

Entrepreneurship Legal Underpinnings: A Case from the Telecommunication Industry in Brazil¹

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Abstract:

Objectives: This paper discusses the relation between regulation and the concept of entrepreneurship to assess the impact of its use as a legal argument in a case from the Brazilian telecommunication industry, the so-called Actium case. The case deals with an authorization to provide a telecommunication service as a mobile virtual network operator, denied by the Brazilian National Telecommunications Agency (Anatel), which ruled there was no legal basis for that purpose.

Prior Work: The paper draws from several studies about the entrepreneurship factors (Cantillon, 2001; Stam, 2008; Knight, 2005; Hébert and Link, 1989; Shane, 2003; Peneder, 2009) and the general role of regulation (Herren Aguillar, 1999; Gunningham & Rees, 1997; Latzer et alli, 2003). Also, the paper builds on a particular notion of public interest from Marques Neto (2002).

Approach: This article adopts a case study approach to assess the relevance of the concept of entrepreneurship to a regulatory ruling in the telecommunication industry in Brazil. For that purpose, I describe the pertaining elements of the entrepreneurial phenomenon and the Brazilian constitutional background, especially related to the freedom of trade and commerce. Then, I describe the relevant facts of the selected case, and analyze the consequences of applying the concept of entrepreneurship to the legal reasoning process, especially to the meaning of equality before the law.

Results: The conclusion is that the concept of entrepreneurship rests upon legal underpinnings in Brazil, and its use as a legal argument could affect a regulatory ruling pertinent to a given telecommunication service.

Implications: According to the Brazilian constitutional and regulatory framework for the telecommunication industry, more in-depth analyses are required from Brazilian authorities when assessing innovative business models. A proper reasoning is needed to deny an authorization to provide services, balancing public interests in conflict.

Value: Prior legal analysis of the Brazilian telecommunication regulatory framework did not recognize the concept of entrepreneurship as a legal argument. Entrepreneurs in Brazil could benefit from this approach, opening the way for more dynamic business models and new telecommunication services.

Key words: Regulation, entrepreneurship, telecommunication, business model, Brazil

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1. Introduction

This paper analyzes the legal relevance of the concept of entrepreneurship in a Brazilian telecommunication industry case. For that purpose, we chose the Actium case, in which the Brazilian National Telecommunications Agency (Anatel) denied an authorization to provide a telecommunication service as a mobile virtual network operator, as it ruled there was no legal basis for that purpose. This paper discusses this ruling, considering that the concept of entrepreneurship may find legal basis in Brazil and affect the legal reasoning pertaining the case.

2. Regulation and degree of regulatory concentration

Regulation means both state intervention and opening freedom spheres in which the rules of an activity (here, a telecommunication service provision) are defined by the actors who undertake it (Herren Aguillar, 1999, p. 29-30). Considering a general legal duty to satisfy public interest, the absence of explicit rules governing a regulated activity must be justified by clear legal guidelines. *Prima facie*, the concept of entrepreneurship may be evoked as a legal guideline to set the due degree of state intervention over a regulated industry, as well as affect the interpretation of the current regulatory framework.

Herren Aguillar (1999, p. 29-30) defines regulation as a public policy that assigns rights to public and private actors of a given activity. They can be “positive” rights that impose duties and obligations or “negative” rights that enable different kinds of freedom. These often-called opposing extremes (Sundfeld, 2007, p. 65) may be connected through the concept of degree of regulatory concentration. According to Herren Aguillar, it means that there is a range of situations in between the state and the private industry pure responsibility on governing the economy – a *continuum* always managed by the state. He states that every freedom to undertake a business is a consequence of a state regulatory policy, a policy of “unconcentrated regulation” (Herren Aguillar, 1999, p. 211). If the right to undertake a business is limited to some extent, then the regulatory concentration will grow correspondingly.

The same phenomenon is commonly described as self-regulation and government regulation: “[...] it will be apparent that there is no clear dichotomy between self-regulation on the one hand and government regulation on the other. Rather, there is a continuum, with pure forms of self-regulation and government regulation at opposite ends. However, those pure forms are rarely found in the real world, in which distinctions between self-regulation and government regulation are incremental rather than dichotomous [...]” (Gunningham and Rees, 1997). However, it must be stressed that this regulatory *continuum* is managed by the state – for this reason called *regulatory* state, covering “technical regulations (regarding industry standards), market structure regulations (to limit the number of sellers and buyers) and behavioural regulations (to prevent anti-competitive behaviour; to control prices)” (Latzer, 2003).

The more the state relies on the companies to attend the public interest by their own, the more regulatory autonomy they will receive, i.e. a lower degree of regulatory concentration will apply. Put differently, the public interest justifies a change on the degree of regulatory concentration by the state (Herren Aguillar, 1999, p. 163). Considering the diversity of values and interests related to the whole regulatory framework and law, stipulating the content of public interest in Brazil is a complex task, plainly possible only looking for a given industry, service (Marques Neto, 2002, p. 156) or even a specific case. This is why public interest may be understood as a “nexus among legitimate private interests” (Marques Neto, 2002, p. 149).

Therefore, we are not allowed to assume a homogeneous definition of public interest, equally applicable to every regulated industry, service or case. So, the due degree of regulatory concentration will be defined through a management process in which all the legitimate interests are balanced, i.e. all interests based on social demands and legal principles. In this scenario, opening freedom spheres to the provision of a telecommunication service by private actors may be justified by a state decision based on a legally relevant argument, balanced with others. That is how the concept of entrepreneurship may be important if conceived as a legal basis for a quite low degree of regulatory concentration for a given activity. We shall address this issue in the next section.

3. Entrepreneurship: functional elements

There are several definitions of entrepreneurship in the economic literature (Hébert and Link, 1989, p. 41). Michael Peneder (2009, p. 2) indicates two factors that lead to this diversity. The first factor is that there is no

consensus about the essential functions that are assigned to the phenomenon. The literature suggests that the entrepreneurial phenomenon is responsible both for balancing market forces and creating market instability. In other words, depending on the chosen academic affiliation, entrepreneurship increases the allocative efficiency for the overall economy given certain means and ends (static equilibrium concept of competition) or generates a more dynamic environment through the progressive creation of new products, services, processes or markets (dynamic non-equilibrium concept of competition).

In addition, the interdisciplinary nature of the subject leads to a variety of concepts, involving economists, business scholars and managers, sociologists, psychologists, and so on, commonly disagreeing within their own scientific field about the essential aspect of entrepreneurs. For each scholar, there is a tendency to emphasize a certain aspect of the phenomenon, which is more important for his own research purposes.

Peneder (2009, p. 4-13) organizes different concepts of entrepreneurship considering different distinctive characteristics in seven categories from an economic perspective, from which we stress four that are more important to our purposes. They are: (i) risk-bearing; (ii) market coordination; (iii) innovation; and (iv) technology diffusion.

First, some authors take individual risk-bearing, or uncertainty, as the main characteristic of entrepreneurship. Cantillon indicates that some agents contract with suppliers and workers for a known price to produce goods that will be sold by an unknown price (Cantillon, 2001, p. 25). This uncertainty that the individual bears would justify his profit. In the industrial process, the so-called entrepreneurs assume the control and responsibility over the productive process and bear the intrinsic risk associated to the activity, while the workers join the enterprise with no concern about the outcome (Knight, 2005, p. 271). Therefore, to Frank Knight, bearing the risk of the venture is the distinguishing characteristic of entrepreneurs.

The second approach stresses entrepreneurship as a process of market coordination. Hayek states that the competitive process stimulates seeking profit opportunities through the information revealed by the price system (Hayek, 1945, p. 526). The entrepreneur would be an intermediate agent, alert to opportunities to assemble low costs on the supply side and high revenues on the demand side (Kirzner, 1973, p. 48). Over time, the outcome of the market coordination process is a balance between supply and demand for products and services - or allocative efficiency. Other so-called equilibrium theorists are Say, Smith, Ricardo, Bentham, Mill, Walras, Marshall, Clark, Dobb and Tuttle (Barreto, 1989).

On the contrary, Schumpeter understands that the creation of opportunities – and the corresponding economic instability – is part of the market dynamics. The distinguishing aspect of entrepreneurs when compared to other agents is the capacity of combining the factors of production in innovative ways, creating business opportunities. Therewith, entrepreneurship is not merely the invention of a new idea, the management of a company or the financial risk assumption of a business (Stam, 2008, p. 135).

As Schumpeter states: “The carrying out of new combinations we call ‘enterprise’; the individuals whose function is to carry them out we call ‘entrepreneurs.’ (...) As it is the carrying out of new combinations that constitutes the entrepreneur, it is not necessary that he should be permanently connected with an individual firm; many ‘financiers,’ ‘promoters,’ and so forth are not, and still they may be entrepreneurs in our sense. On the other hand, our concept is narrower than the traditional one in that it does not include all heads of firms or managers or industrialists who merely may operate an established business, but only those who actually perform that function” (Schumpeter, 1983, p. 74-75).

Put differently, discovery and exploitation of opportunities to innovate is also stressed as the main element of entrepreneurship by Scott Shane (2003, p. 4): “Entrepreneurship is an activity that involves the discovery, evaluation and exploitation of opportunities to introduce new goods and services, ways of organizing, markets, processes, and raw materials through organizing efforts that previously had not existed (...)”.

The last category is concerning the role of entrepreneurship for diffusion of technologies. Entrepreneurship unleashes a process of transferring technology to greenfield applications or markets. On the one hand, the technology itself produces economic instability as it represents an innovation. On another hand, transferring technology to a new market or application is part of a process of coordinating supply and demand. In this sense, diffusion of technologies is a chain that links innovation and market coordination.

Given this framework, the variety of content assigned to the concept of entrepreneurship is clear. However, even subjects as different as the appetite for risk, diffusion of technologies, coordination of supply and demand and innovation are linked by a common guideline, from the legal perspective: freedom, understood as an open legal sphere of protection to the individual action that faces or leads to uncertainty, innovation, and so on.

4. Legal basis to entrepreneurship in Brazil

Particular aspects from the entrepreneurial phenomenon, not its full meaning, should find a legal basis in rules that will serve as institutional support to freedom, together with the greater conceptual framework of entrepreneurship. In Brazil, the main component of entrepreneurship in its legal aspect is the freedom of trade and commerce mentioned in the Brazilian Constitution as a foundation of the Brazilian state (Article 1, IV) and economic order (Article 170), equivalent to “work” in its social value (Grau, 2006, p. 200 and 206).

Various specific meanings for the freedom of trade and commerce can be pointed, separated in two groups (Grau, 2006, p. 204). The first meaning is the freedom of contract as absence of state intervention in the economic domain, either by (i) the faculty to establish and manage an economic activity, or by (ii) protection from any state restriction except by force of law.

Celso Bastos, a well-known constitutional scholar in Brazil, states that the freedom of trade and commerce in this sense should be considered a “fundamental right”, i.e. an intrinsically right pertaining to each human being, since “a man can not be plenty satisfied until the appropriate means are given to him to protrude through a transpersonal act, that is, through the management of other men to achieve a goal” (Bastos, 1990, p. 16-17). The right to sell goods and services onto the market, and the required freedom of management to properly exercise it, would be a consequence of human nature. Thus, the entrepreneur may himself decide what to produce, how to produce and the selling price. That would be the rule and its restrictions are strictly exceptional. Therefore, the freedom of contract regarding the provision of public services, including telecommunication services, requires that the state does not oppose obstacles to the enterprise, for its socially desirable consequences (Grau, 2006, p. 207).

The second meaning for the freedom of trade and commerce is on the competition perspective (Grau, 2006, p. 204): freedom to compete, as (i) a faculty to persuade customers, other than through unfair competition, (ii) a proscription of practices that withhold or restrain competition, and (iii) a neutrality rule for the state before the competitive phenomenon, on similar conditions. Freedom to compete is the second central aspect of entrepreneurship in its legal aspect, considering that the enhancement of competition is an instrument to achieve welfare for consumers and the whole society along with the expected low prices and innovations.

It is obvious that the competitive process leads to unequal results, winning the best competitor. However, it assumes similar conditions for all involved players at least in the early stage (Grau, 2006, p. 209). That is the reason for the protection of competition in a material sense using antitrust laws or different treatment for small and medium enterprises.

The freedom of trade and commerce contains elements from the concept of entrepreneurship, especially: the ability to meet customers’ needs, to organize the factors of production, necessary to market coordination, the assumption of risk and liability pertaining the business, and so on. In turn, as seeking and exploiting opportunities figure as the basis of such competitive behavior, freedom to compete can be interpreted as a legal instrument that takes into account entrepreneurship as a socially desirable behavior.

Therefore, promoting entrepreneurship is a clear public interest. It follows that entrepreneurship is under legal protection, for being a human socially productive activity, and that the state should not restrict this activity unless there is a conflict with other public interests.

Freedom of trade and commerce, including freedom of contract and freedom to compete, is echoed in specific regulations of the telecommunications industry. In this regard one must mention articles 2, I to VI, 6, 71, 110, 127, I, II and IX, 128, 129, 136, 146, 150 and 155 of Federal Law n. 9.472, July 16th, 1997, the Telecommunication General Law (LGT). In all these articles, entrepreneurship is strengthened as an aspect of the freedom of trade and commerce in a broad sense and, in turn, reinforces this legal freedom, revealing a dimension of its overall meaning.

Entrepreneurship requires the freedom of trade and commerce in the legal arena, and materializes the social value of the production, i.e. wealth and welfare, including to the provision of public services as telecommunications services. This attribute turns entrepreneurship into a public interest, as it supports structural principles of the Brazilian constitutional economic order. Here we find the legitimacy needed to use the concept of entrepreneurship to gauge the degree of regulatory concentration.

Considering this criterion, solely, the degree of regulatory concentration should be as low as possible to create an enabling environment without undue restrictions for the entrepreneurial activity. However, the consequence of applying the concept of entrepreneurship may be different: e.g. preserving competition in a material sense demands regulatory action from the state (antitrust prosecution) and enables the entrepreneurial behavior. In this case, the consequence is the opposite of the above noted and yet compatible with the entrepreneurial behavior, and the institutional purpose of individual freedom. The role of the state is to balance and rule in each case the consequence of applying the concept of entrepreneurship, considering the consequences of other public interests at stake (Marques, 2002, p. 158).

5. Applying the concept of entrepreneurship: the Actium case

Once defined the relationship between the entrepreneurial cultural phenomenon and its legal elements in Brazil, this section is aimed at demonstrating the relevance of applying the concept of entrepreneurship to the reasoning and ruling of a case pertaining a particular telecommunication service. The case description will be followed by the corresponding legal analysis.

In April 2001, a company called Actium Telecomunicações Ltda. (“Applicant”) filed a petition requesting authorization to provide Specialized Mobile Radio (SMR) service using the entire radio access network of another operator, which had a license granted to provide mobile telephone service. Specialized Mobile Radio service (also known as trunking service) in Brazil is characterized by a point-to-point or point-to-multipoint communication using mobile devices in a push-to-talk system. In Brazil, the main radio frequency used is in the 800 MHz band. There are minor uses in the 450 MHz and 900 MHz bands. Also, it can be provided only to commercially active legal persons, i.e. businesses. Actium had a license to provide Specialized Mobile Radio service, and wanted to use a third party’s network originally built to mobile telephone service to reach its customers.

In 2002, the Brazilian National Telecommunications Agency (Anatel), through its Private Services Bureau, analyzed the petition and concluded that authorizing the business model as requested by Actium would represent an increase in the competition “in a segment that is now virtually monopolized by NEXTEL, where there is no alternative technology or radio frequency in structured conditions, especially in big cities”². On the legal soundness of the petition, the Anatel’s Attorney Office stated that it would be needed to update the current interpretation of the regulations pertaining infrastructure sharing to authorize the Applicant to provide the service as requested; however, there is no impediment for this, under the condition that the rule is applied to future similar cases³.

Some other offices were consulted inside the Agency and ratified these opinions. The arguments raised in favor include: the Applicant’s request is legally allowed, though it is a novel situation; a major increase to competition may be expected in the SMR relevant market, virtually monopolized at that time by (85% of market share to one single company); shortage of inputs required for anyone who wishes to become a rival through the conventional business model (especially radio frequency specifically assigned to SMR service); and there was a proposed monitoring system to assess the impact of the innovative business model to the relevant market considered.

However, despite those arguments, the Board of Directors of Anatel requested “new analyses to assess the legal soundness of the Applicant’s request”. Afterwards, a new document from the Private Services Bureau (which had already issued an opinion recommending the approval of the authorization) is attached to the case file, recommending two alternatives to the Board of Directors: first, the immediate approval of the request of the Applicant, granting him authorization to provide the Specialized Mobile Radio service using the radio access network from another company; second, consider preparing an explicit rule addressing the hypothesis of the proposed business model and submitting it to public consultation. After losing a legal battle concerning its obligation to issue a formal ruling, the Board of Directors denied the authorization, ruling there was no legal basis to the business model proposed by Actium, and the case was definitely closed on March 21th, 2006.

² See Anatel’s Private Services Bureau’s Administrative Decision 11 PVCPR/PVCP/SPV, of February 19th, 2002.

³ See Anatel’s Attorney Office’s Opinion 080/2002-PRC, March 8th, 2002.

The main explicit argument to this ruling is that “the request of Actium pertains a service that does not exist, for providing the Specialized Mobile Radio service without radiofrequency [specifically assigned to this service] is a contradiction in its own terms”⁴. In addition, it states that Anatel has the power and duty to prevent that “the meaning of regulations about monitored services is distorted by the interested companies in order to better fit their private interests”⁵. However, it shall consider preparing and publicizing explicit rules about the hypothesis under analysis, i.e. to provide e telecommunication service as a mobile virtual network operator. This business model, Anatel recognized, “seems to be a good solution to increase efficiency in spectrum usage and service penetration, especially (...) in small towns”⁶.

Thus, the lack of explicit rules addressing the hypothesis is the main argument of the ruling. Assuming the need of explicit rules, Anatel neglected a legitimate interpretation of the current regulation, did not consider the benefits to competition recognized by its own offices and limited the freedom of contract of the Applicant. The next section discusses the validity of the reasoning that motivated this ruling.

6. Results: legal analysis of the selected case

As discussed above, freedom of trade and commerce, as a legal expression of entrepreneurship itself, requires that individual freedom is not limited in its socially desirable outcomes also in the provision of public services. Otherwise stated, the lack of explicit rules is not enough reason for denying an authorization to provide telecommunication services. Such ruling needs to be justified on offense to competition, customer safety or on other public interests, since the *prima facie* rule is freedom of trade and commerce, part of the entrepreneurial behavior.

In this case, the analysis of the Private Services Bureau and other offices within Anatel cleared that the business model of mobile virtual network operator proposed by Actium would generate benefits to competition in the specific service, enhancing the efficient use of spectrum and expanding the service use. Also, productivity gains arising from intensive use of information and communication technologies must be emphasized. Moreover, it must be assumed that the sharing of radio frequency (through the radio access network) is potentially effective in expanding the service to small cities, as recognized on the case files, and had been used before by Anatel in different contexts⁷.

There are not any legitimate concerns about the customer safety, since the entire radio access network supplier presumably already operates in accordance with the safety regulations. On the other hand, a legitimate regulatory concern pertaining the market behavior could be solved by a monitoring system implemented by Anatel. The necessity and suitability of the proposed market monitoring activity was not even analyzed by the Board of Directors of Anatel.

Throughout the process, a concern with equality before the law may lead to a reasonable doubt about the alternative that best serves the public interest: authorizing the provision of the service as requested, or proposing rules addressing the subject explicitly, and bringing it to public consultation. The agency said the public consultation enables the participation of the whole society and offers the opportunity to every interested person in the same type of authorization. The rule resulting from public consultation would apply to all and not meet a specific situation.

However, authorizing Actium to provide the service does not mean a necessary offense to the equality before the law as the task of defining the public interest is complex and requires an in-depth analysis. The meaning of equality before the law should be considered in contrast with other involved concepts, including the concept of entrepreneurship and its corresponding legal basis.

The pioneering perception of available opportunities is an essential element of entrepreneurship. In this case, the opportunity perceived by Actium was potentially accessible to all companies, since the commonly known freedom

⁴ See Anatel's Board of Directors' Administrative Decision 063/2006-CD, of February 9th, 2006 and Analysis 05/2006-GCJL, of December 12th, 2005.

⁵ See Anatel's Board of Directors' Administrative Decision 063/2006-CD, of February 9th, 2006 and Analysis 05/2006-GCJL, of December 12th, 2005.

⁶ See Anatel's Board of Directors' Administrative Decision 063/2006-CD, of February 9th, 2006 and Analysis 05/2006-GCJL, of December 12th, 2005.

⁷ See Anatel's Resolution 278, of October 15th, 2001.

of trade and commerce requires no restrictions in advance for the private industry, including for the provision of telecommunication services. Additionally, excepting for its Board of Directors, Anatel recognized the legal soundness of the request for authorization considering the current regulations pertaining infrastructure sharing. So, the proper meaning of equality before the law in this case is the similar capacity of accessing the necessary information to perceive the entrepreneurial opportunity. In this sense, equality before the law would not be harmed by granting the authorization requested by Actium.

Moreover, Anatel recommends a case-by-case review of this kind of request, and indicates that the benefit to competition is an important argument to be considered for ruling cases like this, even if a different meaning of equality before the law is held by the agency. Therefore, the “equality before the law” principle, depending on Anatel’s interpretation, could be hindered if the public interest is better achieved, for example, by fostering competition.

Discovery and exploitation of entrepreneurial opportunities (Shane, 2003), as a common element of entrepreneurship in its various meanings, should be encouraged not only for its social benefits. It can be understood as an aspect of underpinning principles of the Brazilian constitutional economic framework, especially freedom of trade and commerce. In this context the concept of entrepreneurship functions as a joint to reconcile apparently opposite effects from freedom to contract and freedom to compete. Both granting rights to private activity and imposing regulatory intervention to limit individual freedom can be justified, prohibiting the government to act lessening competition, or encouraging those who can not afford to compete an equal basis. Entrepreneurship highlights the common institutional goal that links the principles of freedom of contract and management and freedom to compete.

7. Implications and value

Applying the concept of entrepreneurship to the Actium case can radically change the interpretation of the current regulation, since Anatel’s ruling based on the absence of explicit rules regarding the particular business model does not suffice. The rule is freedom of trade and commerce, an expression of entrepreneurship. Other public interests potentially affected by the authorization need to be specifically assessed and evaluated by the Agency. Therefore, from the standpoint of the argument of entrepreneurship, the institutional regulatory practice of the telecommunications agency is questionable, for, if adopted, the concept could have led to a different legal consequence, affecting the corresponding degree of regulatory concentration related to the SMR service.

As stated above, regulation is a fluid phenomenon, expressed in the explicit establishment of detailed rules for a given industry, in the apparent legal omission that enables the exercise of freedom to undertake different business models and in the *continuum* that links these two extremes. Each point on this *continuum* corresponds to the degree of regulatory concentration addressing a certain activity, a specific service, or even a single case. It is argued in this paper that the state balances public interests, thus scaling the regulatory concentration applicable to each situation. This is the meaning of regulation as a function of the public interest acting on the degree of regulatory concentration.

Freedom to decide among available technical choices of service provision is a rule that holds in this case the institutional goal of promoting entrepreneurship, as a source of social wealth. At the same time, entrepreneurship reinforces the meaning of freedom of trade and commerce, clearing the social results to be expected. Other relations between the elements of entrepreneurship and legal rules could be assessed, as the different treatment for small and medium enterprises. Anyway, the focus on the common institutional purpose of the rules must be stressed: promoting and protecting the legal conduct related to entrepreneurial seek and exploitation of opportunities towards innovation, market coordination, diffusion of technologies, and so on.

Once the rule that accomplishes the institutional purpose in a given situation is clearly identified (freedom of trade and commerce, for example), the next step is the evaluation of other public interests at stake. They can strengthen, modify or hinder the legal consequences of the rule, or assume a specific meaning facing the same rule. In our case, the principle of equality before the law has assumed the specific meaning of equal access to the necessary information to perceive an opportunity. Thus, at least from this standpoint, the institutional practice of the Brazilian National Telecommunications Agency in this case can be criticized.

The concept of entrepreneurship is legally relevant in Brazil and affects the degree of regulatory concentration. Its application, as stated above, may affect the on-going debate about the degree of regulatory concentration on a given telecommunication service. Further research developments may identify whether Anatel has been

considering the goal of fostering entrepreneurship in other cases, indicating a possible institutional learning process on this issue. Further studies can also explore other legal consequences of entrepreneurship, related to treatment of small and medium enterprises for licensing purposes, for example, and to what extent these consequences affect Brazilian constitutional values as the right to communicate and have access to information, both important for telecommunication policies, and the public service regime in general.

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