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State Regulation and Deregulation: A Case of the Communication Industry

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Abstract
The paper is focused at the correlation of state regulation and deregulation in the communication industry. The regulation of major sectors such as the communication industry should be up to the challenges of today. In the current context of building a new digital economy and reducing administrative barriers, a special importance is attached to how state regulation and deregulation correlate in the communication industry. The paper provides an analysis of regulation in the industry to identify the sectors may be excluded from state regulation or may benefit from self-regulation or deregulation. It purports to identify (based on analytical findings) the existing trends in the way the public authorities use regulation and deregulation in the communication industry. With this purpose, the author studied possible vectors of deregulation and reviewed the sectors that were more deeply deregulated and those that could benefit from both regulation and deregulation. With the communication industry constantly progressing and the technologies improved, new social relationships not covered by regulation and not subject to deregulation emerge. Thus, the paper also deals with the problem of legal gaps. The methodology involved is a combination of academic research methods, with both general and special (including formal legal and technical) methods used. The research findings are summarized in the form of short conclusions.

Keywords
communication industry, telecommunications, state regulation, self-regulation, deregulation, gap, telecom operator.

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Introduction

State regulation and deregulation demonstrate a variable balance in specific sectors at different development stages of economic relationships for a number of reasons. Regulation may be abandoned (with no statutory regulation in place) for a number of factors. There may be social relationships which:

the authorities do not consider necessary to regulate;
cannot be efficiently regulated by law;
cannot be regulated by law at all.

The dynamic boundaries between these groups will change as specific social relationships develop. The regulatory efficiency/inefficiency and absence of social need in strict regulation is one of the main criteria behind the choice of the model to shape social relationships. The view of E.P. Gubin is remarkable in this regard: "the development of law assumes not only the adoption of new regulations but also "deregulation" of economic relationships" [Gubin E.P., 2022: 36–46].

The modern society has a variety of social regulators, with law being just one of them. As observed in literature, the ever shrinking economic share of the state as a result of privatization, liberalization and deregulation is characteristic of the current stage of economic development in a majority of developed economies [Markvart E., Kurbanov B., 2018: 61-78]. However, deregulation does not mean zero regulation where law as a regulator gives place to other regulators of social relationships.

1. Deregulation and self-regulation

Self-regulation is often believed to be a variety of deregulation.

The main piece of legislation governing the legal status of self-regulated organizations (SRO) in Russia is Federal Law No. 315-FZ "On Self-Regulated Organizations" dated 1 December 2007 which identifies the main requirements to SRO as the legal basis for the emergence of such entities.

The definition of self-regulation given in Article 2 of this Law is instructive for the purpose of this paper. Self-regulation is understood as an

independent and self-motivated activity pursued by agents of a specific business or trade to develop and establish the standards and rules of the given business or trade and to exercise control of compliance with these standards and rules. While regulation is obviously there, legal provisions will give place to the standards and rules established by the business/trade agents themselves. Moreover, these standards and rules are binding on all members of a self-regulated organization. From this perspective, it would be wrong to speak of zero regulation or deregulation as such: regulation is passed to a different level, with membership in a self-regulated organization conditioned by compliance with the established rules and standards. Control is also there: however it is exercised not by the government but rather by the self-regulated organization and with higher efficiency in a number of cases than the public authorities would achieve.

According to Yu. A. Tikhomirov, self-regulation is a system of governing the affairs of society by way of self-organization and independence [Tikhomirov Yu.A., 1994: 193–213]. However it should be said that self-organization and independence are underpinned by a permitting regime established by the state out of the public interest. Where market players cannot reconcile their interests in a certain area, the state should deal with the issue by identifying the most optimal ways and methods of impact.

There is no self-regulation of the communication industry in the full sense though telecom operators attempt to address certain issues by concerted efforts. As to deregulation, this goal was set long time ago but failed to be widely pursued.

Deregulation is believed to be one of the principal ways for overcoming administrative barriers. "It does not mean that regulation is abandoned as such but that it assumes only minimal restrictions required to protect the state and society, regional communities and trades, individuals and legal entities" [Khabrieva T.Ya., Marcou J., 2011]. Moreover, deregulation results in more flexibility and adaptivity to the renewed social relationships.

Meanwhile, it follows from practice that deregulation will often involve the interventions of a different nature and focus. For instance, under the 2006-2008 Medium-Term Socioeconomic Development Programme approved by Government Resolution No. 38-r of 19 January 2006[1], it was decided to take the following steps for deregulation of the communication industry:

[1] Collected Laws of Russia. 2006. No. 5, p. 589.

direct regulation of tariffs for communication services to give place to the control of fair pricing in compliance with legal provisions;

cross subsidization to be phased out;

market mechanisms to be developed and transparency of radio spectrum allocation improved;

arrangements for allocation of numbering resources to be improved by way of transition from lump sum to regular payments to be differentiated depending on the extent the resource is used;

control and supervision procedures with regard to economic agents in the communication industry to be improved and made less cumbersome.

Only the transition from direct regulation of prices and tariffs to the control of fair pricing in the sector could be regarded as deregulation. The abandonment of direct regulation of prices and tariffs is one of the main vectors of deregulation. Its pursuit demonstrates efficiency in competitive market segments. Therefore, direct regulation of prices and tariffs in the communication industry is feasible as long as there is competition.

In this regard, it is instructive to refer to the Federal Antimonopoly Service position outlined in its decision of 31 March 2017 in connection with case No. 1-10-141/00-03-16: "Deregulation is only needed where the conditions are created for true rather than pseudo market competition. For this reason, this issue should be addressed selectively and on a case-by-case basis"[2].

As part of this approach, the FAS of Russia has approved the price ceilings for communication services, within which telecom operators are free to set tariffs. Here are some examples. The FAS order of 19 February 2019 (No. 192/19[3]) approved the maximum tariffs for public communication services to be provided by PAO Tattelecom in Tatarstan as well as the maximum tariffs for local telephony services, intrazone connections between subscribers/users of fixed telephone lines for transmission of voice and facsimile messages and data, and for inland telegram services to be provided by PAO Tattelecom in the said territory.

Similar decisions were made in respect of PAO MGTS in Moscow: order No. 1843/18 of 25 December 2018[4] approved the maximum tariffs for

[2] SPS Consultant Plus.

[3] Available at: http://www.pravo.gov.ru (accessed: 31.01.2019)

[4] Available at: http://www.pravo.gov.ru (accessed: 29.01.2019)

local telephony services to be provided by PAO MGTS in the territory of Moscow, and for intrazone connections between subscribers/users of fixed telephone lines for transmission of voice and facsimile messages and data. At the same time, the FAS approved order No. 1842/18 of 25 December 2018[5] applicable to tariffs for local, intrazone telephony connections and inland telegram services to be provided by PAO Bashinformsvyaz in Bashkortostan.

The maximum tariffs also cover the digital signals delivery services from the nationwide mandatory public TV and radio channels to radio electronic facilities for broadcasting[6].

The elimination of cross subsidizing is designed to improve financing in the industry but does not in any way affect the deregulation process. The development of market mechanisms and more transparent allocation of radio spectrum likewise bear only partially relation to deregulation since Article 22 of the Federal Law "On Communications" gives the Government an exclusive right to regulate the use of the radio spectrum. Moreover, while market mechanisms are allowed to be used at different stages of the radio spectrum allocation and use, they are subject to legal provisions and do not exclude state regulation.

The mechanisms for allocation (including improvement) of the numbering resources do not provide for deregulation either. Moreover, these resources, being scarce, make a case for state regulation and control, something which does not rule out the possibility of engaging market mechanisms as part of regulation.

Making the procedures for control and supervision of economic agents more efficient and less cumbersome is a general trend and a policy pursued by the state that does not exclude regulation.

It is worth noting that there is no universally acknowledged concept of "deregulation". Thus, the authors of the book "Statutory Regulation of Economic Relationships" [Gubin E.P., Karelina S.A., 2018] believe that "deregulation" should not imply the processes of removing the state from the

[5] Available at: http://www.pravo.gov.ru (accessed: 06.12.2018)

[6] See FAS Order No. 1540/18 of 12 November 2018 "On Approving the Maximum Tariffs for the FGUP Russian TV and Radio Broadcasting Network Services to Deliver Digital Signals of Nationwide Mandatory Public TV and Radio Channels to Radio Electronic Facilities for Broadcasting" // SPS Consultant Plus.

market: deregulation is also an economic regulatory tool for the government which can be associated with the methods of direct impact.

One has to agree with A.V. Dyomin [Dyomin A.V., 2017] that "deregulation normally means the abandonment of imperative methods in favour of alternative expansion of independence of private individuals at the expense of the powers of regulating agencies". We believe that deregulation can be regarded broadly as the legislative changes focused at more empowerment and independence of economic agents and at the *relaxation* of regulation, while narrowly — as the substitution of regulation with other social regulators, with specific relationships exempt from it.

Deregulation is a general trend in a majority of countries since it is regarded as one of the main policies supporting the innovative economy. However, it is far from being considered a totally positive phenomenon. As a number of researchers point out, deregulation has negative implications in the form of higher uncertainty within society in the absence of transparent state leverage [Baumann S., 2005: 27, 53–54]; [Nozdrachev A.F. et al., 2015]; [Khabrieva T. Ya., Marcou J., 2011].

In support of this idea, other authors observe with regard to the outcomes of globalization that "the leading capitalist countries, while imposing on the world the maximum economic openness, decentralization and deregulation, are building up a centralized, sovereign and regulated market mechanism whose vested interests are ensured and protected by a powerful state machinery, credit facilities, information and military infrastructure" [Krasinsky V.V., 2017].

There is a yet tougher line on deregulation as it is believed that deregulation does not provide opportunities for the development of new technologies and, most importantly, will reduce the room for the government's control over the national economic development in peripheral countries. As observed by A.Yu. Novoseltsev, "the countries that embark on economic deregulation lose the national jurisdiction even over national, not to mention international, companies" [Novoseltsev A.Yu., 2022: 10–13].

In many cases, globalization has deregulated or made labor markets more flexible, only to mean in practical terms the amendment or abolition of labor laws which prevented layoffs, wage reductions, changes to social security systems", etc. [Kovalev A.A., 2013: 115–116].

Deregulation is often used in the fight for foreign investments to remove as many restrictions as possible, primarily with regard to labor, and to ensure cheap workforce for investors into the sector. However, with automation as a new trend, cheap workforce will cease to be the factor capable of attracting and encouraging investments.

Anyway, the deregulation policies that provide for fewer restrictions should be at least as justified and well-founded as regulatory tightening.

Since less regulation assumes more competition, it is instructive to look into the provisions of Presidential Decree No. 618 of 21 December 2017 "On the State Policy Guidelines for the Promotion of Competition"[7] that has approved the 2018-2020 National Plan for the Promotion of Competition. The policies for communications include, for example, the support for innovative infrastructures on the principles of non-discriminatory requirements to market players irrespective of the technologies they use to provide their services; a choice between at least 3 providers of signal transmission services in minimum 80 percent of cities populated by more than 20 thousand people; the elimination of unfair tariff differentials for mobile services provided to travelers (nationwide roaming)[8]. The said policies primarily purport to do away with monopolies in the market for communication services and to create a competitive environment through legal means. This document does not obviously deal with deregulation of the communication industry.

Meanwhile, it is worth noting that a rapid progress of infrastructure sectors, primarily that of telecommunications, and the use of new technologies help to do away with monopolies in the market for communication services, in particular, by reducing the costs involved in the installation of fiber optic lines (replaced with satellite connectivity in a number of countries) while Russia with its vast territory still has to install more communication lines. De-monopolization of the industry as a result of technological change will relax state regulation as well.

The Digital Economy of the Russian Federation Programme[9] adopted in July of 2017 has multiple references to a need to remove barriers including

[7] Collected Laws of Russia. 2017. No. 52 (Part I), p. 8111.

[8] See more below.

[9] Approved by Federal Government Resolution No. 1632-r of 28 July 2017, voided since 11 February 2019. See: Collected Laws of Russia. 2017. No. 32, p. 5138.

in the sector of telecommunications, a task that was interpreted broadly but did not involve deregulation. The subsequent National Programme of the Digital Economy for the Russian Federation[10] identified normative regulation of the digital environment as one of the main policies aimed, as follows from the text, at drafting and adopting a number of regulations to remove priority barriers in the way of digital economic development, in particular, in such sectors as telecommunications.

There is an ongoing process of regulating overarching legal issues related to the identification of the parties to legal relationships, e-document flow, collection, storage and processing of data including personal information. As follows from the Programme, the set of interventions will spill over, in particular, to other domains and branches of law as the priority sectoral objectives and general systemic issues of establishing a single digital environment of confidence are met.

Evidently, this document likewise does not explicitly envisage deregulation of relationships including in the communication industry — it deals, on the contrary, with regulation. Meanwhile, it is worth noting that deregulation of specific areas of social relationships could be willed by the state in the form of legal provisions, i.e. can result from regulation.

Less regulation effectively implies a reduction of natural monopoly stakes in the given sector. Federal Law No. 147-FZ "On Natural Monopolies" of 17 August 1995[11] contains a list of natural monopoly spheres which include, in particular, the public telecommunication and postal services. With the technological change and emergence of new technologies, a monopoly can cease to be natural as observed in the communication industry where alternative solutions, new communication types and services come to be used in the public interest. The extent of state regulation in this sector will change accordingly. Moreover, whether there is a public interest is principally important.

Natural monopolies are mainly regulated through tariffs: the communication industry is no exception. Deregulation of this kind will improve the flexibility and resilience of the Russian economy and promote fair market

[10] Approved by the Presidium of the Council for Strategic Development and National Projects under the President of Russia, Protocol No. 16 of 24 December 2018 // SPS Consultant Plus.

[11] Collected Laws of Russia. 1995. No. 34, p. 3426.

(competitive) pricing of communication services. Presidential Decree No. 618 of 21 December 2017 "On the State Policy Guidelines for the Promotion of Competition" that approved the 2018-2020 National Plan for the Promotion of Competition provides, in particular, for the national legislation to be amended to remove unfair tariff differentials for mobile telephony services for users traveling across Russia within the coverage of one and the same telecom operator.

This objective is already being implemented: under Federal Law No. 527-FZ of 27 December 2018 "On Amending Articles 46 and 54 of the Federal Law "On Communication" effective since 01 June 2019, mobile telephony operators should guarantee equal service conditions to each subscriber in their networks irrespective of the region he or she is located in. Also, Telecom operators cannot charge fees for incoming calls from other regions of Russia.

It is worth noting an obvious trend of the changing structure and volumes of the telecommunication market. As the Government reported back in 2011, with the growing market for web-based services, the traditional communication services in the VOIP segment were being replaced with web-based mobile technologies. In the segment of local and intrazone telephony, mobile telephony services were the main substitute while IP telephony was used likewise in the segment of international and intercity telephone services[12]. The aforementioned provisions will make this trend even stronger. As a result, a considerably lower need in specific communication services may relax regulation.

While the newly adopted laws undoubtedly serve to protect communication service users, they cannot be regarded as dealing with deregulation of this industry. On the contrary, it was the Government's will to change the situation favourable to telecom operators through amendments to the effective law that allowed to ensure a level field for provision of services. Market mechanisms failed in this case as all telecom operators strived to make more profits. The best international practices were equally ignored. Such situation could only be changed by the state through a focused regulatory intervention.

[12] See Federal Government Ordinance No. 1540-r of 06 September 2011 "On Approving the Socioeconomic Development Strategy of the Central Federal District for the Period until 2020". Collected Laws of Russia. 2011. No. 39, p. 5489.

In a number of cases, the duty of changing the current regulatory regime can be based on Constitutional Court rulings to acknowledge certain provisions of law contrary to the Constitution. This is a case for exclusive state regulation which is essentially a duty of the legislator.

An obvious example is Constitutional Court Ruling No. 2-P of 28 February 2006[13] to recognize paragraphs 2 and 3, Articles 59 and 60 of the Federal Law "On Communication" as contrary to the Constitution of Russia. These provisions deal with the duty of operators of public communication networks to make deductions to the universal service fund for compensation of losses caused to universal service operators in the course of service provision.

While the amount of deductions is the same, their nature is totally different: previously non-tax, they become state-imposed tax payments subject to the general provisions of the Tax Code complemented with those governing calculation rules and due dates, with tax collection enforced by the state. This problem was likewise solved exclusively by state regulation: while self-regulation was possible in theory, it would require a party (self-regulated entity) to regulate the social relationships in question and make sure all members comply with the established obligations. The required conditions are obviously not there yet.

State regulation is tightening in certain areas of telecommunications largely due to the need to provide public authorities with reliable information including on subscribers. Thus, Federal Law No. 533-FZ of 30 December 2020 "On Amending the Federal Law "On Communication" has come to include Article 44.2 initially entitled "The information system for monitoring compliance of telecom operators with their duty to check the validity of subscriber details and those of the users of subscriber services (to be provided by legal entities or private entrepreneurs)", now entitled "Monitoring of Telecom operators' compliance with their duty to check the validity of subscriber details and those of the users of subscriber services (to be provided by legal entities or private entrepreneurs) including services provided by the persons acting on behalf of telecom operators".

For the purpose of monitoring telecom operators' compliance with their duty to check the validity of subscriber details and those of the users of subscriber services (to be provided by legal entities or private entrepreneurs),

[13] Ibid. 2006, No. 11, p. 1230.

this Article requires to put in place a data system integrated into the universal identification and authentication system, the database of migrated subscriber numbers, and other information systems.

State regulation serves to a large extent to facilitate rather than reduce the established procedures by making them digital and remotely executable. Thus, the communication industry was among the first to adopt a register-based model for provision of public services.

As a general trend in development of e-services, they are available without a need to visit public agencies. Thus is achieved, in particular, through the use of the register-based model which does not require to issue a paper document as a result of the service provision: it is the entry to the corresponding register that has a legal value.

Federal Law No. 478-FZ of 27 January 2019 "On Amending Specific Regulations of the Russian Federation Regarding the Register-Based Model for Provision of Public Licensing Services for Specific Activities" has taken effect on 01 January 2021 practically at the same time as Federal Law No. 509-FZ of 30 December 2020 "On Amending Specific Regulations of the Russian Federation" also aimed at introducing the register-based model for provision of public services. The said regulations extend this model to the licensing sector, one of the vital for businesses, by replacing paper licenses with electronic entries [Kucherov I.I., Sinitsyn S.A., 2022].

In our view, there is another noteworthy aspect. Zero regulation of specific social relationships is not tantamount to deregulation. This could signal a legal gap to be eliminated in view of certain circumstances and enforcement problems which are there. These relationships could be subject to regulators of the non-legal nature. From this viewpoint, it is instructive to invoke L.A. Morozova's position in respect of imaginary legal gaps she believes to be intentional silence of the legislator, that is, where a question is deliberately left to the enforcer's discretion or where social relationships are purposefully removed from the regulatory scope [Morozova L.A., 2002]. This approach to distinguish between the imaginary and real gaps has to be made clear. Real problems can emerge either simultaneously with the adoption of a specific law or some time later. This might happen, for example, as a result of the technological change which directly affects the emerging relationships. While new technologies bring about new relationships to be regulated, this may result in legal gaps.

In distinguishing between deregulation and a legal gap, it is useful to refer to the definition given by V.S. Nerseyants whereby a legal gap it is the absence of a provision which would be needed, under the logic of the effective law and by the nature of the social relationships in question, to regulate a situation (relationship) covered by the current regulation [Nerseyants V.S., 2001]. A gap is unlikely to be intentional and purposeful, despite a need in regulation, otherwise it would amount to deregulation which allows for the absence of specific provisions.

There is a view in the doctrine that delegation of public authorities can also amount to deregulation [Romanovskaya O.N., 2017: 143–154]. However, the author justly observes, deregulation will involve the abandonment of state regulation, with private entities likely to fill the emerging void in governance. We believe that, as regards delegation, the state does not step back; it will exercise control over the delegated authorities by correcting wrong decisions as may be necessary, up to the point of revocation.

A principal question for the subject of this paper is the correlation between regulation and deregulation in the communication industry. As was demonstrated, it is now almost completely within the scope of state regulation primarily focused at prices and tariffs for communication services. There is a goal to phase out state regulation of tariffs in competitive sectors, a process to be underpinned by analysis of implications of deregulation in respect of specific natural monopolies[14]. In other words, a legal experiment should be conducted on whether it is feasible to abandon state regulation of tariffs. Developing an infrastructure available to a wide range of market players will also set the stage for the promotion of competition and thus for relaxing or terminating state regulation of tariffs.

Some steps in this direction are already being made. Thus, Federal Law "On Communication" has come to include Article 53.1 "Provision of information under the programme of experimental legal regimes in the sector of digital innovations" (introduced by Federal Law No. 331-FZ of 02 July 2021) whereby in accordance with the said programme approved by Federal Law No. 258-FZ of 31 July 2020 "On the Experimental Legal Regimes in the Digital Innovations Sector in Russia" mobile Telecom operators as par-

[14] FAS of Russia Order No. 279/18 of 12 March 2018 "On Approving a FAS Action Plan to Implement the 2018-2020 National Plan for the Promotion of Competition in the Russian Federation approved by Presidential Decree No. 618 of 21 December 2017 "On the State Policy Guidelines for the Promotion of Competition"// SPS Consultant Plus.

ties to the experimental legal regime were granted broader rights including those to pass to their peers the information on the number of subscribers located in the given period in a territory covered by such regime. Obviously, the opportunities related to human rights could be settled only at the legislative level and exclude any self-regulation.

While the availability of alternative communication services is positive for the market development, it does not affect the extent of state regulation of those services are already covered by the regulatory scope. However, the industry is rapidly developing, with new communication technologies and services making their appearance. As a result, new services are not as regulated as the traditional communication services for a certain period of time. This, however, does not mean zero regulation since these relationships are governed by provisions of the Civil Code. As an option for further regulatory development, there is a scope for broader coverage of the existing communication services by the Civil Code.

Communication services are hard to separate from telecommunications such as Internet access services. As regards this group of relationships, it can be asserted that the scope of state intervention is ever increasing largely due to the efforts to counter illegal or harmful content and terrorism and to ensure information security. This, however, affects the interests of telecom operators who assume extra duties. For example, a resolution on the rules for identification of users of messenger apps effective since 05 May 2019 was passed by the Federal Government as a result of amendments to the Federal Law "On Information, Information Technologies and Data Security" whereby organizers of an instant message exchange service should accept messages only from identified users, with system administrators required to refer to telecom operators for user details. The extra duties of telecom operators also follow from statutory requirements to ensure local residency of personal data, storage of connection data, protection of proprietary rights etc. The legal status of Telecom operators can be specified only by regulation including with the purpose of imposing extra duties.

Conclusion

It has to be admitted that the communication industry is largely regulated by the state, with the trends for deregulation visible only as regards pricing. However, some issues important for both the Government and

businesses, primarily those of security, require concerted efforts. Here the Government should exercise statutory regulation by leaving to economic agents the choice of the most optimal means of protection, identification of security requirements, development of security policies etc. The fight against child pornography, safe Internet initiatives etc. promoted not only by regulatory means but also by private action could come within the scope of concerted efforts of the Government and Telecom operators.

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