces the 2004 EC Merger Regulation and the Commission for Communications Regulation (“Comreg”) supervises the *ex ante* regulatory framework.

Bernstein’s well-worn description of the cycle of regulation through birth, growth, maturity and death of a regulator may usefully put the development of the regulatory model for communications into context. There should be a staggered move through sector specific regulation, from state-controlled provision of network and services to the general *ex post* management of competition between private undertakings by competent competition authorities. Sector specific regulation when enforced must preclude *ex post* competition management.

The central theme of any model for the effective management of competition in the EU’s communications sector must be legal certainty. The costs of over-regulation are real for those supervised by more than one regulator. Providers already regulated by national communications regulators must pursue business plans while also looking over their shoulder to avoid prosecution by the *ex post* competition managers. Application of the EU’s 2004 Merger Regulation estops enforcement of general EC and national competition rules. Irish sector specific regulation should also exclude enforcement of the general competition rules until such time as regulated electronic communications markets are deemed competitive by the regulator, as happens in the United States.

Sin 2: The imposition of dominance criteria

A sector is said to be regulated when the behaviour of its economic operators is managed by an independent body within pre-defined market structures having regard to pre-defined legal obligations with the goal of achieving fair competition in those market structures which sector, upon deregulation, may be managed ex-post by general competition authorities. To use a football analogy, the boundaries of the playing field, the well-resourced teams and the less well-resourced teams must all be clearly identified in advance of the competitive fixture. A referee should manage the game and everyone should know the rules in advance.

The effective enforcement of behavioural rules within the *ex ante* regulatory framework requires that national regulatory authorities must be able to name those players who possess market strength and those who don’t. Clear rules must exist for regulators to designate those players having significant market power in relevant markets. To promote the growth of smaller players and to cultivate competition and market entry, those who possess

networks and market strength should face more onerous legal obligations within the parameters of the regulatory structure. Such obligations usually take the form of *ex-ante* rules requiring from larger market players business separation (where vertically integrated), mandatory access, non-discrimination, transparency and price orientation.

To identify the players with significant market power, it is not appropriate to build a forward looking *ex ante* regulatory model by relying over-heavily on *ex post* competition jurisprudence for the control of past abuses of dominance. To breach Article 82 of the EC Treaty, for instance, past behaviour by a significant market participant must reflect abusive exploitation of a dominant position. A finding of dominance in a relevant market is an essential platform for the examination of past abusive behaviour under Article 82. Unquestioned transposition of “dominance” jurisprudence for designation of significant market power in an *ex ante* regulatory model is not appropriate. Article 82 dominance does not occur in a vacuum. Rather it is determined on a *case-by-case* basis by reference primarily to market share in relevant markets also defined *ex post* on a *case-by-case* basis. Under EC competition law, dominance is presumed where a player’s market share exceeds 50%. A finding of dominance is also possible where a market operator, with other things being present, holds a market share of greater than 40%. *Ex post* competition enforcers tend to define market structure narrowly as it facilitates a finding of dominance. This approach for defining markets and identifying dominance is not suitable for *ex ante* regulatory models.

Designation of significant market power within *pre-defined* markets (under the *ex ante* regulatory framework) using *ex post* dominance criteria is cumbersome and breeds confusion. It would be more effective to set out transparent and objective criteria for significant market power in legislation and permit the national regulatory authorities to designate significant market players in accordance with those criteria, as was the case in the earlier EU telecommunications regulatory model.

The anomaly of transposing criteria for dominance from an *ex post* competition model onto an *ex ante* regulatory framework is best appreciated when one considers the jurisprudence of the ECJ on joint dominance. The EC Treaty is interpreted as prohibiting abusive behaviour by two or more undertakings exploiting a jointly dominant position. Are the goals of *ex ante* regulation served by transposing jurisprudence relating to past abuses of joint dominance onto the *ex ante* regulatory framework to enable decisions by national regulators to cover *future periods*? Should significant legal obligations be imposed on two or more electronic communications providers simply because *jointly* they are considered to have *dominant positions* yet individually they possess no market strength.

Sin 3: Spectrum Management

Radio spectrum is defined as including radio waves and frequencies between 9kHz and 3000GHz. It is viewed as a scarce resource, its scarcity impacting on the viability of electronic communications services that may be offered. The mobile operator who, in April 2000, paid £22.5 billion for a 3g licence to use UK spectrum can best attest to its monetary value.

The legal base for the EU's Spectrum Decision is Article 95 of the EC Treaty. In EU law, Article 95 enables the adoption of pre-emptive supra-national legislation by qualified majority vote. Upon this base, the Spectrum Decision establishes a legal framework to ensure the co-ordination of Member State policy approaches and, where appropriate, harmonized conditions governing the availability and efficient use of the radio spectrum necessary to establish the internal market. The Decision seeks to establish procedures facilitating *policy-making* for the strategic planning and harmonized *use* of spectrum and to ensure the effective implementation of radio spectrum policy.

The legal base for the EU's Framework Directive for the electronic communications sector is also Article 95. The Framework Directive requires the effective management of national radio frequencies (per Article 9). Harmonized use of radio frequencies must be promoted in a manner consistent with the Spectrum Decision (i.e. the need to ensure effective and efficient use of spectrum). Member States are obliged to ensure that radio frequencies are allocated and assigned by national regulatory authorities according to objective, transparent, non-discriminatory and proportionate criteria.

The Spectrum Decision and the Framework Directive assume that EU institutions have legal competence to direct Member States how to manage spectrum. The legislation also assumes that Article 95 is the correct legal base. But does the EU have competence to adopt pre-emptive legislation on spectrum under Article 95? In public international law, territorial sovereignty encompasses land, spectrum and, where appropriate, territorial seas. Land and spectrum are sovereign assets. Ownership of land in individual Member States may rest in private and/or public hands. The EC Treaty itself states that it respects the general system of property ownership inherent in the Member States. Ownership, use and control of private land is exercised by private individuals and the Member States having regard to the superior requirements of the EC Treaty, in particular, the right of establishment and the four freedoms. Ownership and effective control of spectrum rests alone with the

Member States in international law. Spectrum is a sovereign asset. Its management at international level is coordinated in the International Telecommunications Union's World Radio Conference (WRC) by unanimous will of the WRC member states. States agree *unanimously* to allocate and use spectrum for communications purposes in their best interests and to guarantee efficient management of their sovereign resources.

No legal provision of the EC Treaty wrests competence over spectrum from the Member States. No provision of the EC Treaty vests competence over spectrum in the EU institutions. Yet the EU, by *qualified majority* seeks to "co-ordinate" the activities of individual EU Member States in the Spectrum Decision and the Framework Directive under Article 95.

Article 95 as a legal base operates to complement certain substantive free movement provisions of the EC Treaty. It presumes competence and operates preemptively. As a legal base, it applies only to free movement of services and goods insofar as that free movement does not involve the free movement of persons. Article 95(2) provides that Article 95 does not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons. Article 94 of the EC Treaty states that the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, must issue *directives* for the approximation of such laws, regulations and administrative provisions of the Member States as *directly affect* the establishment and functioning of the Common Market. And by way of derogation from Article 94, does not Article 95 apply only for the achievement of the objectives set out in Article 14 of the EC Treaty. Yet, the EU purports *inter alia* to co-ordinate spectrum by way of decision.

Article 14 states that the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the EC Treaty.

Insofar as the EU regulatory model seeks to achieve the free movement of electronic communications services, Article 43 (as part of Chapter 2) of the EC Treaty provides that restrictions on the freedom of establishment *in* the territory of another Member State shall be prohibited. Freedom of establishment is defined as including the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms under the conditions laid down for its own nationals by the law of the country where such establishment is effected. Nowhere in Chapter 2 do its provisions

expressly encompass rights relating to spectrum. Article 44(e) of the EC Treaty obliges the EC Council and Commission to carry out the duties devolving upon them, in particular “by enabling a national of one Member State to acquire and use land and buildings situated in the territory of another Member State”.

It should be argued strongly that Article 95, a legal base complementing the free movement of services provisions of the EC Treaty, is not the appropriate legal base for exercise of EU competence in respect of spectrum. It is not an appropriate base to ground “liberalization of” or “competence over” a sovereign national asset. Irish spectrum is a sovereign asset. An amendment to the Constitution is required to render lawful any purported transfer by the People of Ireland of competence over spectrum to the EU institutions outside the framework of the EC Treaty.

Sin 4: Multi-Stop Shopping – co-ordination deficits in the Planning Process

Since liberalization, no EU national electronic communications provider enjoys exclusive rights or privileges in domestic law. Any EU “authorized” electronic communications provider may enter the Irish electronic communications market and is obliged merely to notify the Irish national regulatory authority upon entry. To “passport in” the provider relies on the harmonized system of authorizations.

EU free movement rules, as reflected in the EU’s Authorisation Directive, facilitate cross-border service provision of electronic communications networks and services. But scrape the veneer and one easily reveals that those seeking to establish new electronic communications networks in Ireland face formidable obstacles when rolling out infrastructure.

Under the Authorisation Directive, conditions relating to national environment and town and country planning requirements, may be attached to general authorizations. Comreg, the electronic communications regulator, has no competence over Irish planning matters. Responsibility for planning is decentralized. No one-stop-shop exists. Administrative challenges and expense face those proposing roll out over territories spanning more than one planning jurisdiction. A myriad of Irish local authorities, including city corporations and county councils have competence for general planning issues while no one government authority has overall planning responsibility for infrastructure roll out. Where proposed networks span two or more local authorities, would-be service providers are obliged to

pursue planning applications with individual planning authorities. These authorities pursue different objectives, highlight different priorities and, depending upon procedural approaches, may pursue applications at very different speeds.

The unnecessary delays caused by a non-centralized planning process must count as a cardinal sin for infrastructure development in the Irish legal system. It remains a significant challenge for Ireland's development as a digital hub in Europe, a challenge which Section 53 of Ireland's Communications Act 2004 reinforces in domestic legislation.

Sin 5: Established Exclusive Arrangements – Non Telecom Infrastructure

Incumbents with whom new entrants are obliged to negotiate "interconnection" enjoy "control" over their own electronic infrastructure albeit in a regulated environment. They have the legal right to charge for access to and use of their networks. Where possible, it must be regarded as preferable to roll out one's own networks as opposed to negotiating the use of someone else's infrastructure.

In Ireland, planning the roll out of infrastructure along public roads is very difficult because of the number of decentralized planning authorities, rural and urban. A similar difficulty arises in relation to roll out over private lands falling within the jurisdiction of so many local authorities. For this reason, in the mid to late 1990s, a number of Government Departments entered into arrangements to vest a "right to use" certain public lands and non-telecommunications infrastructure in new entrant telecommunications providers for the purpose of rolling out telecommunications networks to compete with the incumbent.

New networks were built along the railways of the state-owned transport provider or on the masts of police stations owned by the Department of Justice. Joint ventures were entered into between the State's publicly owned energy utilities and telecommunications entrants to use energy infrastructure and lands. The "exclusive" arrangements between some Government-owned organizations and one particular telecommunications company are now center stage of a public tribunal.

Safety concerns must dictate consideration of future "trenching" along the lines of the Irish rail network. Hence it is reasonable to foresee that no other provider will be permitted to roll out a competing network along those lines. If competing networks cannot be built along the State's railways, the question has to be asked at what price must the current owner of telecom infra-structure along the rail lines now grant access to that infrastructure.

Practice by the Irish Government in the recent past in relation to the roll out of telecom infrastructure along publicly owned lands must count as a sin. Where exclusive arrangement continue to preclude would-be new entrants from rolling out competing or more up-to-date infrastructure that sin is cardinal.

Sin 6: Interference with Private Property Rights

Article 40.3 and 43 of the Irish Constitution guarantee the right to ownership and enjoyment of private property. As mentioned above, that right to private ownership of property is respected by the text of the EC Treaty.

The Irish Constitution permits the right to private ownership of property to be subverted in the interests of the common good and upon the payment of fair compensation for expropriation. Traditionally, statutes of the Irish Parliament have set out the framework for expropriation of lands and the payment of compensation.

Historically, the state owned telecommunications incumbent, under its enabling statute, had the right to acquire and/or enter onto privately owned land under statutory licence. The private successor-in-title to the State's telecommunications incumbent has purportedly inherited all rights and entitlements formerly held under statutory authority by its predecessor. As a private company, the enabling statute needed under law by its predecessor as a public body, is no longer required. Yet, this private company, its servants and agents continue to enjoy rights of way, way leaves and rights of way over private property throughout the country. Now, servants and agents of a privately owned company can enter onto privately owned land to service, replace or maintain existing privately owned infrastructure in an economy where property prices are escalating. The inheritors of a statutory licence have a "free pass" over private property.

The issue of installing new networks or increased human and machine traffic over private property without compensation remains fudged. Under the new EU electronic communications regulatory framework, access rights to incumbent infrastructure are granted to other electronic communications providers. Such access involves, at times, servants of other communications providers entering onto and passing over privately owned property to reach infrastructure subject to access rights. Is not the owner of private lands housing electronic communications networks entitled to be compensated for such additional entry onto his/her lands?

Sin 7: Inappropriate Market Definition

Standard *ex ante* regulatory models require that market parameters/structures should be established clearly in advance either in legislation or by sector regulators in accordance with criteria provided in legislation. Providers, to be compliant, must be able to identify from the outset the boundaries of the field within which they are expected to play into the future. Relevant markets identified for ongoing and future regulation must be realistic. They should correspond closely to market realities and must have proper regard to technology convergence, competition trends and user patterns. Standard *ex ante* regulatory models also require that the behavioural rules by which market operators are expected to play into the future should also be clearly established. The penalties, to be imposed for failure to comply with those rules should be clearly specified.

Where market structures are set in legislative stone and are applicable for considerable periods of time, how appropriate is the current predefinition of relevant markets in EU electronic communications markets? Do the *ex ante* regulatory authorities take adequate account of convergence, technology development or the ever changing traffic patterns involving mobile, fixed line, broad band, mobile-to-fixed or fixed-to-mobile communications in pre-defining those markets?

The day-to-day operation of the regulatory framework for electronic communications effectively recognizes the “mobile” communications market as a market distinct from other land-based markets. Where mobile communications providers with authorization to use spectrum, mobile communications infrastructure and associated facilities for conveyance of signals largely rely on fibre optic cable for transnational conveyance, are those providers properly categorized as falling within the mobile market? Is it fair from a competition perspective that providers “funneling” mobile signals through fibre optic cable should enjoy the regulatory privilege of not being required to grant access to the cable where fibre optic roll out is nationwide? In States dedicated to broadband roll out, is it appropriate that access to the twisted copper pair infrastructure of significant market players is mandatory whereas the nationwide fibre optic roll out of a “mobile” provider is insulated?

Conclusion

Contemporaneous *ex ante* and *ex post* competition management in sector markets results in legal uncertainty for those regulated. The use of *ex post* jurisprudence on dominance to condition the *ex ante* executive designation of significant market power is flawed. The creation of a regulatory framework for spectrum management without a clear EU legal basis is inappropriate. The practical benefits of free movement are lessened by the regulatory and administrative bottlenecks of non-centralised planning structures. Privileged access to the State's (non-telecom) infrastructure undermines effective sector competition management. A regulatory framework operated by the State that does not provide for adequate compensation for private landowners affected by private communication roll out does not uphold and vindicate the private property rights of Irish citizens. *Ex ante* market definition must have realistic regard to convergence of technologies and ever-developing consumption patterns.

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Author: Tom Carney

 CONTACT US

Our Offices

Dublin

33 Sir John Rogerson's Quay,
Dublin 2,
Ireland.
Tel: +353 1 667 0022
Fax.: +353 1 667 0042

Cork

8 Webworks Cork,
Eglinton Street,
Cork, Ireland.
Tel: +353 21 425 0630
Fax: +353 21 425 0632

Boston

26th Floor,
225 Franklin Street,
Boston, MA 02110,
United States of America.
Tel: +1 617 217 2866
Fax: +1 617 217 2566

New York

245 Park Avenue
39th Floor
New York, NY 10167
United States
Tel: +1 212 792 4166
Fax: +1 212 792 4167

Tokyo

12th Floor,
Yurakucho Itocia Building
2-7-1 Yurakucho, Chiyoda-ku
Tokyo 100-0006, Japan
Tel: +813 6860 4885
Fax: +813 6860 4501

e-mail: enquiries@dilloneustace.ie
website: www.dilloneustace.ie

Contact Points

For more details on how we can help you, to request copies of most recent newsletters, briefings or articles, or simply to be included on our mailing list going forward, please contact any of the team members below.

Tom Carney

e-mail: tom.carney@dilloneustace.ie

Tel : +353 1 667 0022

Fax: + 353 1 667 0042

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DUBLIN CORK BOSTON NEW YORK TOKYO

33 Sir John Rogerson's Quay, Dublin 2, Ireland.
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