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The “WiFi4EU” in light of the European Competition regime

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ABSTRACT: The “WiFi4EU” initiative is a proposal for regulation of the European Parliament and of the Council, which amends Regulations (EU) No 1316/2013 and (EU) No 283/2014, each of them on the promotion of Internet connectivity in local communities. This initiative aims to ensure that all Member States of the European Union create high-quality wireless internet access points throughout their territory to combat digital illiteracy and ensure access to healthcare, administrative services, and online commerce. With the following resolution, hospitals, libraries, monuments, museums, and parks will have a public signal available. Therefore, the proposal has a very strong social dimension, since it aims to broaden the internet signal to citizens who live near municipal areas and whose economic statuses are lacking. With a three-year implementation period, the initiative falls within the scope of the Single Digital Market, which is a major political objective and a way for the European Union to attract investments from large economic agents through the “Internet of Things”. It is therefore relevant to give some context and analyze the initiative through the eyes of the Union’s principles and of the notions of competition and regulation, which are essential to the European Union.

KEYWORDS: WiFi4EU – European Union – Competition – Regulation – Digital Single Market.

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I. Context of European competition and regulation¹

Regulation is imposed by legal means, through the creation of rules which impose certain precepts by means of legislative acts imposed by States, which we refer to as “*hetero-regulation*”. Analyzing this through the eyes of Independent Regulators, we are given the notions of sector authorities and horizontal authorities (as is the case of the Competition Authority).

There are sectors of activity that, despite their technical specificity and the need to protect their markets in terms of free competition (which we will cover below), are of key relevance to public interest. This public interest is based on the fulfilling of political and constitutional options. In the Western sphere, which includes the European Union (henceforth, the EU), the political-economic option is that of Capitalism, according to which markets are the main institution guaranteeing rationality, transparency and economic and social efficiency, due to competition.

We are given the notion of direct proportionality between the intensity of competition and the efficiency of markets. Precisely from this point of view, regulation appears as a form of protecting competition and, consequently, the Western Market and social bases. As such, looking at the European plan, we can see that the regulation of electronic communications started out as strictly economical, because of the configuration of what was to be public intervention of the EU and its Member States, which were aimed at ensuring a balanced functioning of the Market.

Considering the previous paragraph, it is essential to stress the overcoming of the nineteenth century notion, in which the Market was autonomously organized on the supply side of the equation, expecting a total transparency of information in which each economic agent would have all the necessary information about the Market itself.² From this point of view, the ideal means of organizing the Market would be through the imposition of a status of pure and perfect competition, which places a significant burden on extant legislation to maintain it.

Consequently, the current view on the Market is a more realistic model of “*imperfect competition*”, where markets that are left to be regulated by themselves will produce less competition. This imperfect competition may, in turn, generate oligopolies, monopolies or monopoly prone conditions.

On the other hand, considering the legislator’s logic, the existence of a Market that operates with a realistic minimum of competition and that, despite natural market distortions, promotes effective and fair competition, becomes an ideal standard. This happens because competition is fragile and is in a sector which, in the European case, easily becomes prone to the existence of companies in a dominant position or enjoying exclusive rights.

Thus, to promote this kind of competition, there are legal documents; one is the Portuguese Law No. 5/2004, of February 10 (Law of Electronic Communications), which in its Article 5(1)(a)³ sets out to promote fair competition through the provision

¹ This paper was selected amongst the essays presented to INTEROP Project researchers by the Master’s students of the School of Law of the University of Minho in the last academic semester of 2017/2018 regarding the development of the Digital Single Market.

² Hayek demystifies this notion, seeing how the most knowledge an individual can have about the Market is the notion of the link between increased supply and falling prices, and vice versa, due to the demand inherently linked to this phenomenon.

³ “Constituem objetivos de regulação das comunicações eletrónicas a prosseguir pela ARN (Autoridade Reguladora Nacional) promover a concorrência na oferta de redes e serviços de comunicações

of electronic communications networks. This is carried out in a transversal manner, always assured by the Competition Authority, which can always be called upon to intervene in the face of antitrust⁴ behavior or unfair competition, which must always be assessed.

Unlike the American model, strongly reflected in the Sherman Act (particularly in its second section), the establishment of a dominant position (a monopoly in the North American context) is not what the EU sets out to combat. The European tradition of dominant positions⁵ due to the activity of public entities (as is the case of Portugal Telecom in Portugal) leads to the assumption that the normal functioning of the market may lead to a dominant position, with the dominant entity having a duty of *not harming the market*.

A concrete and sectoral regulation (as in the case of ANACOM) makes it clear that it is not the rules that construct a market, but rather other concepts, since, from a European perspective, what drives markets is the theory of “*Competition as a means*”. As such, for Europeans, defending competition in the Market is only a means of pursuing a global economic policy and not an end in of itself.

Considering the importance of European electronic communications to which the Digital Single Market⁶ (henceforth, DSM) gained importance, certain technical aspects appear to have been regulated despite the Regulatory Entity of Competition seemingly being devoid of any jurisdiction. Article 102 TFEU, established to “correct” and “prevent” in relation to the harmful effects of companies’ market power, aims to protect markets from the effects of abuse of power / dominant position.

II. “WiFi4EU” through the eyes of the European Union’s principles

With the “*WiFi4EU*”⁷ initiative, the European Commission intends to promote free Wi-Fi in public spaces, such as parks, squares, public buildings, libraries, health centers or museums throughout Europe (with a more local focus).⁸

Above all, the initiative answers the needs of local communities in the broader context of the DSM strategy, seeking above all to secure an internal market for electronic

electrónicas, de recursos e serviços conexos” – Law No. 5/2004, Article 5(1)(a).

⁴ “*Antitrust laws [...] are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms*”. See U.S. Supreme Court Justice Thurgood Marshall *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).

⁵ Originally, a dominant position was defined as a position of economic power held by a company which enables it to avoid any sort of efficient competitors in the relevant Market and to act independently from its competitors, its customers and consumers. See CJEU’s Judgement *United Brands*, Case C-27/76, 14 February 1978, ECLI:EU:C:1978:22.

⁶ “*DSM has a strong link with EU policy setting because the digital economy can create growth and employment across the continent*”. See Joana Covelo Abreu, “Digital Single Market under EU political and constitutional calling: European electronic agenda’s impact on interoperability solutions”, *UNIO – EU Law Journal* 3(1) (2017).

⁷ The purpose of which is to amend Regulations (EU) No 1316/2013 and (EU) No 283/2014 on the promotion of Internet connectivity in local communities.

⁸ “*For everyone to benefit from connectivity, it must be irrelevant where they reside or how much they earn as wages. For this reason, we have decided today to propose that, by 2020, the main centers of public life in all towns and cities in the EU should be provided with free wireless internet access*”. See Jean Claude Juncker, “*Speech on the state of the Union*”, September 2016.

communications and to ensure the participation of the European community in it.⁹

Since it is not possible to create an area (and by mere decision of a Member State) that can cover the whole of the EU with high quality wireless connectivity in a satisfactory way, the proposal appears to be consistent with the principle of subsidiarity of Article 5 of the Treaty of the European Union.¹⁰ In this case, this Regulation shall be applied without prejudice to national law which follows Union law, such as national provisions which do not allow municipalities to provide directly free local connectivity, although they may provide it through private entities.

The proposal under consideration¹¹ also deals with the issue of universal service, which refers to the minimum number of specified quality services available to all users regardless of their location, depending on national conditions, which must be available at an affordable price.

It is precisely predicated on this notion of universal service and its safeguard that the proposal finds its corollary, in line with Article 170 (1) TFEU, in order to ensure that the local communities of the Union are able to take full advantage of the benefits of the DSM, creating an area without internal borders through the deployment of wi-fi¹² networks. Likewise, it appears to be part of the trans-European telecommunications networks actions, as provided for in Article 170 (2) TFEU.¹³

Through the following proposal, hospitals, libraries, monuments, museums, and parks will have a public signal available to them, which highlights the proposal's strong social dimension, as it aims to promote a broadening of the signal to citizens living near municipalities and with lacking economic opportunities. The initiative has a three-year implementation period.

Furthermore, the Member States' municipalities should be responsible for the installation, proper functioning, and maintenance of these services.

Aiming at a more local application, the “*WiFi4EU*” initiative will be implemented in a simple and non-bureaucratic way, namely through online applications, voucher payments and simplified control requirements, the selection criterion being strongly based on the idea of “*first come, first served*”.

It is with these elements in mind that we must analyze the proposal, in light of the European competition regulation.

III. “WiFi4EU” through the eyes of the European regulation

Analyzing the proposal in question, we can conclude that the European Union

⁹ “The Commission considers it important to create the adequate environment and all framework conditions that are essential to foster the emergence of new online platforms that choose the European Union as their main base of operations”. See Joana Covelo Abreu, *Digital Single Market under EU political...*

¹⁰ According to which, by the principle of allocation of powers, the Union acts only within the limits of the powers conferred upon it by the Member States in the Treaties to achieve the objectives set by the latter. The competences which are not conferred on the Union in the Treaties belong to the Member States.

¹¹ <http://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:52016PC0589&from=EN>, accessed December 15, 2017.

¹² This is based on Article 172 TFEU, which covers the EU's contribution to the creation and development of trans-European networks in the transportations, telecommunications and energy infrastructures.

¹³ Which makes it clear that within the framework of a system of open and competitive markets, the Union's actions shall aim at promoting the interconnection and interoperability of national networks and access to such networks. It shall consider the need to link island, landlocked and peripheral regions with the central regions of the Union.

will finance the costs of equipment and the installation of wi-fi access points at a cost of circa 120 million euros, with beneficiaries (i.e. municipalities or other local public institutions) being responsible for the cost of connecting and maintaining the equipment and for contracting their telecommunications operators for a period of at least three years.

It is noted that, by allowing local authorities of Member States to determine which operators will provide services under the proposal, there may be a possible risk to competition. This may occur because, at the end of the short three-year period of implementation, the amount of money needed to maintain services may quickly become excessive, given the limited funds made available by the Union, particularly upon its distribution.

It can quickly be inferred that local authorities will be strongly inclined to hand control of the wi-fi networks established in their municipalities over to private companies, seeing how large telecommunications companies are expected to be easily able to continue to promote the services in question.

This appears to be problematic, particularly considering Articles 101 and 102 TFEU, in the sense that a large company's ownership of a set of local networks progressively essential to consumers could easily accentuate a dominant position towards other, smaller, or more internal operators. Following this line of thought, one can easily foresee a manipulation of these companies' services or prices to the detriment of other companies.

As mentioned above, European tradition does not contemplate the dominant position and its scope as something to be combated or avoided *per se*, much in contrast to the American view expressed in the *Sherman Act*.

In my view, the dynamics of markets, the decisions of the European Union and its Member States upon the transposition of the Union's directives can indeed be allowed to lead to the attainment of a dominant position by one or more companies, so long as these companies assume a burden of not implementing measures that deliberately jeopardize or undermine competition.

By examining the exceptions set out in Article 101 TFEU and its third paragraph, we can conclude that even with a dominant position status, these companies can promote the objectives of the "WiFi4EU" proposal, seeing how it hopes to promote the technical progress of the Union.

Again, as a matter of principle, the proposal constitutes no immediate breach of regulation or competition at a European level, seeing how the long-term fears are precisely the possibility of competition regarding a substantial part of the products vanishing due to the intervention of these large companies.

In fact, the European Commission believes that this service should be free and non-discriminatory, while avoiding any boost to competitiveness, so as not to discourage private investment, which is clearly expressed and transposed by Articles 101 and 102 TFEU.

Still within the scope of competition, it becomes essential to assure that, should a private company acquire a dominant position due to being hired by local authorities in Member States or by the Member States themselves, it will not lead to a distortion of competition by having these companies being "put in charge" of the project.

This issue, in relation to Article 107(1) TFEU¹⁴, can be reasonably mitigated

¹⁴ Which states that, unless otherwise provided for in the Treaties, aid granted by a Member State or through State resources that, in any form whatsoever distorts or threatens to affect trade between

and answered through the implementation of the “*WiFi4EU*” project, because one of the main objectives of the measure is to bring the various Member States closer through access to internet connectivity, combating info-exclusion and contributing to regional development, for which it can be argued that the measure will be protected by the exceptions in Article 107 (3) TFEU.

In light of the previous assertion, aid to promote the implementation of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State and to facilitate the development of certain economic activities or regional conditions of trade to an extent contrary to the common interest are the exceptions to Article 107 TFEU¹⁵, which seem to be fully in line with the objectives of the proposal.

V. Conclusion

Again, seeing how we are referring to a proposal from the European Commission, it is appropriate to emphasize the notion that the analysis made so far is highly speculative and dependent on the implementation and practical effects of the proposed regulation.

In fact, a critical and attentive look can easily discern practical risks following the long-term application of this project, seeing how its respect for the competition laws and for the Union’s own principles is ensured merely in theory and not practice, and especially, when considering how market dynamics can easily lead the impacts of this European connectivity to situations of highly abusive dominant positions.

Regarding the regulation and competition structures, it is our understanding that it is essential to invest in digital communications¹⁶ and, to make the Market more competitive, to clear up what solutions regulators should aim for, and seeing how the promotion of incentives to private investments is seen as a stimulation to innovation.¹⁷ As such, the transmissions of funds and projects such as “*WiFi4EU*” should work in this line of thought.

It is also important to live up to the words of Anabelle Gawer, a renowned authority on DSM issues, who warns that solutions such as the “*WiFi4EU*” and the “*Digital4EU*” conference itself are only partial resolutions to the problems of info-exclusion and underdevelopment of some Member States because of their regional scope. By comparing this relatively small scope with one as broad as that of the European Union, we must always aim to ensure its maximum functionality and respect for the principles of competition, so that its evolution and enlargement proves effective and respectful of the freedom of agents of the European Market and of the DSM.¹⁸

Member States, shall be incompatible with the internal market.

¹⁵ Article 107 (3) (b) TFEU.

¹⁶ “The panelists underlined the need to set achievable goals, built around a set of benchmarks such as simplified cross-border access, investment in high-speed internet, promotion of a data-driven economy, etc”. See #Digital4EU Stakeholder Forum, 24th February 2015, Final Report.

¹⁷ “First, we need to create a friendly investment environment that provides the seed money needed for our companies to grow. Second, we need to change the decision-making process, go beyond national interests and seek a European compromise. Third, we need a holistic approach, so that we do not find ourselves in a situation where some parts are advancing, while other areas are lagging behind (the need for a coordinated effort by Member States on e-skills, data protection or data privacy were mentioned)”. See #Digital4EU Stakeholder Forum...

¹⁸ “In light of the future DSM proposal, Mr. Madelin particularly emphasized the need to find the right balance amongst all the relevant issues such as copyright, access, data protection, startups and the related risks, and the help the

I conclude by highlighting that the “*WiFi4EU*” initiative could be of value to the European e-Justice Strategy in its objective of promoting an effective interconnection between Member States’ public administration databases, linking them with the EU’s central database (which should be responsible for such matters) and thus, facilitating the achievement of the administrative interoperability desired by the Union in the projection of the European Project.

Commission would need in order to get the related policy decisions right”. See #Digital4EU Stakeholder Forum...