

Conversations In Competition: Episode 2 - What's Telecoms Regulation got to do with the Tech Sector?

[00:00:03.770] - Ronan Scanlan, Of Counsel

So good afternoon and welcome to this second podcast in the 'Conversations in Competition' series. In our last podcast, I discussed the role of competition in digital markets with David Foster. We looked at novel theories of harm in the digital space, whether antitrust was a side dish, as some have stated, or the main event and we discussed whether and when merger control is the right tool to tackle perceived market power in the digital space. Today I'm delighted to be joined by ,Dr. Lara Stoimenova, Managing Director of Sigma Economics, a past staff member of Ofcom in the UK and at the CMA where we both worked.

[00:00:41.340] - Dr. Lara Stoimenova, Managing Director of Sigma Economics

Thank you, Ronan, and thank you very much for inviting me to speak with you in this form- podcast. It is my very first podcast, so you know, take that into account a little bit hopefully during our conversations.

[00:00:53.190] - Ronan Scanlan, Of Counsel

I'll go easy on you.

[00:00:54.390] - Dr. Lara Stoimenova, Managing Director of Sigma Economics

Yeah, go easy on me.

[00:00:55.910] - Ronan Scanlan, Of Counsel

At the outset of this podcast, I think we'd like to provide an overview to listeners of how the European Economic Communications Regulation operates and Lara's going to talk us through a little bit of just the key foundation stones of that legislation and then I think we're just going to open up the discussion and talk a little bit about some cross cutting themes, both in relation to the revised Market Definition Notice, the White Paper on physical infrastructure, fibre infrastructure in the EU and then we're going to talk a little bit about how that transects with Article 102, DMA, DMU, SMP Regulation and maybe even telecoms mergers so we've got plenty to cover today but I hope it'll be an interesting and informative episode for listeners, both those new to telecoms and those with deeper knowledge of it.

[00:01:46.720] - Dr. Lara Stoimenova, Managing Director of Sigma Economics

Yes, thank you, Ronan. Indeed, I mean, as you've said in your introduction, I've spent eleven years at the Office of Communication, the UK's telecoms regulator. Now, if you look at telecoms regulation today in the EU and in the UK, the rules are very much set out in what we call the European Electronic

Communications Code, which I will just refer to as "The Code", if I may, because it's just too long a name but I was trying to remind myself when telecoms regulation was first introduced, and it was actually in the 1990s, when the sector was first liberalised to open up the incumbent networks to competition. So we've got basically three decades worth of regulation which has evolved and adapted. So I will try to give you very high level summary, because there is a lot there, as you can imagine, 30 years worth of regulation but in its simplest form, what the telecoms regulation is based on, it starts with the definition of what a relevant market is, it looks at both the product and the geographic market, and it tends to do this by using certain economic concepts, which are based on the notion of the hypothetical monopolist test and the SSNIP test.

[00:03:13.540] - Dr. Lara Stoimenova, Managing Director of Sigma Economics

Basically what we are looking to is, we are looking at the supply and demand conditions to try and define the market by asking ourselves the question, would a hypothetical monopolist find it profitable to impose a small but significant non transitory increase in price? That's what the SSNIP test basically stands for and if your answer is no, you just basically include that product into the market with your starting or focal product, and you do this test until the monopolist will find it profitable to impose a SSNIP price increase, basically so that's how you define the product market and you do the same for the geographic element as well. Why it is important to define the relevant product, because without defining your relevant market, you cannot understand what competitive conditions major players are facing in that market because the next question we want to answer is, having defined the relevant market, which firms might have significant market power in that market and what we are asking ourselves is, are there any firms, one firm or two, who might have an economic advantage, which means they can behave unilaterally and independently from their customers and their main competitors.

[00:04:44.030] - Dr. Lara Stoimenova, Managing Director of Sigma Economics

And in economic terms, that's quite risky, isn't it? Because should they have such market power, they might have an incentive to abuse it. How they might abuse it, they might increase prices to excessive levels, they might produce products of bad quality, there may be no innovation, et cetera, et cetera, and the list goes on. Now, once you have identified the key players and the competitive conditions, then you think about the incentives these players might face, then you start thinking about what should the appropriate Ex Anti Regulatory Framework to define their conduct and behaviours in this market might be. That's when you start designing your remedies and you only impose them after you ask yourself what the European Commission would say. What is the three criteria test is because you should only impose regulation if three cumulative conditions are met i.e there's high and non transitory barriers to entry because if there are barriers to entry, it would be difficult for alternative layers to come and to competitively constrained incumbent, is the market structure tending towards effective competition during the review period, which typically could be three to five years? And the third question is, would expose competition law be sufficient to deal with potential market failures?

[00:06:12.790] - Dr. Lara Stoimenova, Managing Director of Sigma Economics

And if not, then you impose your remedies but obviously any Ex Ante Regulatory Framework will be as effective as the presence of an effective monitoring and enforcement regime. So this is basically at a very high level how the economic and analytical framework for the Ex Ante Regulation of telecoms framework works. Now, if you look at the code, there are also a lot of other requirements in there in terms of end user protection rights, spectrum management, et cetera, et cetera but the bulk of the Ex Ante Regulatory Framework is the hypothetical SNIP test market definition, et cetera.

[00:06:52.750] - Ronan Scanlan, Of Counsel

Lara, thank you so much. Few. That was quite a tour de force and I have to say, pretty impressive to download just briefly an overview of the entire EU telecoms framework and approach to regulation over the last 30 years. I think you said it really succinctly and helpfully, and I think that really nicely tees up this discussion. I think perhaps if you agree, Lara, it might be nice now to move to maybe some of the recent developments you've observed in the telecom space and advising clients here.

[00:07:23.250] - Dr. Lara Stoimenova, Managing Director of Sigma Economics

Telecoms regulation has evolved over the past three decades, but its success is kind of patchy, because one needs to look at the outcomes that have been achieved in the sector before one can say whether it has been 100% success or not and the picture is probably a little bit more nuanced than that, because if you look at the outcomes in the telecom sector in Europe, what you would say is that we've got very good retail competition, we've got value for European customers in terms of good prices. Wholesale competition has evolved better in mobile networks than fixed networks but there is a big issue around investments into the future digital infrastructure needs, both at European and UK level. So there is obviously, it's nice for regulatory authorities to have a rich toolbox but what I'm trying to say is that the results are mixed and they are mixed because it is impossible to design a regulatory framework which will enable you to tick every single box successfully and that is actually what we are seeing the European Commission to try and correct with the next set of initiatives.

[00:08:43.510] - Ronan Scanlan, Of Counsel

Just on that, Lara, I think that's a really important point, right, because there has been this tension over the last 10-20 years, or potentially longer, between consolidation, which the industry believes is necessary to allow for investment in what were, not so long ago, future technologies, 5G and beyond and also then that elusive retail competition that really benefits the consumer when they go into the shop and they're looking for a cheaper SIM card or a bundle package, or pay TV and otherwise and these two sort of objectives have often been in conflict, even at the political level, between DG COMP and DG CONNECT, pursuing slightly different objectives. So I think it's really right to call that out and of course, you know, there's an obvious read across, as you say, with the DMA and the DMU. Can you really tick every box when you're setting up a regulatory regime, or do you need to be a little bit less ambitious with your objectives? So I think it's absolutely right to call that out. I mean, do you think it's worth maybe

jumping in then to a couple of those developments, maybe taking first the revised Market Definition Notice?

[00:09:50.600] - Dr. Lara Stoimenova, Managing Director of Sigma Economics

Yeah, let's start with the revised Market Definition. I mean, there are no surprises in there, and it is long and a technical document and obviously useful for people to read through so that they have an understanding of how the European Commission will approach its competition and regulatory investigation cases in terms of market definition, et cetera, et cetera but what in essence the European Commission has done is to revise that notice to take into account the analytical frameworks it has already applied in recent cases. That's why I'm saying there is no big or major surprise, because in essence, it's looking backwards to try and identify how it has applied the market definition and to revise it in that context. Now, there are perhaps two or three major changes I would like to bring to the listener's attention.

[00:10:46.440] - Ronan Scanlan, Of Counsel

Please do.

[00:10:47.200] - Dr. Lara Stoimenova, Managing Director of Sigma Economics

And I will just list them and perhaps then we can explore what their consequences might be. One of them is the replacement of what I call the SSNIP test with something called SSNDQ and I'll come back to that, because if I start talking about that, we'll never finish. The second one is the European Commission will adopt a more forward looking approach in its cases, which will try and take into account potential changes in market structure over an above new entry, and also pipeline products, which means a more dynamic look at what may happen in the future, especially in innovation rich sectors such as medicine and high tech, which is great, I mean, people like the Competition and Markets Authority have been doing that for a long, long time. so it's nothing new, it's just updating it and the third area is looking at digital ecosystems. This is a very important development, because if you look at the big tech companies such as Google, Meta's of this world, they are big ecosystems and what the European Commission is saying in the revised notice is that it may apply an approach similar to aftermarkets when it's looking at digital ecosystems.

[00:12:08.870] - Dr. Lara Stoimenova, Managing Director of Sigma Economics

To me, those were the three major developments.

[00:12:11.350] - Ronan Scanlan, Of Counsel

I think that's really, really helpful, Lara, and a really nice summary. It strikes me, actually, having attended a couple of conferences recently on Article 102 and discussed with the European Commission the updated guidance, I should say, on 102, that it's very much evolution rather than revolution in its

approach and it is, I think, trying to be relatively conservative, whether it's in that guidance or in the revised Market Definition, it's simply catching up with where the cases are rather than going forward.

[00:12:41.280] - Dr. Lara Stoimenova, Managing Director of Sigma Economics

The question is, obviously, when you are trying to regulate big tech companies or technology companies, where innovation is key and innovation happens very quickly, I think having that forward look is very important. The question, or the risk for me as an economist, as an analytical person, is how forward looking should you be? Because the further out you look, the less guarantee there is that an event will take place. So forecasting is more of an art than a science, I would say, in many respects and obviously you do not want to bring about errors in your analysis by making that forecasting too forward looking and what you will need to do is to look at many different sources of information to actually sense check the forecasts you are receiving from different companies that could be in the context of a merger, for example, information from merger parties, from their suppliers, from their competitors, for other stakeholders, third party data analytics firms, whatever it may need to be. The more forward looking the analysis is, the more it has to be sense checked to make sure one can rely on it.

[00:13:54.980] - Ronan Scanlan, Of Counsel

On, yes, the elusive crystal ball that all merger control authorities would love to have but don't and so we are left with trying to piece together and perceive with some certainty and accuracy the future, which is no mean feat. I mean, the second point you raised there around the SSNDQ test. SSNDQ is a recognition, in part at least, that there are factors other than price, especially in markets where providing products and services free at the point of delivery so I think it'd be really interesting to hear your views on SSNDQ and how it might be used or misused.

[00:14:29.790] - Dr. Lara Stoimenova, Managing Director of Sigma Economics

SSNDQ means small but significant non transitory decrease in quality. So what the commission will be doing in defining relevant markets would be to look at changes in the quality of the product offered to end consumers. Makes sense, but I have three observations on that. First of all, why only look at quality? Because consumers switching behaviour is not only driven by quality, but it's also driven by other non-price parameters, be it loyalty, brand recognition, privacy, security so just focusing on quality just does not make sense to me. The second observation I have is quality can mean different things to different people, and it needs to be defined very, very carefully at the beginning of any investigation, just to give you an example how people define quality in business circles for a business product would be different from how a consumer such as myself sitting at home, might expect from the quality of her broadband connection. In my case, it will be very simple. Is it working? It's not working. In the context of a business. It will be much more finessed than that and that is why we have to be very careful at dividing by what we mean with quality price.

[00:15:58.790] - Dr. Lara Stoimenova, Managing Director of Sigma Economics

Everybody knows what price is. You may agree or disagree with the level of the price, but quality will mean different things to different people.

[00:16:08.630] - Ronan Scanlan, Of Counsel

I mean, price is, as you say, right? I mean, price is quite binary. It goes up and it goes down or it stays the same. Obviously you have, and this was obviously its own issue back in the day in retail cases around bog offs and true prices in various markets, you have add on prices and so on but quality is a varied and qualitative thing, right, by its nature. So I think simply putting it in as a test is fine but I think we are looking for greater guidance in the application of that test, either by the commission itself or on appeal before the general court, as to what is in or out of the quality basket.

[00:16:43.190] - Dr. Lara Stoimenova, Managing Director of Sigma Economics

Indeed and it will change from product to product as well and the third thing is, how do you define a small degradation in quality? If you remember, in telecoms, when economists and regulators were applying the SSNIP test, we had the big issue about making sure our starting price was at the competitive level and not at the prevailing level. Otherwise you might end up defining the market in the wrong way, usually wider than it is, the so called cellophane fallacy but again, a price is a price and with quality, what benchmark do you start from? I mean, I feel that although I understand where the European Commission are coming from, I empathise where they are coming from. They might be actually risking boiling the ocean by replacing one test with another and if you talk to other practitioners in the area, some will say to you, market definition, SSNIP test, SSNDQ test, actually, it's neither here nor there. Nowadays we worry about closeness of competition, not about precisely defining the relevant market as we used to do in telecoms, which is obviously as a sector we know it was characterised by monopoly players so nowadays it's all about closeness of competition, rather than finding precise market which might be substitutes for themselves.

[00:18:05.580] - Ronan Scanlan, Of Counsel

It certainly seems that trying to define and quality is riven with risk, both for the enforcers and the parties. The next part that you touched on a little bit earlier was around the implications of the EC White Paper. Now this is as I understand it quite specific to telecoms, but for those listening with an interest in telecom advisory and regulation regulatory appeals, it might be helpful just to touch on the emerging implications of this for teleco-operators in the EU.

[00:18:33.720] - Dr. Lara Stoimenova, Managing Director of Sigma Economics

I mean, if you look at the telecom sector in the EU, as we said at the beginning, there are some huge challenges in terms of the level of investments required to complete fibre to the home rollouts and 5G standalone networks and for a long time, telecom operators in Europe have been complaining about low returns, low level of investments as a result of too much competition in country and too much regulation,

and also the absence of a level playing field with the so called over the top players or large traffic generators, they have all sorts of different names attached to them and also on top of all of this, there is the European Commission ideology to try and complete the telecoms single market. Now, this context is very important when reading the White Paper, because it is that context that is driving the initiatives captured in the white paper. Now, the White Paper is strategic, it's forward looking, and it has come up with a number of initiatives which it calls scenarios to try and address these big challenges that the telecom sector is facing in Europe in the next ten to 20 years and its initiatives are basically captured along three pillars.

[00:19:55.560] - Dr. Lara Stoimenova, Managing Director of Sigma Economics

The first pillar is all about unlocking investments required to complete these digital rollouts. I think the numbers are quite high, around 200, if not more billion euros in the next 10 to 15 years. The second pillar is all around initiatives to try and complete the telecoms single market and this is where most of the regulatory initiatives potentially sit and the third area, the third class of initiatives, is all around ensuring the resilience and the security of the European digital infrastructure and it all talks about quantum technologies and the cable recommendation in terms of security and resilience. So those are the three big classes and categories of initiatives. I think to me, the one which is really very important for businesses and practitioners, is what falls under pillar two, because what the European Commission is doing, again, looking to extend possibly the telecoms regulatory framework to try and capture more players along the digital supply chain. Why is that? That's because what's happening at the moment is a convergence between what we used to call telecoms infrastructure, telecom players and the digital markets, actually, they are becoming much more converged than separate than they were 10 or 15 years ago.

[00:21:25.770] - Dr. Lara Stoimenova, Managing Director of Sigma Economics

For example, there is in the future, the possibility of providing services such as network as a service, actually, these are already being provided, and it is where cloud providers can provide networks, digital networks, over their own infrastructure. So basically what that means is a big opportunity, because rather than businesses owning and maintaining their own telecoms infrastructure, they can go to a cloud provider and get a virtual network and that is an excellent way to not only cut costs, but also potentially to complete the digital single market in the way that the European Commission is saying. With this recognition, my reading of the rules is that there is potentially a risk of extending regulation to people such as cloud computing or cloud providers and the type of regulations that the European Commission might consider is very much access regulation and dispute resolution. Another potential area where the regulation might be extended is for the big tech, or what we call number independent communication services. Those are the likes of Google, Meta, et cetera, which may be, and I say may be expected to contribute to the universal service obligation as a way to fund the rollout of future networks.

[00:22:47.050] - Ronan Scanlan, Of Counsel

When we initially scoped out this discussion, it was very much to try to, I suppose, think about in a slightly esoteric way, maybe the potential overlaps or read across or analogies between SMP regulation and telecoms, and the wider import to Article 102, DMA and so on and so forth but actually, what's really interesting about this White Paper is that it's already happening, I mean, it's happening directly, potentially in the future, that telecoms regulation is gradually expanding out to incorporate what would have been considered over the top or operations that wouldn't necessarily be related to the physical infrastructure and these questions around cloud infrastructure and net neutrality and so on and so forth are going to become part of that conversation around telecoms regulation.

[00:23:34.310] - Dr. Lara Stoimenova, Managing Director of Sigma Economics

Indeed and the interesting thing is whether there will be any unintended consequences, or over regulation coming out by capturing some products under a potential extension of the current telecoms regulation versus other products being captured by the Digital Markets Act and the question is, how do these two live together and how do they evolve together? And the question that always bothers me is people talk a lot about too much regulation, too little regulation, but who is monitoring for effective regulation?

[00:24:10.970] - Ronan Scanlan, Of Counsel

One of the themes that came out of a discussion in Brussels last week was around, well, SMP regulation in telecoms is essentially managing the gradual liberalisation and increasing competitiveness of what was traditionally state owned enterprises, whereas what we have in the tech space are essentially private enterprises that are becoming increasingly successful in a number of different associated markets, and the attendant need to potentially regulate parts of those behaviours. So they're not exactly coming from the same position, but there's clearly an intersection in the middle, in the venn diagram, between these different competing goals that we need to explore and understand a little bit better. Bringing all of this together a little bit, you know, we'd previously discussed offline some of know challenges in the DMA, and particularly also in the UK in the current approach of the DMCC, just in its quite broad application and relatively generalised approach to assessing market power and how that might eventually play out in practise. I mean, you had some observations, I think, around how some of the lessons, perhaps over the last 30 years of telecoms regulation might apply to the commission, the CMA, as it takes on these roles of regulating gatekeepers.

[00:25:26.830] - Dr. Lara Stoimenova, Managing Director of Sigma Economics

I mean, your earlier observation was very important is that the starting point for telecoms regulation was very different to the starting point of the regulation for the big tap. In the first instance, we were dealing with national monopolies which were mostly state owned. In the latter case, we are talking about private enterprises who have been investing and probably not earning a return for a very long time but they have grown, they have become very successful to the extent that now there is a question mark on whether they have become entities with significant market power themselves, but from very, very different standpoints, starting points. I wouldn't advocate that the telecoms regulation should be cut and paste in order to

address potential competition issues with big tech. However, there are some relevant learnings that one can take on board, and I think the best way to discuss this would be just to give a couple of examples, because the devil is always in the detail, rather than talking kind of very high level and cross purposes, potentially. Now we talk that telecoms worked on this notion of defining markets. Now, when I look at the DMA and in this context, I am going to talk perhaps about the Digital Markets Act, because it has already been implemented and we know what it's requiring the big tech to do, or the gatekeepers to do, or not to do.

[00:27:05.450] - Dr. Lara Stoimenova, Managing Director of Sigma Economics

Now, when I look at the designations, there is, for example, a market, I will call it a market called social platforms, and there are four designated gatekeepers there, which include TikTok, Facebook, Meta and LinkedIn but nowhere, we have an analysis from the European Commission on whether these firms are in any shape or form constraining each other's behaviours, even if it's partially are their products substitutable or not? Nevertheless, they have been designated as gatekeepers. Another example is search, search is another, let's call it a product area where we only have Google Search as designated. Again, there is no market analysis the European Commission might rebut and that, say we had an antitrust case back in 2018, we did a huge market definition, we proved that Google Search is not constrained by the likes of Bing, et cetera, et cetera. Yes, but that was such a long time ago. That was before Chat GPT and if I look at consumer behaviour today, especially the Gen Z, they use TikTok and potentially Chat GPT as their search engines rather than Google. So although I'm not advocating a full market definition exercise, one needs to actually have an understanding of whether these platforms are constraining each other or not.

[00:28:33.730] - Ronan Scanlan, Of Counsel

I think that's a really excellent kind of cross-cutting point as well as you mentioned earlier in the discussion around the revised Market Definition Notice, there is this expectation of the commission doing more forward looking assessments as to how a market might develop and a point that David made on our last podcast, really importantly is, well, that cuts both ways. When you're looking at potential disruption in the market or potential new entry, or the extent of barriers to new entry, I mean, you have to take account of the emergence of AI and generative AI. This was another theme from the conference circuit last week, and this will greatly disrupt the market and clearly all the investment that is going into AI in its various forms, open source, closed source and paid for and free at the point of delivery and so on. I think there's about twelve sort of active AI initiatives at the moment. It may well very significantly disrupt it and certainly in a fast moving market, there does seem to be issue with taking learnings from, I suppose, now six, seven years ago. So I think that's a very fair point.

[00:29:39.450] - Dr. Lara Stoimenova, Managing Director of Sigma Economics

Yes, I totally agree with you, Ronan. My other concern is if you look at the Digital Markets Act, it has a very long list of do's and don'ts or remedies but I'm still quite unsure about what is the objective that

European Commission is trying to achieve here. What does good look like? At least with telecom's regulation, regulators such as Ofcom had a good idea of what they were trying to achieve. It started, let's say, with enabling service level competition, then it moved to infrastructure competition, et cetera, et cetera but when I look at the long list of do's and don'ts, I'm not quite sure what benchmark good the commission has in mind and I say that because you need to have that objective in mind to design the right remedies.

[00:30:30.500] - Ronan Scanlan, Of Counsel

I mean, the commission will probably say they're looking to secure equal and fair access, they're looking for interoperability, they're looking to correct some perceived consumer harms as well as business to business but I entirely agree with you that taking a step back though, I mean, there is a natural ebb and flow to these markets. There are companies entering and exiting all the time, big and small. The role of SMEs is something that has become increasingly important in the conversation. Certainly the Neo-Brandeisians believe that the small and medium sized enterprise is incredibly important, it should be protected at all costs and yet we also have to accept that 80% of businesses fail in the first year so I agree with you that even if you accept that, the objective is sort of a level playing field, which I think you might sum part of it up as - to what end? Is it simply about lowering prices? Well, we have markets that are free at the point of delivery. Is it about securing quality? We discussed how difficult it is to gauge quality degradation or improvements and obviously quality means different things to different people, and it's quite a subjective test.

[00:31:36.590] - Ronan Scanlan, Of Counsel

So I think it's a very fair challenge that at this stage at least, the commission is searching for almost iteratively to ascertain whether making these adjustments result in better outcomes but what those outcomes are and whether they would have been secured anyway in the counterfactual is a bit elusive.

[00:31:54.460] - Dr. Lara Stoimenova, Managing Director of Sigma Economics

Indeed, I mean, you just hit the nail on the head, Ronan and you did mention that one of the objectives might be for the European Commission to try and encourage a level playing field in a very fast evolving digital market sector but then one of their requirements is for the gatekeepers to impose fair, reasonable and nondiscriminatory access terms, friend terms. We both know how difficult it is to interpret a friend term. What is fair and reasonable for you may not be fair and reasonable for me and telecoms regulators have for a long, long time struggled on how to define friend terms ex ante. They have tried to diminish the potential risks around interpretation by either providing guidance ex ante on how they would apply friend terms, or exposed impose those terms themselves whether it's a friend prize or friendiencs, whatever it might be, I'm afraid I think the fact that there is no specificity in certain areas of the DMA will come and bite the commission.

[00:33:09.220] - Ronan Scanlan, Of Counsel

Yes. No, I think there's certainly a lot of hostages to fortune down the line. Lara, thank you so much for that tour de force of telecoms regulation, digital market regulation, and a number of really interesting cross-cutting developments in that space. I think the discussion around the market definition notices is really timely. Of course, the DMA designated gatekeepers will be on the hook from the 7th March for compliance with the DMA. So it's a very interesting year to come in 2024 in this space, but thank you so much for joining me today for this conversation, and I certainly hope to have the opportunity to discuss these issues with you again in the near future.

[00:33:54.600] - Dr. Lara Stoimenova, Managing Director of Sigma Economics

Thank you very much for having me, Ronan, and I hope your listeners enjoy the podcast too.