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### 3. Transparency and accountability of telecommunications regulation in Sweden

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#### Abstract

The purpose of this paper is to examine the transparency and accountability of the regulatory process for the telecommunications market in Sweden mainly at the central regulatory body is the Post and Telecom Authority (PTS). The focus is on how strategic regulatory issues concerning the development of telecoms regulation, outcome and competition are presented and conveyed to the government and to the general public. Strategic issues are defined as the ensemble of goals, developments, current and possible alternative policies and their consequences. The basic idea is to use a general set of criteria for independence, accountability and quality in regulation to check if there may be a potential for raising the bar for regulatory quality in Sweden and Europe. The results are that there is a potential for improvement on almost all the criteria; the analyses presented by the PTS with respect to the early analyses of strategic issues, proposed changes in regulation and outcome of current policies.

## 1 Introduction

The purpose of this paper is to analyse the potential for improving the regulatory practice in the field of telecommunications in Sweden. This is done using OECD recommendations and recent studies of transparency, accountability and perceptions of regulatory quality. The objects of study are both the Swedish government and the regulatory agency for electronic communications the Post and Telecom Authority (PTS). In this analysis the focus is on how options for new policy are examined with respect to their potential impacts on objectives. We also examine how indicators of goal achievement (demand, prices, quality, investment, competition and regulatory outcomes (appeals and time lapse from decision to implementation)) have been formulated and operationalized, how the outcomes are followed up and presented to the public.

In the Swedish debate on the regulation of the telecom markets there have evolved three important strands. A first important strand concerns regulatory delays. Some years ago the Regulatory commission (SOU 2005:4 p. 615) drew the government's attention to the fact that many of its regulatory decisions were held up in the administrative courts due to appeals to lift the requirements decided by the PTS. The government made the assessment that the appeals led to delays in the enforcement of the Electronic Communications Act (2003:389) and that the cases when decisions were overruled by the administrative courts contributed to regulatory uncertainty. Therefore the government subsequently initiated a commission (SOU 2006:88) to investigate possible adjustments in the electronic communications act that could reduce the time period from the first decision over the appeals to the final decision by an administrative court to enforce the law. Subsequently this led up to a number of adjustments of the Electronic Communications Act intended to shorten the delays from initial decision to final decision in the administrative courts. More recently these lags have led to further speculations as to if the PTS handled the decisions with sufficient competence (Haraldsson and Pyddoke, 2012).

A second strand concerns regulatory uncertainty possibly leading to less investment than desirable. In a recent follow up of developments on the Swedish telecoms markets Haraldsson and Pyddoke (2012) summarize evidence on the development of market shares, prices and investments in Sweden from 2003 to 2009 (which was the last year with available comparable statistics). First the authors note that fixed telephony is declining where as Internet subscriptions, mobile telephony and broadband demand grow fast. Data in (PTS 2013b) shows that transmitted data volumes also grows fast. The authors conclude that the concentration of market shares in telecoms markets in Sweden had been declining or stagnating. At the same time prices had also declined. The investments in telecoms markets have also declined. In a context with much focus on competition the observations of fast growing demand and declining concentration may be taken as indications that the regulation of the market may be working well. The observation declining investments combined with the observation that mobile and fixed

broadband traffic is growing, however, may be interpreted with some caution as it may indicate that the climate for investment could be improved.

A third strand is the concern that new regulation is produced with too little consideration for if new regulation will actually improve social welfare or if the costs for regulation outweigh the benefits (eg. Hultkrantz and Nerhagen 2013). This is not primarily a concern only for telecommunications regulation but more generally a concern about how regulatory processes are able to foresee regulatory costs and benefits.

These three concerns lead to questions about what dimensions of regulatory activities lead to well-functioning regulations and telecommunications markets. Some academic studies have studied the connection between openness and regulatory quality. In addition the OECD has tried to transform such analysis into relevant practice recommendations for regulatory institutions.

A basis for requiring transparency and accountability is that the principles for regulation have been legitimately established and that the principles for transparency and accountability are reasonably clear. Among several others, Follesdal (2006) identifies the following objects of legitimacy: participation, rule of law, the division of powers, whether stated objectives are met and whether the objectives are normatively justifiable. The kind of legitimacy focussed on here is if the legislature and public have had a reasonable chance at participating in and informed discussions on the design of new legislation. This depends on the availability and access to early stages of the formation of proposals. From the perspective of member states this may involve publication of the national regulators position papers used as a basis for the formulation national political positions.

Follesdal and Hix (2006) analyse the issue of democratic deficit in the EU. The central thesis is being that in order for a policy to be democratic it has to be created and has a chance of being modified within an arena of political contestation, and that the institutions reliably adopt policies to citizen preferences. The authors argue that the following optimistic version of Majone's (1998) argument for EU's regulatory processes (like telecommunications) is relevant. According to this interpretation Majone's thesis is that "EU 'regulation' is about addressing market failures and so, by definition, is about producing policy outcomes that are Pareto-efficient, rather than redistributive or value-allocative". Member states therefore delegate the regulatory competences to the EU level deliberately to isolate these policies from domestic majoritarian government. From this perspective EU is a glorified regulatory agency much like regulatory agencies at domestic level.

EU-policy should therefore aim at the majority's long-term interest and try to avoid getting trapped by the siren song of short term special interest i.e. 'democratic' interest. In Follesdal and Hix (2006) interpretation of Majone, domestic majoritarian institutions would lose sight of long term

efficient outcomes in favour of short-term policy preferences, and that this would imply redistributive rather than efficiency improving policies.

Follesdal and Hix (2006 p 538) state that for Majone the problem for EU is more of credibility rather than of democratic deficit Follesdal and Hix (2006). Majone therefore believes that what EU needs is procedural reform rather than reforms directed at achieving more democratic legitimacy. These procedural reforms would include more transparency, ex post reviews, more professionalism and technical expertise. Such reforms would therefore suffice to increase the credibility which in turn would entail that citizens would feel that EU was justified.

Follesdal and Hix (2006) approve of Majone's arguments for delegating purely welfare improving policies to independent institutions. A central argument against Majone's thesis for Follesdal and Hix is the degree to which regulatory policies are strictly efficiency improving and not redistributive is not so high as Majone suggests. They argue that many EU regulatory policies have significant redistributive consequences (p 543).

Follesdal and Hix (2006) go on to argue that Majone's argument that EU policy-making should primarily be about Pareto-improving outcomes is thus implausible or would require a drastic reappraisal of current competencies. They then conclude with the assessment that Majone provides good reasons for that competition policy or food safety regulation could be delegated to independent, non-majoritarian institutions (p 543).

Telecommunications policies may lie at both ends of the spectrum from purely welfare improving to strongly redistributive. An example of the former is provided by the impact assessment {COM(2008) 580 final} for the amendment of the EU directive 2002/21/EC on a common regulatory framework for electronic communications networks and services for roaming on public mobile telephone networks which shows that such redistributive consequences may indeed occur. This assessment does, however, indicate that the welfare gains of the reform even in the short run are of such a magnitude that the redistributive consequences appear as insignificant in comparison. An example of the latter is when new price regulation redistributes welfare between consumers and shareholders in companies. But also the regulation of the price of roaming at a lower level than the previous level will benefit consumers in the short run while shareholders of telecom operators are likely to lose in the same perspective. The long term effects from such a policy is less clear.

The central conclusion drawn by Follesdal and Hix (2006) is that fundamental reforms may not be required as a democratic contestation of EU policies is developing. They do however feel that it still is an important challenge to create institutions that create opportunities for contestation of policies and responsiveness to evolving citizen preferences.

Waverman and Koutroumpis (2011) present a study of the correlation between an index of design of telecom regulators worldwide and a general transparency index. The points that we want to bring along from Waverman and Koutroumpis' exercise are the fact that the PTS ranks high and the components in the transparency index according to which Swedish regulation could improve its regulatory governance according to the index chosen by the authors for their regulatory governance index. The first point is the fact that some European countries, including Sweden, rank high on the index (Sweden ranks fifth on the global ranking) which leaves few indications for how the governance in these countries could be further developed or improved. The second point is that there are chiefly two components that could render PTS a higher score on the index. One is that if PTS were to report directly to the parliament and not to the sector ministry and the second would be if the board of regulators were appointed by the parliament and not the ministry. Both these points would contribute to a higher degree of independence. This suggests searching for further sources of possible improvements.

Hanretty et.al. (2012) examine regulators of competition, telecom, energy and rail, in the UK, France, the Netherlands and Germany. They aim at mapping the interrelationship between perceived quality of regulation and independence, accountability and resources. The results are statistically significant positive links between both perceived quality and independence and perceived quality and accountability. The authors go to great lengths to sort out components that contribute to the measures of independence and accountability.

They find that for some criteria all regulators score the same and that consequently these criteria although they may be important determinants of perceived quality they cannot be used to distinguish between regulators. For the remaining criteria some are still shared by most regulators and thus are described as basic to achieving the status.

For accountability the criteria are whether or not goals are explained, reasoned decisions are published and that there are rules on procedures and participation in decisions and rule making. The most ambitious criteria concern how regulators may set standards for themselves by which they may be evaluated. Among these criteria are an annual plan of work, if the regulator follows a code of conduct, if the regulator has an advisory board and finally if the regulator is subject to periodic performance evaluation. Performance evaluation is described by Hanretty et.al. (2012) as belonging to the last stage of accountability and the most demanding criterion. As regards quality Hanretty et.al. (2012) emphasise that quality is a contentious concept (p 51). Nevertheless they do believe that peer evaluations are a suitable proxy for the overall 'true' level of quality.

The theme of evaluation brings us to the theme of analysis and evaluation of regulatory decisions. The OECD has now for some time contributed several reports and studies on regulatory governance. In the central document "Recommendations of the Council on Regulatory Policy and Governance" (OECD

2012) the OECD goes further on the issues of analysis and evaluation of regulatory governance and decisions. In particular the fourth paragraph recommends that Regulatory Impact Assessments should be integrated into the early stages of the policy process. It also emphasises that analysis should clarify policy goals and consider alternative means to achieve them. The purpose of Regulatory Impact Assessments is primarily to guide policy design and support decision making ex ante. In this process the regulator is recommended to “consider the correction of market failure” (p. 10). In the fifth paragraph the regulator is urged to integrate programmes for review and revision of existing programmes. In the sixth paragraph public authorities are recommended to regularly publish reports on regulatory performance.

In the “Better Regulation in Europe - The EU 15 project” on Sweden (OECD, 2010) a central conclusion is that Sweden has a strong and well established public governance framework. The report continues to portray the Swedish Better regulation process as presenting progress. At the same time the polite OECD team does make some critical observations. It observes that Sweden had acknowledged (p 11) that it had failed to develop an effective system for producing impact assessments of new regulation. It also concludes that the transposition of EU directives could benefit from wide ranging consultation and evaluation (p 5). Also a strategic missing link is an overall evaluation of the Better Regulation agenda. The author would add that regular evaluations of regulatory policies in general may benefit the efficiency of these policies.

Two recent studies of regulatory impact assessments have been carried out in Sweden. One study researched the Swedish Transport agency (Lindberg och Nerhagen, 2013) that is in charge of most regulatory issues for the transport sector. The other study looked at the Swedish civil contingency agency (Hultkrantz och Nerhagen, 2013) which is responsible for regulations concerning safety issues like e.g. dams and flooding. Both these conclude that there is considerable potential for improving the process for and the quality of the results from the regulatory impact assessments. In particular Lindberg and Nerhagen (2013) point out that alternative solutions seldom are analysed and that effects seldom are quantified (Appendix p. 34). The authors also stress the need for educating employees in the concept of market failure and the welfare economic justifications for policy (p. 30).

## 2 Method

Observing the analysis of an agency requires some definition. In the present paper we have delimited the PTS’s understanding to its strategic documents (PTS 2009 and 2013a). The main reason is that these are summarizing documents intended to communicate the overarching perspectives on PTS’s regulatory activities.

The norm against which the PTS’s documents are compared are the OECD (2012) recommendations for regulatory policy and governance. These recommendations point to a welfare economic

perspective and terminology including economic concepts like consumer welfare, efficiency and market failure.

There are at least two potential fallacies in this approach. The first is that there may be analyses both within the PTS and at the EU level that are not covered by this approach. By focussing on a narrow set of documents the investigator may leave out other documents where analysis is formulated. The defence to this argument is that the legislators and the general public need to be reminded about the most important basic arguments for a policy and the most important arguments (and possibly sources for these). A strategic document is just the place for such a reminder.

The second potential fallacy is the following. A policy may be seen as having a hierarchical structure with some fundamental elements upon which other elements are posed like building blocks. When elements at a more detailed level are added or adjusted it may suffice to do the policy analysis in that particular context. If this is the case going over the reasons for the basic structure may be irrelevant and distract the reader from the most important parts of the analysis. There are two parts to the defence against this argument. The first is parallel to the above defence to the first fallacy and is that a reader will be helped by some map as to the context in which a new policy instrument is placed. The second is that the analyst must be careful to present the analysis where the regulator sets a new policy instrument into context.

In evaluating the transparency and accountability of telecommunications policy the criteria suggested by OECD and the research on transparency, accountability and independence have been synthesized into the following criteria.

1. The current policy has been subjected to a regulatory impact assessment by an independent body.
  - a. The national policy objectives are formulated independently of the EU policy to advise the Swedish legislators and public, and are explained.
  - b. Regulatory Impact Analyses are integrated at early stages of the policy process
  - c. Alternatives to the current policy have been analysed
  - d. The current goals are regularly followed up
2. The regulatory body, PTS, has:
  - a. A strategy with
    - i. clear and explained goals
    - ii. an analysis of markets and developments
  - b. Regulatory Impact Analyses are integrated in suggestions for revision of current rules and these analyses are framed in terms of market failure and investigate alternatives
  - c. An annual plan of work
  - d. A code of conduct, with rules on participation in decisions and rule making

- e. An advisory board
  - f. Is subjected to periodic performance evaluation
3. The regulatory decisions
- a. Are published with reasons and explanations for their form.
  - b. The analysis is framed in terms of market failure.
4. Evaluation
- a. The regulator has programmes for review and carries out revisions of existing programmes
  - b. Reports on regulatory performance are regularly published either by the regulator or by an independent body.

### 3 The assessment of the current Swedish policy

This section aims to assess to what extent the current policy in Sweden is subjected to something like a regulatory impact assessment, and to what extent the four sub-criteria listed above are met by Swedish policy.

Current Swedish policy may be said to be formulated on three levels; by EU legislation, by national legislation and by the requirements formulated by the Swedish regulatory agency PTS following the regulation. The European policy and its goals are formulated in European legislation in the relevant directives. The Swedish national legislation transposes EU legislation and adapts it to be consistent with existing legislation and legal institutions. The Swedish legislation also transposes the overarching policy objectives. These goals are supplemented with a national broadband policy, stating the diffusion of high speed broadband in the population.

The central goal formulation in Swedish policy is that users “shall have access to reliable and efficient electronic communication and best possible benefit in terms of quality and price” (LEK 2003:3891 kap § 1). In 2009 this goal was supplemented by a national broadband strategy (Swedish Government, 2009), where a goal of 90 per cent of all households having 100 Mbit/s in 2020 was introduced.

The transposition of the first legislative packages from EU to Swedish legislation was preceded by a Swedish commission that considered their adaption to Swedish legislation (SOU 2002:60). This gave the opportunity to consider and explain the objectives. The later supplementation of the broadband strategy (Swedish Government, 2009) was a bit more arbitrary. This implies that Swedish policy objectives have partly been introduced via the conventional legislative path and partly as a government initiative.

Before new EU legislation is introduced there is now since some time a rule requiring the European Commission to perform a regulatory impact assessment. This document is intended to guide the European Commission and the member states in their formulation of EU legislation. Presently it is however unclear to what extent these impact assessments or other balanced material is considered by wider circles of stakeholders in Sweden. Or to which extent Swedish ministries actively consult stakeholders.

It is, however, clear that neither the Swedish government nor the PTS, have recently performed anything more than superficial assessments of impacts for the consequences for Sweden of either new EU legislation or new Swedish telecommunications legislation. Furthermore the Swedish positions as regards the EU legislation are not preceded by anything close to the scrutiny preceding national legislation.

A public commission (SOU 2002:60) regularly precedes changes in Swedish law. This was the case when the Electronic Communications Act was enacted. Thereafter several revisions have taken place where some have been preceded by public commissions (e.g. SOU 2006:88).

One of the central purposes of these commissions is to sort out a possible, reasonable and potential compromise propositions for a reform. The commission reports are however seldom appended with an analysis of effects (Gunnarsson and Lemne 1998). Gunnarsson and Lemne (1998) did not study the issue of to what extent the commissions study alternatives. They did however discuss the role of commissions to produce a good compromise. This author's experience is that it is rare for commissions to consider alternative solutions.

OECD (2008) describes a Regulatory Impact Assessment (RIA) essentially as a cost benefit analysis of the new regulation. This implies assessing at least the most important effects quantitatively. With compliance costs on the one hand and citizen benefits on the other hand.

An important precondition for a regulatory impact assessment is the search for alternative methods to reach the desired improvement. An analysis of such an alternative may in principle be costly. Such alternatives are therefore seldom analysed in Swedish government commission reports. We conclude the analysis of the presence of regulatory impact assessments with the observation that Swedish consequences appear to be rarely analysed neither at the EU-level nor at the national level.

If the public and the legislators desire to evaluate the choices and design of policy instruments there is a need to follow up on both the goal attainment and the efficiency of individual policy instruments. In the case of the Swedish Electronic Communications Act there have been some ad hoc follow ups initiated by the government.

In 2003 the Swedish government commissioned the PTS to suggest indicators for following the attainment of the goals for electronic communication. The following year PTS delivered a report suggesting a system of indicators. So far the Swedish government has not answered to PTS proposal. This has not led to a systematic follow up of the goals at national level by the PTS. Some aspects have however been covered by the annual reports from the PTS, which we will return to below.

In 2010 the Swedish government initiated a follow up of the broadband strategy (2009). The first follow up was published in PTS (2011). The follow ups cover many central aspects of developments in the markets like yearly investments, market shares and penetration.

Shortly after the Electronic communications Act (2003:389) was enacted emerging problems were perceived. A government commission (SOU 2005:4 p. 617) noted that there was an emerging problem with appeals of decisions taken by the PTS on operators with significant market power and obligations for such. Another government commission (SOU 2006:88) noted that there was a lack of precision in

decisions taken by the PTS and this was confirmed in PTS annual report for 2006. The commission (SOU 2006:88) concluded that the prolonged handling in administrative courts contributed to a considerable regulatory uncertainty that could harm the willingness to invest in the Swedish telecommunications sector.

In 2013 the Swedish National Audit Office (RiR) (2013) examined how the appeals processes concerning the PTS SMP decisions had developed in the administrative courts. It found that both the absolute and the relative number of appeals declined. In 2003-2004 43 out of 54 or 79 per cent decisions were appealed and in 2009-2010 only 22 out of 64 decisions were appealed or 23 per cent (p. 38). On the other hand the ratio of decisions that were changed by administrative courts increased from 41 per cent in 2003-2007 to 87 per cent in 2008-2012 (p. 40). The RiR concluded that it would be desirable for the PTS to follow its decisions and how they fare in the courts more closely (p. 46). Furthermore that the PTS has had insufficient routines for learning by continuously collecting experiences from its decisions and court processes (p. 57).

The RiR asked operators how they perceived the legislative situation. The response was that they perceived the situation as uncertain and some stated that they had reduced their planned investments accordingly (p. 41). It is worth noting that bringing appeals to the administrative courts will cost the firm its own costs for handling the appeal. It does not, however, come with neither the risk of paying trial costs nor damages to authorities or competitors if losing. The rules for entering new material at later stages are also very liberal leading to cases where operators enter blank appeals filling them in at later stages.

To summarize we find that the initial EU objectives were transposed as national objectives and introduced and explained in a public commission report (SOU 2002:60). In addition the Swedish government introduced goals in the context of a broadband strategy. These were not preceded by the customary concept of public consultations. Swedish policy is subject to public regulatory impact assessment to the extent that this is done by the EU Commission. There is no assessment done for particular Swedish consequences unless it is done by a Swedish commission which is rare. Furthermore Swedish commissions rarely analyse policy options. The overarching objectives of the electronic communications act are followed as they are partly covered by the broadband strategy follow up. There is a follow up of the broadband strategy objectives and thereby partly but not completely of the objectives in the electronic communications act.

## 4 The formal and potential responsibilities of the PTS

This section aims to assess the PTS with respect to its strategy, analysis of market developments, if and how regulatory impact assessments are published, presence of market failure analysis and analysis of policy options. The formalisation of processes is examined in terms of the presence of an annual work plan, a code of conduct and consultation, an advisory board and periodic performance evaluations.

As stated initially strategic issues are defined here as the ensemble of goals, developments, current policies and possible alternative policies. These are fundamentally political issues which therefore require sensitive handling by civil servants. At the same time the demands for transparency and accountability require clarity and precision in the presentation of the effects of regulation and actual outcomes.

### 4.1 Strategic analysis

In this section the strategic documents of the PTS are analysed with respect to the analysis of goals and developments with respect to the goals and competition. The sources are primarily two strategic analysis documents published by the PTS (PTS 2013a and 2009). In addition the follow up of the market is spread out in several documents of which the SMP decision documents<sup>1</sup>, the follow ups of the broadband policy, and Svensk telemarknad (a biannual consumer survey) are the most important. Furthermore the Swedish auditor general recently provided new data on the appeals of the PTS decisions and the prolongation of the implementation of the law.

The structure of the strategic documents follows the formal remit closely. What is the mission from the government? What are the tasks of PTS according to legislation? Consequently an analysis of the political goals is practically non-existent. In the latest strategic document (PTS 2013a) the PTS does not portray itself as an active partner in developing the goals. In the earlier document the PTS (2009 p 40) emphasised the role of presenting statistics and analysis for political decision making. The goals were more extensively analysed. The PTS then suggested a further analysis and clarification. No indication was however given as to what different levels of ambitions or achieving them with different policy would cost. Further, in the document the PTS (2009 pp 52-55) discussed levels of ambitions. Otherwise there was little discussion of the consequences of different goal ambitions.

The PTS also largely refrains from commenting on goal attainment in the strategic documents although goal attainment is addressed in the annual reports (e.g. the 2012 report). The PTS chooses to present developments in terms of broad statements on the developments as will be exemplified below. There are few tables and diagrams in PTS (2013a) presenting market share statistics or price and cost trajectories.

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<sup>1</sup>An important part of PTS strategic analysis is carried out in the preparation of the SMP decisions and obligations.

In addition to the annual reports the developments towards the broadband goals are depicted in annual reports on broadband policy development (e.g. PTS, 2013b). In this document the PTS summarizes the development of investments and formulates assessments of the development of the supply of fibre up to 2020. The development of investments is in a diagram but no interpretation of the diagram is given. In Haraldsson and Pyddoke (2012) a similar diagram is interpreted as a stagnation of investments. The conclusion on the expected development is that in most cases the goal of 90 per cent citizens having access and actually using broadband will not be achieved.

The PTS (2013a) presents the following main observations on the developments of the telecommunications markets. Generally there is a fast increase in the volume of data transmission (PTS 2013a, p 12). This in turn requires a steady increase in capacity. For the fixed broadband subscriptions this is done by a successive move to subscriptions involving higher speeds and fibre based subscriptions (PTS 2013a, p 17). This development is expected to continue.

Owners of apartment buildings in urban areas are important actors and such buildings have a high degree of coverage while single family houses have a lower degree of coverage. In 2011 the urban network operators owned 80 per cent of the access points to fibre based nets (PTS 2013a, p 28).

There is also a dramatic decrease in fixed telecom speech traffic (PTS 2013a, p 21), which is corresponded by a fast increase in the number of mobile broadband subscriptions (PTS 2013a, p 12). This has already induced mobile operators to cooperate to expand capacity (PTS 2013a, p 30). Other noteworthy observations are:

- “IP-fication” meaning that formerly separate communication services are used through the internet<sup>2</sup>. This opens for various kinds of package deals which, according to PTS, may have serious implications for competition. This has ramifications for competition through the large potential effects it has on revenues generated by minute based prices. New technologies allowing for differential treatment of customers and services may come to be used by operators to also differentiate pricing.
- Most of the investments in fibre access networks are done either by TeliaSonera or by 180 urban network companies (in many cases sponsored by municipalities). These investments are primarily done for firms and for apartment buildings. The implication is that infrastructure competition on commercial grounds does not seem to be forthcoming for the whole market.
- The development of “communication operators” in Sweden.

This section argues that the strategic analysis of PTS is built up on broad observations of market development and deployment of the remedies suggested by EU law and the European Commission. There is, however, little of coherent discussion of how goals could be attained by different policy

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<sup>2</sup>This opens for various kinds of package deals which may have serious implications for competition.

options or else be reformulated. In the PTS (2013a) there is no designated analysis of the interaction between the goals of European and Swedish telecom policy, the potential policy instruments and consequences. The analysis rather presupposes a high degree of prior knowledge of development of markets, competition (or rather lack of) and regulation.

#### 4.2 Regulatory impact assessment

This section aims at analysing the PTS's presence of regulatory impact assessment of suggested policies and remedies.

The remedies discussed in PTS (2013a) are primarily application of the remedies associated with the European legislation and overseen by the European Commission. In particular the PTS (2013a p, 54 and PTS 2009, p 56) has been looking at the potentially upcoming needs for regulation. PTS (2013a) discusses the possibility to impose mandatory leasing of physical channels for fibre, the lifting of current price regulation of fibre leases and a possible geographic differentiation of fibre regulation. The possible consequences of these are not analysed in the strategic documents. The PTS also discusses developments that may require yet unnamed remedies.

In PTS (2009) the following further remedies were envisaged; e.g. regulation of the supply of the copper network, regulation of access to the copper lines closest to customers in the form of mandating the former incumbent to continue to supply services through copper, functional separation of the supply of copper and fibre infrastructure.

The remedies suggested are discussed in broad terms and are not explicitly framed in market failure terms. Neither are the remedies analysed in comparison to other options. An analysis in market failure terms would require some theoretical tool for distinguishing between inefficient market outcomes and their causes from broader value judgements on the development. There is no suggestion of the possibility of impact analysis for the potential remedies suggested by PTS.

In PTS (2013a) the PTS gives some observations on the likely development of competition. PTS central assessment for the Swedish market is that without policy, parallel fibre nets are not likely to be established in the whole of Sweden (PTS 2013a, p 28), and hence competition in the supply of fibre networks is not likely to occur (PTS 2013a, p 51). The PTS notes that at the present it is primarily municipal firms, real estate owners and TeliaSonera that invest in fibre networks. There is also a tendency that TeliaSonera acquires urban fibre networks. PTS therefore deems it likely that no other operators will engage in fibre networks. From this assessment the analysis jumps to the statement of the political desire to expand fibre networks. This shortcuts the questions of what precisely is the market failure that motivates policy and how much network expansion would be likely with current policy (or with less mandatory leasing of fibre). The analysis also excludes the question how much more expansion can be reached with different policies and what the benefits and costs from this would

be. Instead of posing and answering the questions in the “regulatory impact assessment” spirit the PTS goes on to emphasize its obligation to expand obligations for SMP operators (PTS 2013a, p 54).

A further development of the central assessment is that the expansion of fibre that does occur on commercial grounds is concentrated to buildings with several homes. In an ensuing section the PTS (2013a p 55) goes on to argue the necessity of a continued regulation with obligations to allow access to fibre networks.

Large costs for continued investment combined with low profitability create a tendency that the small urban network owners seek cooperation. This may put continued competition at risk. This has also triggered the association of urban networks to take initiatives to change the law prohibiting municipally owned firms to invest outside the municipality.

During the first part of the first decade of this century the supply of broadband expanded by different forms like the cable TV. The high degree of competition makes it harder to foresee the kinds of business models that are likely to develop.

An increasing degree of cooperation between mobile operators may contribute to a risk for less competition (PTS 2013a, p 44). The PTS does however assess that as long as the mobile operators compete for end customers the risk of less competition can be countered.

Unless the government knows that 90 per cent of Swedish households want to pay for the broadband speeds of the policy goal, this implies that the government wants all citizens to be part of this development independently if an individual can or wants to pay what it costs. This perspective may have good reasons. It may be necessary to have internet to be able to e.g. to take part in the dissemination of news, culture and commercial services as well as receive information from authorities and to declare your income to tax authorities. This is however presented with formulations like “the access to broadband should chiefly be on commercial grounds” (PTS 2009, p. 45). As a contrast the recent commission on a more efficient support for fibre expansion states that “it is not obvious that the social benefits from the current policy instruments to stimulate /fibre expansion/ exceeds the social costs in the short run” (SOU 2013:47 p 122). For the long run the commission refrains from a definite assessment.

The lack of clarity concerning the goals and ambitions to persuade citizens to acquire broadband or impose it on them also leads to ambiguities when the social gains from providing broadband are not articulated. Neither are the most efficient forms of government intervention investigated.

In an interview with representatives for PTS, they explain that the authority regularly meet with the government to explain developments and options for policy. These explanations, however, appear to leave few traces in the published reports.

The PTS analysis concludes that an analysis of the goals is needed. There is a clear need for an analysis framed in welfare theoretic terms separating which development can be expected on a market with a minimum of efficiency regulation, and what further motives in terms of democratically motivated need to provide citizens with the means to communicate with public agencies. A related question is if a “broad spectrum of affordable services” is something that will be spontaneously provided. Furthermore an analysis is needed of if the current development of urban fibre networks is compatible with the idea of a spontaneously intensified infrastructure competition.

To summarize, this section argues that regulatory impact assessments are not integrated in suggestions for revision of current rules and these analyses are not framed in terms of market failure and do seldom investigate alternatives. The suggested remedies are not analysed for effects and the discussion cannot be said to constitute a regulatory impact analysis.

#### **4.3 Annual plan of work**

An annual plan of work may serve several purposes. First, it can be the obvious reference point against which the last year’s performance may be measured. Second, it will force the regulatory agency to consider what aspects of its regulatory activities it will desire, or have to, communicate in advance. By communicating in advance the planned work of the agency, it will provide the actors in the market time and possibility to adapt. Thirdly the activities of the upcoming year will ideally be followed by further regulatory activities covering other aspects and building on the findings of the current year.

Obviously the PTS produces several documents that manifest different aspects of the plan of work for an upcoming year. There must be a budget and the strategic agenda (PTS 2013c), published annually since 2008, summarizes the objectives of the electronic communication policy and gives an overview of the central activities related to each objective to be done during 2013. The PTS used to have an annual plan of work (see e.g. PTS 2004 and PTS 2008). In 2013, however, the agency didn’t publish an annual work plan.

#### **4.4 The regulatory decisions**

For the telecommunications markets the PTS mainly produces three kinds of regulatory decisions: the SMP decisions, decisions in supervision cases and decisions in dispute resolutions

The ultimate responsibility for the handling of the decisions in the SMP process lies with the European Commission. Therefore the explanations of the Swedish decisions are characterized by explaining which rules are invoked and explaining how the rules are applied. To a large extent the PTS decisions refer back to the Commission decisions. The PTS therefore justifies its decisions primarily in terms of how its decisions comply with legislation and recommendations from the European Commission. It is

not constructed as the substantive arguments for the ultimate benefits and costs from the regulation or in market failure terms in Sweden.

Of course it is not possible to iterate the ultimate reasons for the regulation for each and every change in the details of the regulation. Such justifications must by necessity be constructed as justifications for the detail. There is however a need for each member state to justify how European Law.

#### **4.5 Code of conduct**

The PTS states that it collects experiences while working with the ongoing process of developing new SMP-decisions and the handling of supervision cases and dispute resolutions. There have also been various versions of an internal handbook for handling of cases at the PTS. This accumulation however has not resulted in any public document. According to the PTS the material feeds into the decision processes for new SMP decisions, supervision cases and dispute resolutions.

The PTS arranges and participates in number of fora and consultation groups for issues like consumer, standardization etc. There is, however, currently no public code of conduct.

#### **4.6 Advisory board**

An advisory board can serve several purposes. First, it can give an outside perspective on how PTS is perceived by the well-informed general public. In this respect it merely complements the role of the board of directors. Second, if it includes academics from relevant disciplines they may advise the PTS on scientific method in its investigations and in its personnel policy. Thirdly, it may also advise on issues concerning how PTS can acquire advice from other experts. The PTS does not have an advisory board.

#### **4.7 Periodic performance evaluation**

Currently the most important sources for an overview of regulatory performance are the strategic analysis documents, the SMP-decisions, the annual reports, the Swedish telecommunications market report. There is however no periodic performance evaluation of the PTS.

### **5 Evaluation**

The subject of a report on regulatory performance could in principle deal with the following subjects.

- a. A quantitative description of the development of markets in terms of turnover, prices, the number of active firms, market shares etc. A particularly important dimension for a sparsely populated country like Sweden is depicting the geographical differences in penetration.

- b. A quantitative description of the activities of the regulator. For example the number of SMP decisions, supervision cases and dispute resolutions, the handling costs of the PTS for the respective decisions, the handling times, the ratios of appealed decisions, the ratio of decisions that are upheld by appeals courts, and the delays from initial decisions.
- c. Review and revision of existing programmes
- d. Theoretical discussions of the potential effects of the regulation compared to a counterfactual scenario
- e. If possible modeled results for the effects of particular pieces of regulation

Of these four main themes for regulatory performance the two first could be presented regularly by the regulatory body itself. The regulatory body could also be charged with the task of doing the other two tasks. The experts at PTS, however, point to an important qualification, if the PTS openly questions its own handling or its own methods this will provide “ammunition” for appealing firms and undermine its cases in the administrative courts. This is a valid argument for improving the case of the PTS. At the same time it demonstrates the problem of giving conflicting roles to a government agency. In this case the conflict between efficient handling of the cases on the one hand and a transparent evaluation of the PTS actions on the other hand.

For more evaluatory tasks the government may want to commission an independent evaluation body to do the task. Such a task could involve assessing the development of the productivity, staff competence and organization of the regulatory body.

The evaluation of the regulation in the sense of legislation is inherently a political task. The mission to evaluate regulation policy is therefore difficult to do in a way that will be perceived as insightful, important and objective. This is however the core of the task of developing better regulation and is inescapable for a government wanting to have the best possible performing regulation. There are however some options.

The government may also create a separate evaluation agency. Giving the task to a government agency may raise the suspicion that the evaluation of the current government’s action will not be objective. It may therefore be difficult to handle for a public administration. The government may also direct research financing to bodies wanting to do research on regulation. These may range from think tanks (mostly sponsored by stakeholders), over consultancy firms and research institutes to universities. Possible drawbacks with this system will be less of continuity and consistency.

### **What need for regulation?**

In welfare economic terms policy can either be justified by market failure or by distributional objectives. Either way a well formulated justification would identify the motive and analyse at least two different policy instruments that could lead to goal attainment. The argument for formulating

policy analysis in these terms is that it requires its authors to identify a clearly formulated reason for why the markets could not be expected to deliver an efficient allocation. The analysis could also give a foundation for choosing between different policy instruments. This is the core of a regulatory impact analysis.

The welfare economic programme would include the following basic points:

- Identifying significant market failures or distributional issues
- Identifying potentially effective policy instruments to alleviate market failures or distributional deficiencies
- Identifying a relevant “do nothing” alternative
- An analysis presenting a set of empirical relationships (or assumptions) by which an assessment of which policy instrument should be chosen.

Turning now to the strategic analyses of the PTS we have seen that they are not formulated in welfare economic terms. The concept counterfactual development also seems largely absent. In the absence of reliable models of effects the choice between competing policy instruments must rest on reasoned assumptions about their consequences. Such analysis is also largely lacking.

Ultimately the goal of the EU directive and the Swedish law is to achieve “safe and efficient electronic communications at lowest possible social cost” LEK 1 kap. 1§ (2013a, p 49). The underlying directive presumes that “a competitive market will give users access to a broad spectrum of services” (dir. 2009/140 p.23). For this purpose competition is seen as a means and not an end. Therefore the legislation emphasises the importance of achieving efficient investments.

There are clearly two aspects of policy, one promoting competition when possible, but also to ensure investments even when the competition is not likely to arise. In Sweden and Europe this has implied an increasing focus on stimulating a continued expansion of the fibre network (2013a, p. 51). The stated motives for this are to increase the competitiveness of the Swedish (and European) economy and that all citizens should have access to important services in the future.

It is at precisely this point (2013a, p 51) that policy seems to hover between an idea of investments driven by the ability and willingness to pay by individuals and organisations in the market and an idea that politics should provide these services even if the willingness and ability to pay falls short. The idea seems to be that for some reason market demand for fibre capacity may not be manifest enough to ensure sufficient investment. In welfare economics terms, this analysis lacks a precise identification of which market failure or distributional objectives that may motivate the need for policy.

In the terms of the OECD (2012) recommendations, this is a case where it could be useful to have an analysis what the likely development may be and what the policy options are and what consequences

they would have. The PTS rightly points to the need for further analysis of the objectives (2013a p. 63), but is this not precisely what a strategic analysis should do? The point here is that PTS, over time, justly does several of the analyses needed, but that in addition, an overarching welfare theoretic perspective is needed in a strategic analysis.

In the section on the need for regulation (PTS 2013a) the PTS emphasises its obligation to consult with the European Commission on the decisions on obligations for operators with “significant market power” (SMP). A further point here is that as Sweden’s telecom market is one of Europe’s most liberalised and developed, and that the design of policy in Sweden may very well be at the European front. The position of PTS is therefore is of significant importance for the EU, and it may be highly desirable that the PTS develops and explains its position not only to the Commission but also to the Swedish government and to the general public.

A welfare economic analysis of the Swedish market failure could imply reasoning along the following lines. High costs are a hurdle for expansion. An argument for stimulating investment could either be high cost in combination with short sighted investors or that investors do not fully appreciate increasing returns from scale in the provision of broadband and that given a population wide investment costs could be covered by revenues given a sufficiently large supply. An alternative argument could be that it would be motivated to subsidise particular clients and the expansion of the demand. The latter would imply a higher valuation to society of the services thus provided than the forgone welfare of tax payers having to finance the subsidy.

## **6 Summary and conclusion**

The purpose of this paper is to examine the transparency and accountability of the process for telecommunications regulation in Sweden. The paper takes as its points of departure that the Swedish regulatory process ranks high in a transparency index but that it could earn higher scores if the PTS were to report directly to the parliament and if the board of regulators were appointed by the parliament. A second study points to strong positive links between perceived quality of regulation and the independence of the regulator on the one hand and the accountability on the other. A third observation is that a formalisation of the regulatory process in terms of an annual plan of work, a code of conduct, an advisory board and periodic performance evaluation may contribute to the perception of accountability. Fourthly, the most ambitious dimension suggested by the OECD is that Regulatory Impact Assessments should be integrated into the early stages of the policy process and consider the correction of market failure. Finally, the paper also departs from the hypothesis that there is a potential for developing a stronger capacity for regulatory quality and regulatory reform by reforming institutional design supporting open learning and diffusion of best practices (OECD 2012, p 1).

A first observation concerns the shared responsibility and accountability. The EU introduces collective lawmaking at the union level where the member states have a significant say. At the same time

member state parliament and government are answerable to its voters both for how it acts in EU legislation issues and how it performs its mandate on national level. For telecoms regulation this introduces a sort of double commando by which the European Commission has a responsibility to oversee the national telecoms regulators. This seems to have created an initial submissiveness at the Swedish national level in the sense that the Swedish legislators and the Swedish regulator appears to have given up the ambition to communicate the main choices for the design of the regulation and assessments of its consequences. There does not appear to be any studies analysing if this is changing but there are some indications that Sweden is starting to pick up on analysing consequences. By not explicitly considering the central choices for the design of the regulation and not regularly analysing its consequences, the Swedish government relinquishes its possibilities to better understand how the EU and national regulation works in Sweden.

The initial EU objectives for electronic communications were transposed as national objectives and introduced and explained in a public commission report (SOU 2002:60). In addition the Swedish government introduced goals in the context of a broadband strategy. These were not preceded by the customary public consultations. Swedish policy is subject to public regulatory impact assessment to the extent that this is done by the European Commission. There is no assessment done for particular Swedish consequences unless it is done by a Swedish commission which is rare. Furthermore Swedish commissions rarely analyse policy options. The overarching objectives of the electronic communications act are followed up as they are partly covered by the broadband strategy follow up. There is a follow up of the broadband strategy objectives and thereby partly but not completely of the objectives in the electronic communications act. The analysis proceeds to analyse central strategic documents published by the PTS to find out if there is a potential to develop in the dimensions leading to perceived quality. The findings are that the strategic analysis of PTS is built up on broad observations of market development and deployment of the remedies suggested by EU law and the Commission. There is, however, little of coherent discussion of how goals could be attained by different policy options or else be reformulated. In the PTS (2013a) there is no designated analysis of the interaction between the goals of European and Swedish telecom policy, the potential policy instruments and consequences.

Regulatory impact assessments are not integrated in suggestions for revision of current rules and these analyses are not framed in terms of market failure and do only seldom investigate alternatives. The suggested remedies are not analysed for effects and the discussion cannot be said to constitute a regulatory impact analysis.

Although the PTS has several documents that manifest different aspects of the plan of work for an upcoming year, like the budget and the strategic agenda (PTS 2013c), there is currently not a published annual work plan.

The PTS has developed versions of an internal handbook for handling of regulatory decisions. There is, however, currently no public code of conduct. There is no advisory board. The PTS does not publish systematic regulatory performance evaluations.

The conclusion from the above analysis is that on all these accounts there is potential for increasing the efforts to analyse alternatives and to communicate more of the analyses etc. The responsibility for realising this potential is shared by European legislators, the Swedish government and the PTS.

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