

# Brooklyn Journal of International Law

---

Volume 27

Issue 3

SYMPOSIUM:

International Telecommunications Law in the Post-Deregulatory Landscape

---

Article 13

2002

## The Post-Deregulatory Landscape in International Telecommunications Law: A Unique European Union Approach?

Herbert Burkert

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

---

### Recommended Citation

Herbert Burkert, *The Post-Deregulatory Landscape in International Telecommunications Law: A Unique European Union Approach?*, 27 *Brook. J. Int'l L.* (2002).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol27/iss3/13>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

# **PANEL I: TELECOMMUNICATIONS DEVELOPMENTS IN THE EUROPEAN UNION**

## **PRINCIPAL PAPERS**

### **THE POST-DEREGULATORY LANDSCAPE IN INTERNATIONAL TELECOMMUNICATIONS LAW: A UNIQUE EUROPEAN UNION APPROACH?**

*Herbert Burkert\**

#### **I. INTRODUCTION**

This Article has two purposes: the first is to provide an overview of the developments in telecommunications sector specific regulation before and after the so called “Telecommunications Review 1999” (“1999 Communications Review”) of the European Union (“EU” or “European”), with an emphasis on the “new regulatory package” that has evolved from this review. After a brief overview of the “constitutional” basis for EU activities in the field of telecom regulation and the regulatory toolbox available in Part II, a presentation of the key elements of EU telecom law until the 1999 Communications Review will follow in Part III, as well as a description of the main issues of that Review and the consequences as expressed in (the current state of) the new regulatory package. It should be noted that

---

\* Senior Research Fellow, Fraunhofer Institute for Media Communication, St. Augustin, Germany; President, Research Centre for Information Law, University of St. Gallen, Switzerland; Chairman, Legal Advisory Board to the “Information Society” General Directorate of the European Commission, Brussels, Belgium. The author can be contacted at [hb@herbert-burkert.net](mailto:hb@herbert-burkert.net).

this post-deregulatory landscape in the EU has not fully emerged yet. One element of the original package has already been put into operation: Regulation 2887/2000 of the European Parliament ("Parliament") and of the Council of the European Union ("Council") of 18 December 2000 on Unbundled Access to the Local Loop.<sup>1</sup> The finalization of the remaining elements of the package is envisaged for Spring 2002. The Member States will be obliged to transform the package into national law by 2003. Due to this situation, this Article, when reporting on the full package, will focus principally on the stage of *all* proposals as first presented by the European Commission ("Commission") in 2000. Where appropriate, however, reference will be made to changes which occurred after the Commission reconsidered its proposals following the First Reading in the Parliament. While this approach does not fully reflect the state of affairs at the time of writing, this Article will at least provide the reader with a timeline which can be used at a later stage to make a full comparison of the original package with the final outcome.

The second purpose of this Article is to invite — with the benefit of hindsight, a benefit that should never be left unexploited — another view on these developments: Statements of the main political actors on past regulatory activities tend to convey the impression that regardless of any past changes, each of the previous stages had always been under control and an inherent logic had always been at work at every step in the process. Part IV begs to differ from such logification by selecting two issues for closer scrutiny: the "European Regulatory Authority" that hovers through these regulatory changes like the "ghost of Christmas yet to come"<sup>2</sup> and the revival of the "public service" concept. It is suggested that rather than being the consequential outcome of a market-logical sequence of deregulation and re-regulation — some of the changes appear to be the result of an unpredicted interplay of forces outside telecommunications regulation, forces which will continue to thwart econocratic regulatory intentions.

---

1. Parliament and Council Regulation 2887/2000 of 18 December 2000 on Unbundled Access to the Local Loop, 2000 O.J. (L 336) 4 [hereinafter Parliament and Council Regulation 2887/2000].

2. See CHARLES DICKENS, A CHRISTMAS CAROL (1st ed., Barron's 1985) (1843).

Whether the results — and the results of this regulatory endeavor are not yet evident — will be *very much* different from the results once intended is not the point at issue here. The Article seeks only to provide examples demonstrating that, for the purpose of comparing regulatory policies in the EU, the historical, institutional, political and cultural factors in the regulatory environment in the EU are so important that a very general level of abstraction is needed to make comparison with other regulatory regimes meaningful. There is sufficient institutional economics and political science analysis available to offer appropriate explanations of such “path dependency” and “institutional constraints.” However, this Article also tries to convey that such influences should not solely be seen as hindrance, constraints or obstacles to the virtuous path of regulation, but as potent and delicious flavors of regulatory culture.<sup>3</sup>

The new regulatory package will be the focus of our attention in tracing the influence of these “soft” framework conditions. Clearly, for a complete understanding of the regulatory environment, both competition law *and* sector specific regulation must be considered together. Further, recent developments in competition law have to be taken into account, particularly because of their influence on the specific sector regulation.<sup>4</sup> Due attention will be given to these influences. While there is still a debate as to whether competition law will eventually replace sector specific regulation in telecommunications, there is a basic understanding that sector specific regulation for the time being is still necessary and the new regulatory package is material proof of this belief.

---

3. On such a “constraints” and “path” oriented comparison between the U.S. and EU approaches, albeit restricted to the area of rate rebalancing, see Barbara A. Cherry & Johannes M. Bauer, Institutional Arrangements and Rate Rebalancing: Empirical Evidence from the United States and Europe, Paper Presented at the Thirteenth Biennial Conference of the International Telecommunications Society (July 2-5, 2000), *available at* [http://www.its2000.org.ar/conference/cherry\\_bauer.pdf](http://www.its2000.org.ar/conference/cherry_bauer.pdf).

4. See Commission Working Document on Proposed New Regulatory Framework for Electronic Communications Networks and Services: Draft Guidelines on Market Analysis and the Calculation of Significant Market Power under Article 14 of the Proposed Directive on a Common Regulatory Framework for Electronic Communications Networks and Services, COM(01)175 final [hereinafter Commission Working Document on Proposed New Regulatory Framework].

Since the early beginnings, not only EU telecommunications law, but EU law, EU institutions and even the terminology of the EU as such have been (and continue to be) subject to constant change. Therefore, the following terminological clarifications may be useful:

(1) "EU" in this Article identifies what in correct terminology is the "European Community" ("EC" or "Community"), i.e., the first pillar of the three pillar structure of the EU introduced with the Treaty on European Union ("TEU") — Maastricht Treaty — in force since November 1, 1993.<sup>5</sup> The other two pillars are the common foreign and security policy and the cooperation in the fields of justice and home affairs.

(2) The primary legal source for EU telecommunication law is the Treaty Establishing the European Community ("EC Treaty").<sup>6</sup> This treaty was last amended by the Treaty of Amsterdam, which came into force on May 1, 1999.<sup>7</sup> Among other things, the Treaty of Amsterdam changed the numbering of the EC Treaty. To avoid confusion, this Article will refer to the EC Treaty using the post-Amsterdam numbering system, even in cases of pre-Amsterdam applications.

## II. THE LEGAL FRAMEWORK OF EU ACTIVITIES

### A. *The Constitutional Framework for Telecommunications*

The EU institutions draw their regulatory and policy making power from the treaties as their primary source of legitimacy. The EC Treaty provides several references to telecommunications: (1) Articles 154 to 156, introduced in the Maastricht Treaty as Article 129(b)-(d), explicitly refer to telecommunications *policy* goals under the heading of "Trans-European Networks;"<sup>8</sup> and

5. TREATY ON EUROPEAN UNION, Feb. 7, 1992, O.J. (C 191) 1 (1992).

6. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) 3 (1997) [hereinafter EC TREATY].

7. TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, O.J. (C 340) 1 (1997) [hereinafter TREATY OF AMSTERDAM]. The Treaty of Amsterdam also contained changes of the TEU.

8. The text of Article 154 states:

1. To help achieve the objectives referred to in Articles 14 and 158 and to enable citizens of the Union, economic operators and regional

and local communities to derive full benefit from the setting-up of an area without internal frontiers, the Community shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures.

2. Within the framework of a system of open and competitive markets, action by the Community shall aim at promoting the interconnection and interoperability of national networks as well as access to such networks. It shall take account in particular of the need to link island, landlocked and peripheral regions with the central regions of the Community.

EC TREATY art. 154. Article 155 states:

In order to achieve the objectives referred to in Article 154, the Community:

-- shall establish a series of guidelines covering the objectives, priorities and broad lines of measures envisaged in the sphere of trans-European networks; these guidelines shall identify projects of common interest;

-- shall implement any measures that may prove necessary to ensure the interoperability of the networks, in particular in the field of technical standardisation;

-- may support projects of common interest supported by Member States, which are identified in the framework of the guidelines referred to in the first indent, particularly through feasibility studies, loan guarantees or interest-rate subsidies; the Community may also contribute, through the Cohesion Fund set up pursuant to Article 161, to the financing of specific projects in Member States in the area of transport infrastructure.

The Community's activities shall take into account the potential economic viability of the projects.

2. Member States shall, in liaison with the Commission, coordinate among themselves the policies pursued at national level which may have a significant impact on the achievement of the objectives referred to in Article 154. The Commission may, in close cooperation with the Member State, take any useful initiative to promote such coordination.

3. The Community may decide to cooperate with third countries to promote projects of mutual interest and to ensure the interoperability of networks.

*Id.* art. 155. Article 156 states:

The guidelines and other measures referred to in Article 155(1) shall be adopted by the Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee and the Committee of the Regions.

Guidelines and projects of common interest which relate to the territory of a Member State shall require the approval of the Member State concerned.

(2) Article 157 seconds these objectives on a more general level.<sup>9</sup>

The main regulatory instruments, however, have been the articles referring to: (1) liberalization — Article 86 (ex Article 90);<sup>10</sup> (2) harmonization — Article 95 (ex Article 100a);<sup>11</sup> and

*Id.* art. 156.

9. The text of Article 157 is:

1. The Community and the Member States shall ensure that the conditions necessary for the competitiveness of the Community's industry exist.

For that purpose, in accordance with a system of open and competitive markets, their action shall be aimed at:

- speeding up the adjustment of industry to structural changes;
- encouraging an environment favourable to initiative and to the development of undertakings throughout the Community, particularly small and medium-sized undertakings;
- encouraging an environment favourable to cooperation between undertakings;
- fostering better exploitation of the industrial potential of policies of innovation, research and technological development.

2. The Member States shall consult each other in liaison with the Commission and, where necessary, shall coordinate their action. The Commission may take any useful initiative to promote such coordination.

3. The Community shall contribute to the achievement of the objectives set out in paragraph 1 through the policies and activities it pursues under other provisions of this Treaty. The Council, acting unanimously on a proposal from the Commission, after consulting the European Parliament and the Economic and Social Committee, may decide on specific measures in support of action taken in the Member States to achieve the objectives set out in paragraph 1.

This Title shall not provide a basis for the introduction by the Community of any measure which could lead to a distortion of competition.

*Id.* art. 157.

10. Article 86 states:

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in

fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

*Id.* art. 86.

11. Article 95 states:

1. By way of derogation from Article 94 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 14. The Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.

3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.

4. If, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.

5. Moreover, without prejudice to paragraph 4, if, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.

6. The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market. In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been



(3) the arsenal of competition regulation — Articles 81-89 (ex Articles 85 - 94).<sup>12</sup>

approved. When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.

7. When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure.

8. When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonisation measures, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures to the Council.

9. By way of derogation from the procedure laid down in Articles 226 and 227, the Commission and any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in this Article.

10. The harmonisation measures referred to above shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 30, provisional measures subject to a Community control procedure.

*Id.* art. 95.

12. Article 81 states:

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
  - (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
  - (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

EC TREATY art. 81. Article 82 states:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

*Id.* art. 82. Article 83 states:

1. The appropriate regulations or directives to give effect to the principles set out in Articles 81 and 82 shall be laid down by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament.

2. The regulations or directives referred to in paragraph 1 shall be designed in particular:

- (a) to ensure compliance with the prohibitions laid down in Article 81(1) and in Article 82 by making provision for fines and periodic penalty payments;
- (b) to lay down detailed rules for the application of Article 81(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;
- (c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 81 and 82;

As stated above, the competition law instruments are mentioned here for the sake of completeness. This Article will focus on the use of the liberalization and harmonization instruments.

The main institutional agents involved in EU regulation and policy making are the Commission, the Council and the Parliament. The Commission is the main initiator of regulation and oversees the enforcement of the treaties. The Member States of the EU are represented in the Council. Since 1979, the Parliament is directly elected in the Member States according to their election rules. The Parliament has increasingly received co-decision power by the various changes to the treaties. With the Treaty of Amsterdam, the Parliament can now be regarded as co-legislator together with the Council.<sup>13</sup> With the appointment of the President of the Commission being subject to Parliament's approval, Parliament has also gained more

---

(d) to define the respective functions of the Commission and of the Court of Justice in applying the provisions laid down in this paragraph;

(e) to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article.

*Id.* art. 83. Article 84 states:

Until the entry into force of the provisions adopted in pursuance of Article 83, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the common market in accordance with the law of their country and with the provisions of Article 81, in particular paragraph 3, and of Article 82.

*Id.* art. 84. Article 85 states:

1. Without prejudice to Article 84, the Commission shall ensure the application of the principles laid down in Articles 81 and 82. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, who shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

2. If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decision and authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation.

*Id.* art. 85.

13. See TREATY OF AMSTERDAM, arts. J.11, K.17, 109q & 12o.

weight in its relationship to the Commission.<sup>14</sup> As we shall see, this gradual shift of power has significant effects on the way telecommunications regulation evolved.

### *B. The Regulatory Toolbox*

Liberalization, harmonization and checks on competition describe the functional objectives of the instruments of Community law that are available to the EU institutions.

#### 1. Liberalization

Liberalization measures have been based on EC Treaty Article 86 (ex Article 90). National telecommunications operators were among those undertakings which had been granted special and exclusive rights in the general economic interest. For a long time, their role was not questioned, although the EC Treaty had made it clear that such undertakings could pose competition problems in the EU market.<sup>15</sup> However, Article 86 also confirmed that such undertakings enjoyed possibilities for exemption if necessary to enable those undertakings to perform the particular tasks assigned to them.<sup>16</sup> But this exemption itself was subject to an exemption: the Commission has to act when and where necessary to ensure, by decisions and/or directives, that this exemption in turn is guided only by the requirements of the particular tasks assigned to the undertakings, or is based on particular aspects of general economic interest accepted in the context of the EC Treaty (like public health and safety, which already permit exemption from the free movement of goods and services), and that the exemption does not disrupt trade to an extent that would be contrary to the Community's interests.<sup>17</sup>

---

14. For a concise description of these developments, see KLEMENS H. FISCHER, *THE EUROPEAN UNION: A COMPACT GUIDE FOR BUSINESS-GOVERNMENT-RELATIONS* 62-63 (2001); Europarl, *Fact Sheets*, at [http://www.europarl.eu.int/factsheets/default\\_en.htm](http://www.europarl.eu.int/factsheets/default_en.htm) (last visited Apr. 20, 2002) [hereinafter *Fact Sheets*].

15. See EC TREATY art. 86.

16. Such a derogation was explicitly given to voice telephony. See Commission Directive 90/388 of 28 June 1990 on Competition in the Markets for Telecommunications Services, 1990 O.J. (L 192) 10 [hereinafter Commission Directive 90/388].

17. See EC TREATY art. 86.

When the Commission started to intervene on this legal basis in the area of telecommunications, it immediately created a source of conflict among EU institutions and with the Member States. We will briefly look at these conflicts when we describe the situation before the 1999 Communications Review. However, in preview of some of the final observations of this Article, it may be observed that Commission policy gradually seems to re-emphasize aspects of public interest and public service, again not without consequences for telecommunications regulation.

## 2. Harmonization

“Harmonization” according to EC Treaty Article 95 (ex Article 100a) had been the traditional *good for everything* method. The Article allows for approximation of regulatory mechanisms (not only laws) in the Member States as long as such approximation serves the EU market, unless other provisions are more directly applicable. The harmonization effort, however, has to be the main thrust of the proposed measure.<sup>18</sup>

## 3. Competition

The traditional competition law instruments are general instruments of market (re)balance directed at undertakings. Since the focus of this Article is the specific telecommunications law landscape created by the EU for the Member States, these measures are described here only to complete the picture. There are, however, overlaps: overlaps of competence between general competition authorities and specific telecommunications regulatory authorities and overlaps of definition for intervention thresholds. As we shall see, sector specific regulatory activities in telecommunications have attempted to address some of these problems. There are three instruments which the Commission uses to ensure and maintain competition: (1) ac-

---

18. See Case C-187/93, *Parliament v. Council*, 1994 E.C.R. I-2857; Case C-155/91, *Commission v. Council*, 1993 E.C.R. I-939. For further comments, see PIERRE LAROCHE, *COMPETITION LAW AND REGULATION IN EUROPEAN TELECOMMUNICATIONS* 408 (2000).

tion against concerted practices; (2) action against abuses of dominant positions; and (3) investigations into mergers.<sup>19</sup>

In the context of telecommunications, the bases for actions against concerted practices are EC Treaty Articles 3(g), 81, 83, 84 and 85 (ex Articles 85, 87, 88 and 89).<sup>20</sup> These actions are governed by the prohibition principle of Article 81(1) and (2) which states that all agreements between undertakings (including associations and concerted practices) that may affect trade between Member States are prohibited and void.<sup>21</sup>

Article 81(3) is an exemption to this principle and relates to agreements which are deemed to have positive effects on the economy, such as agreements that improve the production or distribution of goods or promote technical or economic progress. These agreements, however, have to show direct benefits for the consumers as well, and they may not impose unnecessary restrictions or aim to eliminate competition for a substantial part of the products concerned.<sup>22</sup>

The Commission intervenes according to Council Regulation 17/62 of 6 February 1962 (based on EC Treaty Article 83) - with various later amendments. The Commission finds infringements and may impose fines and penalty payments. Damages to third parties may be granted, but only by national courts, whereas penalties and fines may also be charged by national competition authorities. The Commission may also grant what is known as a "negative clearance," i.e., provide a certificate to an undertaking that its agreements are not in conflict with the prohibition principle. In addition, the Commission may grant individual exemptions. There is also the widely used possibility of an "en bloc negative clearance" for certain typical agreements in specific areas.<sup>23</sup>

---

19. There are other measures – against state aid – used to ensure competition, however, they are not directly relevant here. *See, e.g.*, EC TREATY arts. 87-89.

20. *See Fact Sheets, supra* note 14, at pt. 3, ch. 3.1.

21. EC TREATY art. 81(1)-(2).

22. *Id.* art. 81(3).

23. *See, e.g.*, Council Regulation 19/65 of 2 March 1965 on Application of Article 85(3) of the Treaty to Certain Categories of Agreements and Concerted Practices, 1965-1966 O.J. SPEC. ED. 35; Council Regulation 2821/71 of 20 December 1971 on Application of Article 85(3) of the Treaty to Categories of Agreements, Decisions and Concerted Practices, 1971 O.J. SPEC. ED. (L 285) 49; Council Regulation 1215/99 of 10 June 1999 Amending Regulation

Even if there is an infringement, the Commission will not act in cases of minor importance. This *de minimis* principle not only reduces the workload, but also tends to favor small and medium sized enterprises. The threshold for agreements which fall under the scrutiny of the Commission is a market share of 10% for vertical agreements and 5% for horizontal agreements. However, certain activities remain generally prohibited regardless of the *de minimis* rule: price fixing, joint sales offices, production or delivery quotas, sharing of markets or supply sources in the area of horizontal agreements and fixing the resale price and absolute territorial protection clause as regards vertical agreements. All these rules are currently under revision, independently of the changes in the telecommunications regulation sector, aiming at a more flexible and a more decentralized system of competition control.<sup>24</sup>

Measures against abuse of a dominant position<sup>25</sup> are based on EC Treaty Article 82 (ex Article 86). Abuse of a dominant position occurs when the undertaking influences the structure of the relevant market or its degree of competition (e.g., imposing unfair prices or unfair trading conditions; limiting production, markets or technical development to the detriment of consumers; etc.) throughout the EU market, or at least a substantial part of it.<sup>26</sup> Criteria are the nature of the product, substitute products and consumers' perception. Abuse of a dominant position must adversely affect trade between Member States, or be likely to do so.<sup>27</sup> The Commission may decide to order a stop to such abuse, may impose a fine or penalty, or, as the case may be, may also issue a "negative clearance" at an undertaking's request if it considers that the practice concerned does not infringe EU law.<sup>28</sup> This system is currently subject to reform as well.

---

19/65 on the Application of Article 81(3) of the Treaty to Certain Categories of Agreements and Concerted Practices, 1999 O.J. (L 148) 1.

24. See Proposal for a Council Regulation on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty and Amending Regulations 1017/68, 2988/74, 4056/86 and 3975/87 ("Regulation Implementing Articles 81 and 82 of the Treaty"), COM(00)582 final.

25. See *Fact Sheets*, *supra* note 14, at pt. 3, ch. 3.2.

26. *Id.*

27. *Id.*

28. *Id.*

The rules on abuse of a dominant position imply merger control as a proactive risk control measure against the imminent danger of an abuse of a dominant position.<sup>29</sup> A merger occurs when a firm acquires exclusive control of another firm or of a firm it controlled jointly with another firm, or where several firms take control of a firm or create a new one. The Commission has the power to examine mergers before they occur. The Commission will analyze their compatibility with the European market by looking at the impact on the relevant market. This comprises: (1) defining the relevant product market; (2) defining the relevant geographic market; and (3) assessing the compatibility of the merger with the internal market on the basis of the principle of a dominant position. The Commission looks at cases if certain thresholds are reached.<sup>30</sup>

The main instruments of EU regulatory power are decisions, directives and regulations:

(1) Decisions can be directed at other EU institutions, Member States or physical and legal persons;<sup>31</sup>

(2) Directives are addressed to Member States. Member States have a time span set by the directive in which the objectives of the directive must be transformed into national law. In theory, Member States have a certain measure of discretion to use the appropriate means to achieve these objectives.<sup>32</sup> Increasingly, however, directives have become more and more

---

29. See Council Regulation 4064/89 of 21 December 1989 on the Control of Concentrations between Undertakings, 1989 O.J. (L 395) 1 [hereinafter Council Regulation 4064/89]. It was subsequently amended by Council Regulation 1310/97 of 30 June 1997 Amending Regulation 4064/89 on the Control of Concentrations between Undertakings, 1997 O.J. (L 180) 1, which took effect on Mar. 1, 1998 [hereinafter Council Regulation 1310/97].

30. The companies concerned have a combined worldwide turnover of at least ECU 5 billion; and at least two of the companies concerned have a minimum Community-wide turnover of ECU 250 million. Each of the companies concerned generates no more than two-thirds of its aggregate Community-wide turnover in one Member State; or the companies have a combined worldwide turnover of more than ECU 2.5 billion and a turnover of more than ECU 100 million in each of at least three Member States. Individually, for at least two of the companies concerned, a turnover of more than ECU 25 million in each of the three Member States and more than ECU 100 million in the Community as a whole. See Council Regulation 1310/97, *supra* note 29, art. 1.

31. EC TREATY art. 249.

32. *Id.*



precise to counterbalance occasional reluctance in Member States to transform directives appropriately. Directives or appropriate parts of the directives may become directly binding in such Member States which have failed to transform the directive within the given time limit.<sup>33</sup> In addition, the Commission may start infringement procedures before the European Court of Justice ("ECJ").<sup>34</sup> It should be kept in mind that whenever reference is made to a directive, it does not effect change directly, but requires — as indicated by the term "directive" — internal national transformation procedures which may or may not always fully reflect the objectives of the directive; and

(3) Regulations are directly applicable in the Member States. They directly become part of a Member State's legal system without any further national transformation act.<sup>35</sup>

Depending on the subject of regulation, EU institutions act separately or in prescribed cooperative procedures. The typical instrument of regulation in the telecommunications field is the directive. Where such a directive aims at the harmonization of the regulatory environment of telecommunications in the Member States, the adequate procedure is the "co-decision procedure."<sup>36</sup> Such regulatory activity is initiated by the Commission. The proposal goes to the Council and to the First Reading

33. See, e.g., Case 8/81, *Becker v. Finanzamt Münster-Innenstadt*, 1982 E.C.R. 53 (holding that unconditional and precise provisions of a directive trump national provisions that are incompatible with the directive).

34. See The Court of Justice of the European Communities, *Court of Justice and Court of First Instance: Jurisdiction*, at <http://www.curia.eu.int/en/pres/comp.htm> (last visited Apr. 15, 2002) [hereinafter ECJ Website]. The ECJ consists of the Court of First Instance ("CFI") and the Court of Justice ("CJ"). The CJ decides — among other issues — on disputes between Member States; and disputes between the EU and Member States; disputes between EU institutions; and disputes between individuals and the EU. *Id.* It provides opinions on international agreements and preliminary rulings, which help to ensure the uniform interpretation of Community law. *Id.* Preliminary rulings are provided in cases where a question of law has been referred to the CJ by national courts, which have a case pending before them for which the answer to that legal question is decisive. *Id.*; see also EC TREATY art. 234. The CFI is the court of first instance for (among others) disputes between the Community institutions and staff, and for certain actions brought against the Commission by undertakings or associations or individuals. ECJ Website, *supra* note 34. CFI judgments can be appealed to the CJ only on points of law. EC TREATY art. 234.

35. EC TREATY art. 249.

36. *Id.* art. 251.

in Parliament. Depending on the outcome, there will be amendments from that First Reading, a “Common Position” from the Council and an amended proposal, which then go to a Second Reading of the Parliament and, if necessary, into conciliation procedure, or the proposal simply fails.<sup>37</sup>

### III. THE REGULATORY STORY: BEFORE THE REVIEW, THE REVIEW AND AFTER THE REVIEW

The plot of the following story is very simple: the 1999 Communications Review<sup>38</sup> is taken as the watershed for telecommunications regulation in Europe. Other historical moments would offer themselves as well, such as the full liberalization of the European telecommunication markets on January 1, 1998.<sup>39</sup> Emphasizing the 1999 Communications Review also implies the danger of overlooking the importance of other EU documents which may have carried perhaps a hidden, but nevertheless important meaning for the future course of telecommunications regulation. The author will, in the course of this Article, argue the importance of both the Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implication for Regulation — Towards an Information Society (“Green Paper on Convergence”)<sup>40</sup> and another paper which normally is not considered in direct connection with European telecommunications regulation — the Communication on Services of General Interest in Europe.<sup>41</sup> It was the 1999 Communications Review, however,

37. *Id.*

38. Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Towards a New Framework for Electronic Communications Infrastructure and Associated Services: The 1999 Communications Review, COM(99)539 final [hereinafter 1999 Communications Review].

39. This is true with the exception of Luxemburg, Spain, Ireland, Portugal and Greece, which were granted longer transition periods. See EUROPEAN COMMISSION, STATUS REPORT ON EUROPEAN UNION ELECTRONIC COMMUNICATIONS POLICY 40 n.113 (1999), at <http://europa.eu.int/ISPO/infosoc/telecompolicy/en/tcstatus.pdf>.

40. Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation: Towards an Information Society Approach, COM(97)623 final [hereinafter Green Paper on Convergence].

41. Commission Communication on Services of General Interest in Europe, 1996 O.J. (C 281) 3 [hereinafter Services of General Interest].

which brought with it the new regulatory package and the design of the future regulatory landscape, and this is why we take it as the turning point.

*A. The State of Telecommunications Regulations Before the 1999 Communications Review*

1. The Early Beginnings

EU telecommunications policy began in 1987 with the Green Paper — Towards A Dynamic European Economy, Green Paper On The Development Of The Common Market For Telecommunications Services And Equipment (“1987 Green Paper”)<sup>42</sup> — although other authors refer to earlier yet failed beginnings.<sup>43</sup> At that time, the public telecommunications operators (“PTOs”) enjoyed national monopolies with regard to both infrastructure and services. In most cases, these operators were owned by the state and very often they were also integrated into the administrative system of that state.<sup>44</sup> Nevertheless, there was European cooperation. In 1959, the Western European countries founded, outside the institutional framework of the EU, the Conférence Européen des Administrations des Postes et des Télécommunications (European Conference of Postal and Telecommunications Administrations) (“CEPT”) to assist in setting standards for transborder electronic communications.<sup>45</sup> At that time, there had also been failed attempts, now found within the framework of the EU, to open at least the internal procurement markets of the telecommunications sector. Only in the United Kingdom, after the rise of the Thatcher government, did British Telecom turn into an entity separate from the state (although still owned by it at least for a short while), and a competitive network operator, Mercury Communications, was allowed to enter the market.<sup>46</sup>

---

42. Towards a Dynamic European Economy, Green Paper on the Development of the Common Market for Telecommunications Services and Equipment, COM(87)290 final [hereinafter The 1987 Green Paper].

43. See ELI NOAM, TELECOMMUNICATIONS IN EUROPE 305-06 (1992).

44. LAROUCHE, *supra* note 18, at 2.

45. Radiocommunications Agency, *European Conference of Postal and Telecommunications Administrations*, at <http://www.radio.gov.uk/topics/international/ceptintro.htm> (last visited Apr. 23, 2002).

46. See NOAM, *supra* note 43, at 104.

The U.K. had already been the testing ground for a Commission decision which contained all the drama and curious coalitions of power that were to mark the coming changes in telecommunications regulation in the EU. In 1982, a Commission decision based on EC Treaty Article 82 (ex Article 86) intervened against British Telecom to stop the prevention of service companies from forwarding high speed telefax messages between foreign countries using telephone lines.<sup>47</sup> While British Telecom, now in its new British environment, accepted that decision, the Italian government did not, mainly as its PTO was losing money because of the activities of those service companies. The Italian government brought the case before the ECJ, arguing that the Commission had overstepped its competence.<sup>48</sup> The British government also intervened, but on behalf of the Commission to uphold the decision. The ECJ ruled in favor of the Commission and made it clear that EU competition law did apply to those public sector players which dominated telecommunications in the Member States.<sup>49</sup> This case also showed the coming front lines between those Member States who were open to change and sided with the Commission, and the more reluctant Member States on the other side.

## 2. Forces at Play

Another frontline was soon to become visible in a different conflict to be solved by the ECJ: the conflict between the Commission and the Council over legal instruments, where the Commission had claimed it could use the liberalization article to proceed and open the telecommunications market.<sup>50</sup> This instrument had no small advantage — the Commission could use it alone without formal consent from the Council or the Parliament.

The Parliament, so as not to forget the third institutional player, took rather a liberal view on telecommunications regu-

---

47. See Günter Knieps, *Regulatory Reform of European Telecommunications: Past Experience and Forward-looking Perspectives*, Paper Presented at *Diskussionsbeiträge des Institut für Verkehrswissenschaft und Regionalpolitik* (May 2001), available at <http://www.vwl.uni-freiburg.de/fakultaet/vw/disk77.pdf>.

48. Case 41/83, *Italy v. Commission*, 1985 E.C.R. 873.

49. *Id.*

50. See *infra* Part III.A.4.

latory policy. As regards the discussion on the appropriate legal instruments, the Parliament sided with the Council's approach due, perhaps, to a natural suspicion towards Commission activities. In substance, however, the Parliament had also already started to worry about the social implications of liberalization.<sup>51</sup> With increasing power, especially with the introduction of the "co-decision procedure" in the Maastricht Treaty in 1993, Parliament became more outspoken on the issue of public services and their importance for solidarity and social integration in the EU, which did not remain without consequences for the regulatory policies in the telecommunications sector.<sup>52</sup>

At that time, however, the fronts were not that clearly cut. Mark Thatcher refers to a complex pattern of national players and their telecommunications policies interwoven with other activities on the level of the EU institutions.<sup>53</sup> In all Member States there was an understanding of the need for change and that this change would fundamentally affect the future role of PTOs, which in most cases themselves were already open to change.<sup>54</sup> The main question was timing and the control of timing, and there was the expectation of receiving gains, perhaps in other areas, if one showed a willingness to change. Governments could still envisage their national PTOs playing an important macro-economic role in a liberalized environment while cashing in on eventual privatization and harvesting the political benefits from an economy revitalized by a more competitive telecommunications infrastructure and market. PTOs, particularly in top management, saw new opportunities to prove their management skills which, in their opinion, had been reigned in too much and for too long by national administrative thinking.<sup>55</sup> The PTOs were looking for new sources of capital influx in order to become global players. Even European trade un-

---

51. LAROCHE, *supra* note 18, at 43.

52. See THOMAS HART, EUROPÄISCHE TELEKOMMUNIKATIONSPOLITIK: ENTWÜRFE FÜR EIN ZUKUNFTSORIENTIERTES REGULIERUNGSKONZEPT 53 n.35 (1999); LAROCHE, *supra* note 18, at 43.

53. MARK THATCHER, THE EUROPEANISATION OF REGULATION: THE CASE OF TELECOMMUNICATIONS (European Univ. Inst., Working Paper RSC No. 99/22, 1999), available at [http://www.iue.it/RSC/WP-Texts/99\\_22t.html](http://www.iue.it/RSC/WP-Texts/99_22t.html) (last visited Apr. 15, 2002).

54. See *id.*

55. See *id.*

ions, already in the process of fighting their own identity crises, could prove themselves reliable agents of change, while at the same time seeking advantages for their members and their organizations before the inevitable settled in. And consumers, the “end-end users,” did not feel affected as long as voice telephony was not disturbed, and as long as they could get their standard services a little faster than before.<sup>56</sup>

Furthermore, in all the national negotiations, reference could be made to EU negotiations, Commission requirements and Council outcomes, thus all the apparent “European necessities” helped to accelerate transformation processes. This did not restrain Member States from also using the Council to slow down such processes again if deemed necessary. At that time, what was actually happening in the Council occurred behind a curtain of institutional secrecy with only limited access for the general public.

### 3. Reasons for Change

The Commission never stopped displaying its intention to speed up change. And the need for change was obvious: technological change had questioned the basis of natural monopolies. Globalization (at that time known under the heading of “operations of international companies”)<sup>57</sup> required international networks and services, and so did national industries and world trade in general. Even the individual end user, the consumer, became increasingly dissatisfied with the level of services available. In addition, since 1984, deregulation in the United States had sent new powerful competitors into international markets. Indeed, 1984 became the year which saw the beginning by various attempts of the recently unbundled American Telephone and Telegraph Company (“AT&T”) to take a hold in the European market by founding, for example, AT&T and Philips Telecommunications Besloten Vennootschap together with Koninklijke Philips Electronics NV (first attempts of cooperation dating back to 1982), a venture which later became AT&T Network System International. AT&T bought a

---

56. *See id.*

57. *See id.*

25% share of Olivetti.<sup>58</sup> AT&T was also initiating negotiations with Alcatel and began various other activities in Europe.<sup>59</sup>

Change was happening in the Commission as well. In 1983, a task force for information technology and telecommunications was formed. In 1984, the Senior Officials Group on Telecommunications was set up to give advice to the Commission.<sup>60</sup> This group promptly proposed an action program.<sup>61</sup> That same year, the CEPT agreed to cooperate with the EU in the European Committees for Standardization and Electrotechnical Standardization. The first recommendations on standardization in the telecommunication area were issued in that year as well,<sup>62</sup> followed by another recommendation on liberalizing the terminal equipment market. The year 1985 was mainly dedicated to getting research activities off the ground.<sup>63</sup> In 1986, the Directorate-General XIII (Telecommunications, Information Industries, and Innovation) was created (today called "Information Society"). In 1987, the EU saw a wide range of directives and regulations which, however, did not yet fundamentally affect the operations of the national PTOs.<sup>64</sup> So while the 1987 Green Paper became the first clearly visible sign of change for telecommunication regulation in the EU, it did not necessarily come as a total surprise.

The main aim of the 1987 Green Paper was, in its own words, "[to open up] the telecommunications sector without destroying

58. See ANNE-MARIE DEALAUNAY MACULAN, *HISTOIRE COMPARÉE DE STRATÉGIES ET DÉVELOPPEMENT DES TÉLÉCOMMUNICATIONS* 98 (1997).

59. *Id.*

60. See Communication from the Commission to the Council on Telecommunications: Progress Report on the Thinking and Work Done in the Field and Initial Proposals for an Action Programme, COM(84)277 final.

61. *See id.*

62. See Council Recommendation 84/549 of 12 November 1984 Concerning the Implementation of Harmonization in the Field of Telecommunications, 1984 O.J. (L 298) 49.

63. See Council Decision 87/372 of 25 July 1985 on a Definition Phase for a Community Action in the Field of Telecommunications Technologies: R & D Programme in Advanced Communications Technologies for Europe (RACE), 1985 O.J. (L 210) 24; Council Decision 88/28 of 14 December 1987 on a Community Programme in the Field of Telecommunications Technologies: Research and Development (R&D) in Advanced Communications Technologies in Europe (RACE Programme), 1988 O.J. (L 16) 35.

64. For more details, see ECKART WIECHERT, *EUROPÄISCHES TELEKOMMUNIKATIONSRECHT – EU TKR - RECHTSVORSCHRIFTEN UND DOKUMENTE DER EU; EINFÜHRUNGEN UND ERLÄUTERUNGEN* 28 (1995).

the organizational structures which maintain the integrity and viability of the infrastructures, and which allow the operators to carry out their public service functions.”<sup>65</sup> However, this was only part of the message. When addressing the solutions, the 1987 Green Paper did concede that the telecommunication administrations were essentially necessary in order to provide for public service functions. But, at the same time, the Commission pointed out that it would become increasingly difficult to draw a line between those services that could be reserved to the PTOs and those which should be opened.<sup>66</sup> And it added that time was running short to get started for change. After consultation on the 1987 Green Paper, the Commission published its plans for the next five years up to 1992,<sup>67</sup> which were then accepted by the Council in 1988.<sup>68</sup>

#### 4. Regulatory Activities Before the 1999 Communications Review

Not all instruments available to start the regulatory game were equal. Liberalization measures as provided by EC Treaty Article 86 (ex Article 90) had the particular advantage already mentioned above: they could be used by the Commission alone — at least in theory.<sup>69</sup> On the other hand, harmonization procedures, based on EC Treaty Article 95 (ex Article 100a), were a matter essentially for the Council for final decision.<sup>70</sup> Which route to take for telecommunications? Following Yogi Berra’s advice on what to do when one comes to a fork in the road, both institutions went ahead with their ways. The Commission is-

65. The 1987 Green Paper, *supra* note 42, at 7. See also STEPHAN POLSTER, DAS TELEKOMMUNIKATIONSRECHT DER EUROPÄISCHEN GEMEINSCHAFT 8 (1999).

66. For further details, see LAROCHE, *supra* note 18, at 9.

67. See Communication from the Commission: Towards a Competitive Community-wide; Telecommunications Market in 1992 Implementing the Green Paper on the Development of the Common Market for Telecommunications Services and Equipment, COM(88)48 final.

68. See Council Resolution 88/C 257/01 of 30 June 1988 on the Development of the Common Market for Telecommunications Services and Equipment up to 1992, 1988 O.J. (C 257) 1.

69. EC TREATY art. 86.

70. *Id.* art. 95.



sued the "Terminal Equipment" directive in May 1988.<sup>71</sup> While there had been common basic agreement on the goals, some Member States did challenge this kind of procedure which threatened their control of timing. They challenged the directive in court. The same happened to the later Commission Directive 90/388 on Competition in the Markets for Telecommunications Services ("Services Directive"), although by then a compromise on procedure with the Council had already been found, but still not all Member States had been happy with the consequences.<sup>72</sup>

This compromise ("Compromise of December 1989")<sup>73</sup> was primarily a compromise on substance, the details of which have now lost their importance with the progress of liberalization and harmonization. But it was also a compromise on procedure in so much as both institutions would carry on with their liberalization and harmonization procedures. The Commission would use self-restraint and would go ahead with a liberalization directive only if there were as many Member States behind such an instrument as required if the same issue would have to be adopted by the Council in a harmonization procedure, i.e., a qualified majority of Member States.<sup>74</sup> It is significant for the transparency of policy-making in the EU, at least at the time, that such information had to be deduced from a frugal press bulletin of a Council meeting, since the record of such meetings had not been publicly accessible.<sup>75</sup>

In its judgments on the challenged directives, the ECJ basically affirmed the Commission's legal argument, but with a

---

71. Commission Directive 88/301 of 16 May 1988 on Competition in the Markets in Telecommunications Terminal Equipment, 1988 O.J. (L 131) 73. This directive was subsequently updated by Commission Directive 94/46 of 13 October 1994 Amending Directive 88/301 and Directive 90/388 in Particular with Regard to Satellite Communications, 1994 O.J. (L 268) 15 [hereinafter Commission Directive 94/46].

72. Commission Directive 90/388, *supra* note 16.

73. For further discussion and sources see LAROUCHE, *supra* note 18, at 43.

74. *See id.* at 47.

75. The transparency situation, although still heavily criticized, has now changed legally, as far as any visit to European Community websites can show. *See* Parliament and Council Regulation 1049/2001 of 30 May 2001 Regarding Public Access to European Parliament, Council and Commission Documents, 2001 O.J. (L 145) 43 [hereinafter Parliament and Council Regulation 1049/2001].

slight twist.<sup>76</sup> The court stated that the Commission could not act against Member States directly, but it could set the specification in general terms of obligations arising under EC Treaty Article 86.<sup>77</sup> It concluded furthermore that approaches according to the liberalization rules and approaches according to the harmonization rule of EC Treaty Article 95 (ex Article 100a) were not mutually exclusive — an argument the contesting parties had used against each other.<sup>78</sup> But even more important was the confirmation from the ECJ that those “special or exclusive rights” in Article 86, which had been taken for granted for so long, could be subjected to liberalization measures.

In any case, as far as procedures were concerned, the ECJ in essence confirmed the Compromise of December 1989:<sup>79</sup> the Commission and the Council could go ahead in parallel with liberalization and harmonization measures.<sup>80</sup> These decisions and the Compromise of December 1989 set the stage for the regulatory activities to come, but it also bred inconsistencies which would become apparent much later. Indeed, the next five years saw a wide range of activities both in the area of liberalization and harmonization, however, not always in a sufficiently harmonized manner.<sup>81</sup>

As indicated above, the main instrument to start liberalization had been the Commission’s Services Directive.<sup>82</sup> This Di-

76. See Case 202/88, French Republic v. Commission, 1991 E.C.R. I1223 (against Commission Directive 88/301) [hereinafter Case 202/88]; Joined Cases C-271, C-281 & C-289/90, Spain v. Commission, 1992 E.C.R. I5833 (against Commission Directive 90/388).

77. See Case 202/88, 1991 E.C.R. I1223, ¶ 17.

78. See LAROCHE, *supra* note 18, at 52.

79. See *id.* at 53.

80. See *id.*

81. JOACHIM SCHERER, DIE ÜBERPRÜFUNG DES EUROPÄISCHEN TELEKOMMUNIKATIONSRECHTS: REGULIERUNGSBEDARF UND OPTIONEN FÜR DAS KÜNFTIGE RECHT DER ELEKTRONISCHEN KOMMUNIKATIONSINFRASTRUKTUR 7 (2000).

82. See Commission Directive 90/388, *supra* note 72. This directive is referred to, somewhat emphatically, since it exempted voice telephony but defined voice telephony rather narrowly, as “the very basis for . . . the introduction of the Internet in the European Union.” HERBERT UNGERER, USE OF EC COMPETITION RULES IN THE LIBERALISATION OF THE EUROPEAN UNION’S TELECOMMUNICATIONS SECTOR: ASSESSMENT OF PAST EXPERIENCE AND CONCLUSIONS FOR USE IN OTHER UTILITY SECTORS 4 (2001), at [http://europa.eu.int/comm/competition/speeches/text/sp2001\\_009\\_en.pdf](http://europa.eu.int/comm/competition/speeches/text/sp2001_009_en.pdf).

rective subsequently provided the basis for directives on: (1) satellite services, for which exclusive rights were to be phased out by the end of 1994;<sup>83</sup> (2) cable networks, which had to be opened to telecommunications services (with the exception of voice telephony at that time) and allowed to interconnect with telecommunication networks;<sup>84</sup> and (3) mobile telephony, for which separate networks could be installed and which could then interconnect with third party networks.<sup>85</sup> Total liberalization came with the "Full Competition" Commission Directive 96/19,<sup>86</sup> except for those countries which had been granted transition periods.<sup>87</sup> These transition periods have now expired.

The starting document for the harmonization activities was Council Directive 90/387 on "Open Network Provisions" ("ONP"), which set out the harmonized conditions for network access.<sup>88</sup> On that basis, further sector and issue specific directives followed, such as: (1) Council Directive 92/44 on "Leased Lines;"<sup>89</sup> (2) Parliament and Council Directive 97/13 ("Licensing Directive"), which harmonized procedural questions;<sup>90</sup> (3)

83. See Commission Directive 94/46, *supra* note 71, arts. 1, 2 & 4.

84. See Commission Directive 95/51 of 18 October 1995 Amending Directive 90/388 with Regard to the Abolition of the Restrictions on the Use of Cable Television Networks for the Provision of Already Liberalized Telecommunications Services, art. 1, 1995 O.J. (L 256) 49, 54.

85. See Commission Directive 96/2 of 16 January 1996 Amending Directive 90/388 with Regard to Mobile and Personal Communications, art. 1, 1996 O.J. (L 20) 59, 65.

86. See Commission Directive 96/19 of 13 March 1996 Amending Directive 90/388 with Regard to the Implementation of Full Competition in Telecommunications Markets, 1996 O.J. (L 74) 13.

87. See *supra* note 39 and accompanying text.

88. Council Directive 90/387 of 28 June 1990 on the Establishment of the Internal Market for Telecommunications Services Through the Implementation of Open Network Provision, 1990 O.J. (L 192) 1.

89. Council Directive 92/44 of 5 June 1992 on the Application of Open Network Provision to Leased Lines, 1992 O.J. (L 165) 27. This directive was later amended by Parliament and Council Directive 97/51 of 6 October 1997 Amending Council Directives 90/387 and 92/44 for the Purpose of Adaptation to a Competitive Environment in Telecommunications, 1997 O.J. (L 295) 23 [hereinafter Parliament and Council Directive 97/51]; and Commission Decision 98/80 of 7 January 1998 on Amendment of Annex II to Directive 92/44, 1998 O.J. (L 14) 27.

90. Parliament and Council Directive 97/13 of 10 April 1997 on a Common Framework for General Authorizations and Individual Licenses in the Field of Telecommunications Services, 1997 O.J. (L 117) 15 [hereinafter Parliament and Council Directive 97/13].

Parliament and Council Directive 97/33 on “Interconnection,” which also contained the first rules on EU wide universal services;<sup>91</sup> and (4) Parliament and Council Directive 98/10 on “Voice Telephony,” which again also contained further regulations on universal service (collectively the “ONP Directives”).<sup>92</sup>

### 5. Evaluation

In all, these packages did not necessarily provide a transparent and clearly structured regulatory environment. Liberalization and harmonization directives could not avoid occasionally addressing the same subject, nor was the terminology always consistent. Consequently, the new design for the regulatory environment became an important part of the Commission’s suggestions in the 1999 Communications Review.<sup>93</sup>

Throughout this “first phase”<sup>94</sup> (and up to this day) the Commission kept evaluating progress at regular intervals in its reports on the Implementation of the Telecommunications

---

91. Parliament and Council Directive 97/33 of 30 June 1997 on Interconnection in Telecommunications with Regard to Ensuring Universal Service and Interoperability Through Application of the Principles of Open Network Provision (ONP), 1997 O.J. (L 199) 32 [hereinafter Parliament and Council Directive 97/33]. It was later amended by Parliament and Council Directive 98/61 of 24 September 1998 Amending Directive 97/33 with Regard to Operator Number Portability and Carrier Pre-selection, 1998 O.J. (L 268) 37.

92. Parliament and Council Directive 98/10 of 26 February 1998 on the Application of Open Network Provision (ONP) to Voice Telephony and on Universal Service for Telecommunications in a Competitive Environment, 1998 O.J. (L 101) 24 [hereinafter Parliament and Council Directive 98/10].

93. See 1999 Communications Review, *supra* note 38.

94. LAROCHE, *supra* note 18, at ch. 1. Larouche identifies four phases or “regulatory models.” *Id.* at 1. The first model running, in Larouche’s opinion, until 1990, and followed by the “regulatory model of the 1987 Green Paper” until 1996. *Id.* at 1-3. The time between 1996 and 1997 is termed the “transitional model” initiated by the 1992 Review of the Situation in the Telecommunications Services Sector, SEC(92)1048 final; Communication from the Commission, Green Paper on the Liberalisation of Telecommunications Infrastructure and Cable Television Networks: Part One: Principle and Timetable, COM(94)440 final; and Green Paper on the Liberalisation of Telecommunications Infrastructure and Cable Television Networks: Part II: A Common Approach to the Provision of Infrastructure for Telecommunications in the European Union, COM(94)682 final. The fourth phase, the “fully liberalized model” started in 1998. LAROCHE, *supra* note 18, at 22. Since this Article focuses on the year 1999 and after, the author has taken the liberty of providing a more compressed time model.

Regulatory Package.<sup>95</sup> Obviously, in these reports, implementation in the Member States played the main role. Up to the fifth report — the situation shortly before the 1999 Communications Review — this situation was still far from optimal. By that time the Commission had started about ninety infringement procedures against Member States because they were not in conformity with the directives, particularly in the areas of authorization and interconnection.<sup>96</sup> Authorizations were very often found not to be in conformity with the conditions set by the Commission. Moreover, procedures were found to be overly time consuming, lacking transparency or were simply too complicated or too expensive (not reflecting, it seemed, the costs of administration as prescribed in the Licensing Directive). Incumbents proved to be reluctant in many cases to provide sufficient standard interconnection offers. National regulatory authorities (“NRAs”) were lacking stamina or sufficient legal competence. Accounting principles established in the various sector specific ONP Directives had not been sufficiently implemented in many Member States.

But the basic figures looked fairly bright. Prices for regional and long distance calls had gone down, whereas prices for local

---

95. Reports are being periodically published by the Commission regarding the Implementation of the Telecommunications Regulatory Package: (1) Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the Implementation of the Telecommunications Regulatory Package, COM(97)236 final; (2) Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the Implementation of the Telecommunications Regulatory Package: First Update, COM(97)504 final; (3) Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Third Report on the Implementation of the Telecommunications Regulatory Package, COM(98)80 final; (4) Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Fourth Report on the Implementation of the Telecommunications Regulatory Package, COM(98)594 final; (5) Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Fifth Report on the Implementation of the Telecommunications Regulatory Package, COM(99)537 final; and (6) Sixth Report on the Implementation of the Telecommunications Regulatory Package, COM(00)814 final [hereinafter Sixth Report].

96. See SCHERER, *supra* note 81, at 13. In July 2001, there were still about sixty-five cases pending. *Id.*

calls seemed to have risen only moderately. By November 1999, in all Member States there were roughly 250 providers of long distance calls, more than 220 local call providers, about 180 national and international network providers and almost 400 local network service providers. But, of course, there still were problems, and the 1999 Communications Review was designed to address them, and more.

And politically? The political aim of the Commission — and the Commission did have political aims — was basically reached by solving the “service of a general economic interest” problem, the only area that could have generated potential political resistance. The Member States had either reluctantly or willingly given up on the idea of the usefulness of a nationally privileged PTO, even for the purpose of such a public (universal) service. This service would have to be organized differently, and it might as well still end up with the incumbents. But politically the Member States by now were convinced, as seen in the words of a European official at that time:

[T]he full effect of EU competition law in this respect could only be achieved by carefully correlating the measures with the development of the general regulatory framework and the build-up of a national “regulatory infrastructure” [with the help of the ONP Directives]. The approach was based on the conviction that the objectives at EU level of liberalising sectors must be internalised into the Member States political and regulatory structures to create the necessary base and the “political mass” required for major liberalisation exercises.

The very basis of action in the telecommunications sector was that the Commission recognised the objective of universal service in the sector, but that it strongly emphasised proportionality of measures to secure this goal. It generated, by broad consultation exercises, the general conviction that this task could be secured by less restrictive means than retention of monopoly rights, e.g. by financial contributions or the creation of universal service funds. The telecommunications sector is now seen as the best demonstration in the Community that the goals of competition and public service can therefore be complementary and mutually reinforcing.<sup>97</sup>

The future will tell what remains of this confidence.

---

97. UNGERER, *supra* note 82, at 7.

## *B. The 1999 Communications Review*

### 1. The Mandate

The various ONP Directives had included reference to a necessary review of telecommunication regulation in view of market developments.<sup>98</sup> The review was preceded by a number of studies from external experts. The results of the studies were incorporated in the 1999 Communications Review. The term "Review" in this context is, of course, perhaps slightly misleading since the main thrust of this exercise was to argue for and to initiate change. Indeed, this communication not only announced but effected change, or is still in the process of doing so.

### 2. The Main Elements of the 1999 Communications Review

The starting point of the 1999 Communications Review is the changing market, or rather market and technology changes. The 1999 Communications Review states:

Technological and market change in the communications sector is proceeding at an ever-increasing pace. . . . The Internet is to a large extent overturning traditional market structures, providing a common platform for the delivery of a wide range of services. . . . Wireless applications are increasingly important in all segments of the market. . . . Finally, the development of technologies within the media sector, in particular digital television (DTV) is providing transactional "on demand" services and new services such as data, Internet and E-commerce, characterised both by services on digital terrestrial (DTTV) networks in many Member States, and a wave of satellite and cable TV digital platforms.<sup>99</sup>

The impact of these changes is not clearly foreseeable. Based on this dilemma, the Commission goes on with a rhetorical balancing act: these markets should be left to develop, but they should also be helped by stimulation, then these markets

98. See Parliament and Council Directive 97/51, *supra* note 89, art. 1 (amended art. 8 of the Council Directive 90/387); *id.* art. 2 (amended art. 14 of the Council Directive 92/44); Parliament and Council Directive 98/10, *supra* note 92, art. 31; Parliament and Council Directive 97/33, *supra* note 91, art. 23(2); Parliament and Council Directive 97/13, *supra* note 90, art. 23. See also SCHERER, *supra* note 81, at 15.

99. 1999 Communications Review, *supra* note 38, at iii-iv.

should be sustained, but, of course, public and consumer interests should also be protected in these markets. It seems worthwhile to reread this balancing act in the Commission's very own words:

How all the above trends [market and technology changes] will shape the market over the next decade cannot be forecast precisely. Regulators and market players alike face uncertainty as they look towards the future convergent environment. Regulators will need to have very clear objectives, including those of public interest, and a set of general-purpose regulatory "tools" if they are to succeed in stimulating and sustaining a market that remains vigorously competitive and meets users' needs, while at the same time protecting consumers' rights.<sup>100</sup>

Judging from these observations, regulation is seen as essentially a management issue, i.e., reaching an optimum created from conflicting goals by balancing conflicting interests. In the 1999 Communications Review environment, this management task is no longer primarily to manage the transition to competition by mainly helping new entrants — it is now about managing competition itself.

The 1999 Communications Review does not necessarily imply a change of policy objectives, although one could argue that consumer interests seem to have a stronger political weight now than in previous policy papers. Rather — and this seems to coincide with a general change of the political climate in the EU and Member States — there is perceivably less enthusiasm for EU institutions and almost consequently, the 1999 Communications Review seems to propagate a phase of regulatory minimalism. We shall return later to this phenomenon.

Then again, this regulatory minimalism runs into its own conflicting objectives: regulatory stability, yes, but in face of the dynamics of the market; technological neutrality, yes, but all equal services should be treated equally. Finally, there is another example of elegant "European regulatory speak": "future regulation should: . . . be enforced as closely as practicable to the activities being regulated, whether regulation has been agreed globally, regionally or nationally."<sup>101</sup>

---

100. *Id.* at iv.

101. *Id.* at v.



How does the new philosophy of regulatory minimalism translate into the old environment of EU regulation? The 1999 Communications Review suggests a two-tiered approach: (1) binding measures would be complemented by non-binding measures, or rather, the importance of non-binding measures would be made more visible; and (2) the range of the binding measures would be curtailed drastically. The 1999 Communications Review sees the new regulatory order like this:

(1) Binding Measures: (a) a framework directive for the general and specific policy objectives; (b) four specific directives (on licensing, access and interconnection, universal service, privacy and data protection); and (c) the continuing task of competition law with an intention to substitute sector specific regulation by general competition law;<sup>102</sup> and

(2) Non-Binding Measures: recommendations, guidelines, codes of conduct and other non-binding instruments to respond to market developments.<sup>103</sup>

The very near future, however, would show how insufficient non-binding measures could turn out to be. The "local loop" problem was waiting to show its persistence. It was not that the Commission had not already seen the local loop problem looming in the background. The 1999 Communications Review in fact had stated: "Urgent action is required to increase competition in the local loop."<sup>104</sup> But the Commission was a bit too hopeful with regard to the efficiency of non-binding measures and a bit too confident that competition tools would be sufficient. Nevertheless, it is interesting to read how the necessity of binding regulations leads (at least in a first step) to a need for "recommendations":

National regulators in many Member States are introducing requirements for incumbents to unbundle their local access networks for use by competing service providers. The Commission welcomes this trend and considers that Community action cannot wait for legislation to be adopted in this area. Instead, the Commission will use Recommendations and, in specific cases, its powers under the competition rules of the

---

102. *Id.* at v-vi, 16.

103. *Id.* at 18.

104. *Id.*

Treaty to encourage local loop unbundling throughout the EU.<sup>105</sup>

Whereas the regulatory approach adopted the minimal perspective, the general concept and outlook of the Commission had by now broadened: the 1999 Communications Review shows the Commission's intent to address the electronic communication infrastructure of the EU as such, allowing exceptions only for content related rules. In short, the Commission was ready not only to make telecommunications regulation "lighter" but also to take on convergence.

This perspective had been prepared by the above mentioned Green Paper on Convergence in 1997.<sup>106</sup> It had been open for consultation processes which were summarized in a working document. The working document had invited a second round of consultations asking for input on "access to networks and digital gateways in a converging environment, creating the framework for investment, innovation, and encouraging European content production, distribution and availability, and ensuring a balanced approach to regulation."<sup>107</sup> The results of that second round had become part of yet another communication,<sup>108</sup> which was then integrated into the 1999 Communications Review.<sup>109</sup>

---

105. 1999 Communications Review, *supra* note 38, at ix.

106. See Green Paper on Convergence, *supra* note 40. As Scherer points out, the change is also the result of subtle changes resulting from inner-institutional competition between the now called "Education and Culture" General Directorate, formerly called "Information, Communication, Culture and Audio-Visual Media," and the "Information Society" General Directorate, formerly called "Telecommunications, Information Market and Exploitation of Research, Information Industry and Market and Language Processing." SCHERER, *supra* note 81, at 18 n.52

107. Working Document of the Commission: Summary of the Results of the Public Consultation on the Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors; Areas For Further Reflection, SEC(98)1284, available at <http://europa.eu.int/ISPO/convergencegp/workdoc/1284en.pdf>.

108. See Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: The Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation: Results of the Public Consultation on the Green Paper [COM(97)623], COM(99)108 final.

109. See SCHERER, *supra* note 81, at 19.

Furthermore, the 1999 Communications Review took in the results from the consultations on the Green Paper on Radio Spectrum Policy<sup>110</sup> and conclusions from the Report on the Development of the Market for Digital Television in Europe.<sup>111</sup> In the 1999 Communications Review, the Commission thus marked the beginning of at least the intention to develop a comprehensive “electronic communications policy” rather than a merely reformed continuation of “telecommunications policy.”

As regards the regulatory consequences of convergence, the 1999 Communications Review again gives a slightly confusing impression. The Commission affirms that a single regulatory framework for communications infrastructure and associated services is advisable and will be the objective for further regulation.<sup>112</sup> Technical convergence, however, does not necessarily lead to regulatory convergence. There may be different public sector interests in different converging areas which require different treatment.<sup>113</sup> The Commission cannot deny the existence of a highly differentiated system of regulations in the Member States which seek to meet the different public interest issues in the different areas of communications services and which have led to separation into:

(1) telecommunications services or, in the new terminology of the working papers accompanying the 1999 Communications Review, “communication service” defined as:

[S]ervices provided for remuneration which consist wholly or mainly in the transmission and routing of signals on electronic communications networks; it covers *inter alia* telecommunications services and transmission services in networks used for broadcasting. It does not cover services such as the

---

110. See Green Paper on Radio Spectrum Policy in the Context of European Community Policies such as Telecommunications, Broadcasting, Transport, and R&D, COM(98)596 final [hereinafter Green Paper on Radio Spectrum Policy].

111. Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: The Development of the Market for Digital Television in the European Union: Report in the Context of Directive 95/47 of the European Parliament and of the Council of 24 October 1995 on the Use of Standards for the Transmission of Television Signals, COM(99)540 final.

112. See 1999 Communications Review, *supra* note 38, at vi.

113. *Id.* at 5.

content of broadcasting transmissions, delivered using electronic communications networks and services.<sup>114</sup>

(2) electronic mass communication services (e.g., radio and television); and

(3) “Information Society” services, defined rather elaborately, for example, in Council Directive 2000/31 (“Electronic Commerce Directive”) as:<sup>115</sup>

[A]ny service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service; those services . . . which do not imply data processing and storage are not covered by this definition. Information society services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line; activities such as the delivery of goods as such or the provision of services off-line are not covered; information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data; information society services also include services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service; television broadcasting within the meaning of Directive EEC/89/552 and radio broadcasting are not information society services because they are not provided at individual request; by contrast, services which are transmitted point to

114. Communication from the Commission: The Results of the Public Consultation on the 1999 Communications Review and Orientation for the New Regulatory Framework, COM(00)239 final [hereinafter Results of the Public Consultation].

115. Earlier definitions can be found in Parliament and Council Directive 98/34 of 22 June 1998 Laying Down a Procedure for the Provision of Information in the Field of Technical Standards and Regulations, 1998 O.J. (L 204) 37. The directive was later amended by Parliament and Council Directive 98/48 of 20 July 1998 Amending Directive 98/34 Laying Down a Procedure for the Provision of Information in the Field of Technical Standards and Regulations, 1998 O.J. (L 217) 18; and Parliament and Council Directive 98/84 of 20 November 1998 on the Legal Protection of Services Based on, or Consisting of, Conditional Access, 1998 O.J. (L 320) 54.

point, such as video-on-demand or the provision of commercial communications by electronic mail are information society services; the use of electronic mail or equivalent individual communications for instance by natural persons acting outside their trade, business or profession including their use for the conclusion of contracts between such persons is not an information society service; the contractual relationship between an employee and his employer is not an information society service; activities which by their very nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts or medical advice requiring the physical examination of a patient are not information society services.<sup>116</sup>

Consequently, the Commission states in the 1999 Communications Review that: "These rules would of course be without prejudice to regulatory obligations (whether at EU or national level) which apply to the content of broadcasting services or other information society services."<sup>117</sup> Thus, the 1999 Communications Review leaves untouched the system of division between contents, conduit and transaction services, but at the same time the Commission seeks to introduce its own concept.<sup>118</sup> The Commission first sets aside services provided over

116. Parliament and Council Directive 2000/31 of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce), ¶¶ 17-18, 2000 O.J. (L 178) 1, 34 [hereinafter Parliament and Council Directive 2000/31].

117. 1999 Communications Review, *supra* note 38, at vi.

118. The activities in the area of Internet content, based on the Council Recommendation 98/560 of 24 September 1998 on the Development of the Competitiveness of the European Audiovisual and Information Services Industry by Promoting National Frameworks Aimed at Achieving a Comparable and Effective Level of Protection of Minors and Human Dignity, 1998 O.J. (L 270) 48; and resulted in Parliament and Council Decision Adopting a Multi-annual Community Action Plan on Promoting Safer Use of the Internet by Combating Illegal and Harmful Content on Global Networks, 1999 O.J. (L 33) 1, are not aimed at regulation but are encouraging self-regulatory activities and user empowerment.

Contents regulations or at least content related regulations in the Council Directive 89/552 of 3 October 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1989 O.J. (L 298) 23, relate to the services aspects of broadcasting. The directive is later amended by Parliament and Council Directive 97/36 of 30 June 1997 Amending Directive 89/552 on the Coordination of Certain Provisions Laid

networks, e.g., broadcasting services and electronic banking. This is an area to be regulated, as the case may be, by national law or by specific measures of EU law, like the Electronic Commerce Directive already quoted or Council Directive 97/36.<sup>119</sup> According to the 1999 Communications Review, the remaining traditional “conduit” part then has two sub-parts: (1) “Associated Services” are communications services like the traditional telecommunications services, following the definition given above, and conditional access services; and (2) “Communications infrastructure” are communications networks and associated facilities like cable television networks and application program interfaces (“APIs”).<sup>120</sup>

But even with this model, the 1999 Communications Review cannot avoid (and even implicitly points to) a dilemma that it cannot sufficiently resolve itself. There are issues which link at least content and conduit almost inseparably, and these issues occur whenever one has to weigh property interests of owners of scarce or at least limited transport resources (frequencies) against public interests. This weighing of interests produces “must carry” rules which the Commission has to address.<sup>121</sup> And these rules show the limitations of such a separating approach. So, although the 1999 Communications Review started out with a broad perspective on convergent infrastructures, it is stuck with the need to carry on with regulatory differentiation.

The minimalism philosophy, the broadened but somewhat double-bound view on convergence and the practical experiences with the past regulatory arrangements lead the Commission to give specifics in its new regulatory program. As regards the binding measures and the new framework directive, the Commission suggests that such a directive should:

[1] [I]dentify specific policy objectives for Member States. . .

[2] guarantee specific consumers’ rights (e.g. dispute resolution procedures, emergency call numbers, access to information, etc.);

---

Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1997 O.J. (L 202) 60 [hereinafter Parliament and Council Directive 97/36].

119. Parliament and Council Directive 97/36, *supra* note 118.

120. 1999 Communications Review, *supra* note 38, at vii fig.

121. *See id.* at 30; SCHERER, *supra* note 81, at 21.

[3] ensure an appropriate level of interoperability for communications services and equipment;

[4] set out the rights, responsibilities, decision making powers and procedures of NRAs (e.g. criteria for implementation of flexibility clauses, forbearance), including possibilities for appeal at national level and obligations to exclude arrangements that are contrary to Community competition law.<sup>122</sup>

The four specific directives would comprise the following:

[1] Directive on authorisations and licensing, (based on the Licensing Directive including rules for effective management of, and access to, scarce resources);

[2] Directive on the provision of universal service, incorporating elements of the current Voice Telephony Directive, and Interconnection Directive;

[3] Directive on access and interconnection (based on the current Interconnection Directive and the TV standards Directive); [and]

[4] Directive on data protection and privacy in the telecommunications sector (based on the Telecoms Data Protection Directive, updated and clarified to take account of technological developments).<sup>123</sup>

The 1999 Communications Review did provide some further information on how such regulation would look in more detail. We will revisit the themes below when analyzing the current situation. In the area of non-binding instruments, the Commission remained very “flexible”:

Complementary measures include guidelines and recommendations developed by the Commission or national authorities. Where appropriate, codes of conduct, co-regulation agreements, recommendations, standards, memoranda of understanding, redress procedures, and other similar measures could be drawn up in parallel with the aim of achieving harmonised solutions to common problems. Such measures can be more easily and quickly agreed or adapted than legislation and — where they are agreed by consensus of interested parties and backed up by effective sanctions in cases of non-compliance — can be very effective. . . . They provide a flexible tool for regulators, and will allow for regulation that is re-

122. 1999 Communications Review, *supra* note 38, at 15.

123. *Id.*

sponsive to the changing needs of the communications services market.<sup>124</sup>

There was another, this time outspoken, question in the air at least since the Green Paper on Convergence: would there be or should there be a European regulatory authority (“ERA”)?<sup>125</sup> However, based on external advice<sup>126</sup> and institutional insight in view of the responses to public consultation, the Commission refrained from proposing such an authority. This does not imply that the then institutional structure of regulation was considered satisfactory: since the beginning of deregulation, Member States had separated the regulatory activities of their administration from their operational functions.<sup>127</sup> There had been manifold information and notification duties of NRAs to the Commission, and there had already been dispute resolution.<sup>128</sup> In addition, EU regulations had created several new bodies and committees, with different purposes and procedures on the Community level.<sup>129</sup>

It was thus tempting to cut through these organizations and create an ERA. The Commission’s concession not to pursue this idea any longer came with a price for the NRAs. The Commission suggested in the 1999 Review:

Since the rules at EU level will be more general than at present, there will be a need for mechanisms to ensure that NRAs apply the objectives and principles set out in the directives in a way which safeguards the integrity of the internal market.

. . . .

---

124. *Id.* at 18.

125. See SCHERER, *supra* note 81, at 80. For general information on the problem of such an authority within the context of EU law in contrast to U.S. law, see Xénophon A. Yataganas, Delegation of Regulatory Authority in the European Union: The Relevance of the American Model of Independent Agencies, Harvard Jean Monnet Working Paper No. 03/01, <http://www.jeanmonnetprogram.org/papers.01/010301.rtf> 2001.

126. See EUROSTRATEGIES/CULLEN INT’L, FINAL REPORT ON THE POSSIBLE ADDED VALUE OF EUROPEAN REGULATORY AUTHORITY FOR TELECOMMUNICATIONS (1999), available at <http://europa.eu.int/ISPO/infosoc/telecompolicy/en/erastudy.pdf>.

127. See SCHERER, *supra* note 81, at 79.

128. See Parliament and Council Directive 98/10, *supra* note 92, art. 26.

129. For more details, see SCHERER, *supra* note 81, at 80.



The Commission continues to have a number of concerns with regard to the effectiveness of some of these arrangements, and will strengthen existing legal provisions to ensure that:

- the independent national regulator can undertake its role of supervision of the market free from political interference, without prejudice to the government's responsibility for national policy;
- allocation of NRA responsibilities to different bodies does not lead to delays and duplication of decision making;
- where sector-specific regulators and national competition authorities are both involved in issues related to communications infrastructure and associated services, there is effective co-operation between the two bodies and that NRAs ensure that their decisions are compatible with Community competition law;
- the decision-making procedures at national level are transparent.

...

The Commission recognises the need for a clear regulatory function to be exercised at the level of the Union . . . . The Commission proposes to:

- replace the existing two telecommunications committees with a new Communications Committee, drawing on the expertise of a new High Level Communications Group involving the Commission and NRAs to help improve the consistent application of Community legislation;
- review existing legal provisions with a view to (i) strengthening the independence of NRAs, (ii) ensuring that the allocation of responsibilities between institutions at national level does not lead to delays and duplications of decision making (iii) improving cooperation between sector specific and general competition authorities and (iv) requiring transparency of decision making procedures at a national level.<sup>130</sup>

How much coordination and information this would mean for NRAs would soon be shown in the new regulatory package, when the ideas as to institutional balances in the new regulatory framework would take shape. Again, this is an issue worth revisiting later for a more general analysis.

---

130. 1999 Communications Review, *supra* note 38, at 53.

*C. Consequences of the 1999 Communications Review: The New Regulatory Package*

1. The New Regulatory Package and its Progress

The 1999 Communications Review contained a number of specific proposals for: (1) licensing and authorizations; (2) access and interconnection; (3) universal service; (4) competition in the local loop; and (5) consistent regulatory action at the EU level.<sup>131</sup> The 1999 Communications Review proposals initiated the usual consultation process, which lasted until February

---

131. *Id.* at 55. The 1999 Communications Review also contained observations on the radio spectrum policies. The main purposes of regulatory activities in this area have been transparency and coordination, allowing discussion of radio spectrum issues at Community level where Community interests and policies are concerned, and ensuring a (partial) mandate to defend Community interests in international negotiations. *Id.* at 55-57.

This approach has so far been dealt with in the following documents: Green Paper on Radio Spectrum Policy, *supra* note 110; Parliament Resolution A4-0202/99 on the Commission Green Paper on Radio Spectrum Policy in the Context of European Community Policies such as Telecommunications, Broadcasting, Transport, and R&D (COM(98)0596 – C4-0066/99), 1999 O.J. (C 279) 72; Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Next Steps in Radio Spectrum Policy: Results of the Public Consultation on the Green Paper, COM(99)538 final; and Parliament Resolution A5-0122/2000 on the Commission Communication to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on “Next Steps in Radio Spectrum Policy - Results of the Public Consultation on the Green Paper” (COM(99)538 – C5-0113/2000 – 2000/2073(COS)), 2001 O.J. (C 59) 245.

Further documents include: Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Results of the World Radiocommunications Conference 2000 (WRC-2000) in the Context of Radio Spectrum Policy in the European Community, COM(00)811 final; Proposal for a Decision of the European Parliament and of the Council on a Regulatory Framework for Radio Spectrum Policy in the European Community, 2000 O.J. (C 365 E) 256 [hereinafter Radio Spectrum Policy Proposal]. This proposal was discussed in the Council (of Telecommunications Ministers) on June 27, 2001 and has received its First Reading in the European Parliament on July 5, 2001. See also [Report](#) on the Proposal for a Decision of the European Parliament and of the Council on a Regulatory Framework for Radio Spectrum Policy in the European Community, A5-0232/2001 final, at <http://www2.europarl.eu.int/omk/OM-Europarl?PROG=REPORT&L=EN&PUBREF=//EP//NONSGML+REPORT+A5-2001-0232+0+DOC+PDF+V0//EN&LEVEL=3&NAV=S> (last visited May 1, 2002).

2000. In April 2000, the result of this consultation process was made public in a communication to the Parliament and the Council.<sup>132</sup>

In July 2000, the Commission adopted several proposals which formed the new regulatory package: (1) a proposal for a directive on the new regulatory framework;<sup>133</sup> (2) a proposal for a directive on access and interconnection;<sup>134</sup> (3) a proposal for a directive on authorizations;<sup>135</sup> (4) a proposal for a directive on universal service and users' rights;<sup>136</sup> (5) a proposal for a directive on data protection;<sup>137</sup> (6) measures as regards the local loop problem; and (7) a Proposal for a Decision of the European Parliament and the Council on a Regulatory Framework for Radio Spectrum Policy in the European Community.<sup>138</sup>

The five directive proposals were of the "harmonization" type based on EC Treaty Article 95, to be adopted in a co-decision procedure by the Council and the Parliament.<sup>139</sup> In March 2001, these proposals were supplemented by a notice from the Commission on the proposal of a "liberalization" directive based on EC Treaty Article 86 for which the Commission is solely responsible (within the limits of the Compromise of December

132. See Results of the Public Consultation, *supra* note 114.

133. See Proposal for a Directive of the European Parliament and of the Council on a Common Regulatory Framework for Electronic Communications Networks and Services, 2000 O.J. (C 365 E) 198 [hereinafter Framework Proposal].

134. See Proposal for a Directive of the European Parliament and of the Council on Access to, and Interconnection of, Electronic Communications Networks and Associated Facilities, 2000 O.J. (C 365 E) 215.

135. See Proposal for a Directive of the European Parliament and of the Council on the Authorisation of Electronic Communications Networks and Services, 2000 O.J. (C 365 E) 230.

136. See Proposal for a Directive of the European Parliament and of the Council on Universal Service and Users' Rights Relating to Electronic Communications Networks and Services, 2000 O.J. (C 365 E) 238 [hereinafter Universal Service Proposal].

137. See Proposal for a Directive of the European Parliament and of the Council Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector, 2000 O.J. (C 365 E) 223 [hereinafter Data Protection Proposal]; Parliament and Council Directive 97/66 Concerning the Processing of Personal Data and the Protection of Privacy in the Telecommunications Sector, 1998 O.J. (L 24) 1 [hereinafter Parliament and Council Directive 97/66].

138. See Radio Spectrum Policy Proposal, *supra* note 131.

139. EC TREATY art. 95.

1989) and which will consolidate the Services Directive of 1990 as modified in 1996 and 1999.<sup>140</sup>

As regards measures for competition in the local loop, the Commission was immediately going ahead, taking the usual steps but taking them unusually fast, first by directly issuing — in parallel to the communication on the general results of the post-1999 Communications Review consultation process — a communication and a proposal for a recommendation,<sup>141</sup> then a month later the recommendation.<sup>142</sup> In the end, the recommendation proved to be insufficient: a regulation was needed, and a proposal for a regulation concerning the local loop became part of the regulatory package of July 2000.<sup>143</sup> Although the proposal for the local loop regulation received several amendments in the Council and the Parliament,<sup>144</sup> it became the first and so far only proposal of that package that was turned into a legally binding instrument, entering into force in the beginning of 2001.<sup>145</sup>

So, from the various options available to address the local loop issue,<sup>146</sup> the Commission had given up the recommendation approach and had made true its 1999 Communications Review warning by now directly prescribing a standard offer for unbundled access, strictly cost-based and to be supervised by the NRAs. This fast-track approach was also another, and

---

140. See Notice by the Commission Concerning a Draft Directive on Competition in the Markets for Electronic Communications Services, 2001 O.J. (C 96) 2.

141. See Communication from the Commission: Unbundled Access to the Local Loop: Enabling the Competitive Provision of a Full Range of Electronic Communication Services Including Broadband Multimedia and High-Speed Internet, COM(00)237 final.

142. See Commission Recommendation of 25 May 2000 on Unbundled Access to the Local Loop: Enabling the Competitive Provision of a Full Range of Electronic Communications Services Including Broadband Multimedia and High-Speed Internet, 2000 O.J. (L 156) 44.

143. See Proposal for a Regulation of the European Parliament and of the Council on Unbundled Access to the Local Loop, 2000 O.J. (C 365 E) 212.

144. See Proposal for a Regulation of the European Parliament and the Council on Unbundled Access to the Local Loop, COM(00)394 final; Amended Proposal for a Regulation of the European Parliament and of the Council on Unbundled Access to the Local Loop, 2001 O.J. (C 62 E) 314.

145. See Parliament and Council Regulation 2887/2000, *supra* note 1.

146. For more detail, see LAROCHE, *supra* note 18, at 324.

this time more direct answer to the question whether telecom law was still needed in addition to competition law.

The whole of the regulatory program of the 1999 Communications Review had in fact been an answer to that question whether it would not be sufficient — after having reached the stage of “full competition” — to rely on (general) competition law alone, rather than to carry on (also) with sector specific (and framework) regulations for communications services. In the context of the Green Paper on Convergence, there had already been a strongly supported opinion that EU competition law would, at least in the near future, be fully sufficient to handle the problems of telecommunications.<sup>147</sup> But there were a number of deficiencies in competition law.<sup>148</sup> Among them the local loop situation. Whereas, looking at the European situation in general, at the level of the trunk networks, there was a fair amount of services and infrastructure competition in Europe. The incumbent telecommunications operators had still kept an almost natural monopoly in the area of the “last mile” or “local loop” or “subscriber network,” a situation which allowed for hardly anything else than service based competition in this field. Or, as Herbert Ungerer had keenly observed in 1999:

[W]hile we have changed successfully the regulatory framework across Europe and . . . as well as in implementation control, we have not changed market structures. In all EU Member States . . . the incumbents continue to have a firm bottleneck control on competition in the local loop. Europe has deregulated, but it has done this without a divestiture.<sup>149</sup>

New technologies, like wireless services, did not necessarily change this situation, since the question of which of the local lines would eventually be accepted by the subscriber adds additional investment risks. In the Commission's view, what it called “regulatory minimalism” did not imply leaving intervention to competition law alone. The urgency of this situation explains why the Commission had moved ahead so vigorously

---

147. *See id.* at 322 n.1.

148. *See id.* at 322.

149. Herbert Ungerer, Local Loop Unbundling, Keynote Address at London Business School. (June 14, 1999), at [http://www.europa.eu.int/comm/competition/speeches/text/sp1999\\_011\\_en.html](http://www.europa.eu.int/comm/competition/speeches/text/sp1999_011_en.html).

in the area of the local loop without waiting for the fate of the other parts of the new regulatory package.

The remaining five “harmonization” directive proposals (framework, access and interconnection, authorization, universal services and users’ rights and data protection)<sup>150</sup> which will now be the center of our further interest,<sup>151</sup> are also progressing at different speeds. The Commission had initially planned to pass the whole package by the end of 2001. As shown, it has only succeeded with regard to the local loop issue. By September 2001, four proposals had their First Reading in Parliament, and the Council had reached political agreement on a “Common Position”<sup>152</sup> on those four<sup>153</sup> — the proposal on data protection

150. See *supra* notes 133-37 and accompanying text.

151. For a very detailed, yet highly readable analysis of the status of the package as of April 2001, see Robert Queck, *Vers un Nouveau Cadre Réglementaire Européen des Réseaux et Services de Communications Électroniques: Réflexions à Mi-Chemin*, 9 REVUE UBIQUITÉ 41 (2001).

152. Political agreement means agreement on a “common position” in principal while the exact wording is still being framed in appropriate committees. See ROWE & MAW’S EU COMPETITION AND TRADE GROUP, EUROPEAN DEVELOPMENTS IN THE COMMUNICATIONS SECTOR 1 (June 2001), available at [http://www.mayerbrownrowe.com/london/pdf/ec\\_comms\\_jun01.pdf](http://www.mayerbrownrowe.com/london/pdf/ec_comms_jun01.pdf) [hereinafter ROWE & MAW’S EU COMPETITION AND TRADE GROUP]. Such agreement was reached for the framework proposal, the access and interconnection proposal and the authorization proposal in the meeting of the Telecommunications Council (the responsible ministers for telecommunications from the Member States) in its meeting in April 2001. See Press Release, 2340th Council Meeting, Transport/Telecommunications (Apr. 4-5, 2001), available at <http://ue.eu.int/newsroom/LoadDoc.asp?MAX=1&BID=87&DID=66088&LANG=1> [hereinafter 2340th Council Meeting]. Political agreement on the universal service proposal was reached in the meeting of the Telecommunications Council in June 2001. See ROWE & MAW’S EU COMPETITION AND TRADE GROUP, *supra* note 152, at 1.

153. The first proposal is the Amended Proposal for a Directive of the European Parliament and of the Council on a Common Regulatory Framework for Electronic Communications Networks and Services, COM(01)380 final [hereinafter Amended Framework Proposal]. For the current state of the drafting of the Common Position in the Council, see Council of the European Union Brussels, Outcome of Proceedings, Draft Directive of the European Parliament and of the Council on a Common Regulatory Framework for Electronic Communications Networks and Services – Common Positions, May 11, 2001, Interinstitutional File 2000/0184 (COD) 8208/01 ECO 116 CODEC 357.

The second proposal is the Amended Proposal for a Directive of the European Parliament and of the Council on Access to, and Interconnection of, Electronic Communications Networks and Associated Facilities, COM(01)369

is still waiting for the First Reading,<sup>154</sup> and any fast agreement on this issue is highly unlikely.<sup>155</sup> It is assumed now that the package will be passed in Spring 2002, with an obligation for the Member States to transform the directives into national law by 2003. For reasons given in the introduction, an overview of the most important substantive elements of the proposals will be based on the original proposals as presented by the Commission in 2000.

---

final [hereinafter Amended Interconnection Proposal]. For the current state of the drafting of the Common Position in the Council, see Council of the European Union Brussels, Outcome of Proceedings, Draft Directive of the European Parliament and of the Council on Access to, and Interconnection of, Electronic Communications Networks and Associated Facilities – Common Position, May 11, 2001, Interinstitutional File 2000/0186 (COD) 8200/01ECO 114 CODEC 355.

The third proposal is the Amended Proposal for a Directive of the European Parliament and the Council on the Authorisation of Electronic Communications Networks and Services, COM(01)372 final [hereinafter Amended Authorization Proposal]. For the current state of the drafting of the Common Position in the Council, see Council of the European Union Brussels, Draft Directive of the European Parliament and the Council on the Authorisation of Electronic Communications Networks and Services – Common Position, May 11, 2001, Interinstitutional File 2000/0188 (COD) 8203/01 ECO 115CODEC 356.

The fourth proposal is the Proposal for a Directive of the European Parliament and of the Council on Universal Service and Users' Rights Relating to Electronic Communications Networks and Services, COM(00)392. For the current state of the drafting of the Common Position in the Council, see Council of the European Union Brussels, Draft Directive of the European Parliament and of the Council on Universal Service and Users' Rights Relating to Electronic Communications Networks and Services, July 6, 2001, Interinstitutional File 10661/01 ECO 211 CODEC 717.

154. For the current state of the drafting of the Common Position in the Council, see Council of the European Union Brussels, 29 June 2001, Outcome of Proceedings, Proposal for a Directive of the European Parliament and of the Council Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector, Interinstitutional File 2000/0189 (COD) 10451/01ECO 202 CODEC 677. There is still disagreement on the question of unsolicited communications and French and British delegations still maintain parliamentary scrutiny reservations. *Id.*

155. See Council of the European Union, Outcome of Proceedings of Working Party on Telecommunications, July 23, 2001, Interinstitutional File 2000/0189 (COD) 11164/01 ECO 221 CODEC 778.

## 2. Some Observations on the Substance of the Regulatory Package

The Proposal for a Directive of the European Parliament and of the Council on a Common Regulatory Framework for Electronic Communications Networks and Services (“Framework Proposal” or “FP”) maintains the convergence approach and the content/conduit-division, however, “it is open to address contents issues in the interest of media pluralism, cultural diversity and consumer protection.”<sup>156</sup> The Framework Proposal consequently defines its objects of regulation as: (1) electronic communications networks; (2) electronic communications services; and (3) associated facilities:

“[E]lectronic communications network” means transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, networks used for radio and television broadcasting, “powerline” systems and cable TV networks, irrespective of the type of information conveyed.<sup>157</sup>

“[E]lectronic communications service” means services provided for remuneration which consist wholly or mainly in the transmission and routing of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but excluding services providing, or exercising editorial control over, content transmitted using electronic communications networks and services,<sup>158</sup>[and]

....

“[A]ssociated facilities” means those facilities associated with an electronic communications network and/or an electronic communications service, to which enable and/or support the provision of services via that network and/or service. It includes conditional access systems and electronic programme guides.<sup>159</sup>

156. See Framework Proposal, *supra* note 133.

157. Amended Framework Proposal, *supra* note 153, art. 2(a).

158. *Id.* art. 2(b).

159. *Id.* art. 2(d).



With these definitions, the FP has, of course, followed the convergence approach by integrating the transport side of radio and television and Internet services. At a closer look, however, and as a result of what might be called the convergence trap, this integration is more a textual than a functional integration. One of the main reasons for separate regulatory cultures in telecommunications and electronic mass media has been the content sensitivity of the latter. If one leaves untouched contents in a converging approach, as was the declared intention of the Green Paper on Convergence and the 1999 Communications Review, convergence remains a formality. But even on the formal level, the new regulatory package prefers to place telecommunications, radio and television regulations side by side under a common heading rather than seeking functional integration in one new conduit concept. And as indicated above, contents comes back even on that level as the must carry rules. To call this result “a merger of hitherto separate regulatory cultures”<sup>160</sup> sounds slightly euphemistic.

What the Framework Proposal does achieve, however, is changing the benchmark of intervention for the NRAs. The basic market oriented question of a sector specific approach is when to allow authorities to set *ex ante* obligations for market participants. In the pre-1999 Communications Review regulatory framework, the threshold of intervention, or “significant market power” (“SMP”), was defined as follows:

An organization shall be presumed to have significant market power when it has a share of more than 25% of a particular telecommunications market in the geographical area in a Member State within which it is authorized to operate. National regulatory authorities may nevertheless determine that an organization with a market share of less than 25% in the relevant market has significant market power. They may also determine that an organization with a market share of more than 25% in the relevant market does not have significant market power. In either case, the determination shall take into account the organization's ability to influence market

---

160. Director General Robert Verrue, The New Regulatory Framework for Electronic Communications, Remarks at the Roundtable on Multi-Media and Telecommunications on the Future of Spectrum Management Organized by the European Institute (May 10, 2001), *available at* <http://www.eurunion.org/news/speeches/2001/010510rv.htm>.

conditions, its turnover relative to the size of the market, its control of the means of access to end-users, its access to financial resources and its experience in providing products and services in the market.<sup>161</sup>

This definition was seen as too formal to take fully into account the fact that since the gradual liberalization of the late 1990's, the situation of the incumbent national telecommunications operators which had originally been the addressees of that regulation was changing. Also, the SMP concept could not sufficiently address situations where a small number of companies were exercising oligopoly power. And finally, this definition still left a large amount of discretion for intervention by the NRAs. The Commission had therefore intended to set a more clearly defined threshold for ex ante regulatory intervention.<sup>162</sup> In the FP, the definition of SMP moves away from a numerical benchmark notion. It now seeks to harmonize the definition with the general competition law definition (the concept of "dominance"), and with the interpretation of this definition by the ECJ, justifying this move explicitly by referring, e.g., to oligopoly situations.

Article 13 of the FP now gives the following definition of SMP:

Undertakings with significant market power

1. Where the Specific Measures require national regulatory authorities to determine whether operators have significant market power, paragraphs 2 and 3 shall apply.

2. An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.

3. Where an undertaking has significant market power on a specific market, it may also be deemed to have significant market power on a closely related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market,

161. Parliament and Council Directive 97/33, *supra* note 91, art. 4(3). The same definition can be found in the directives on leased lines, voice telephony and authorization. See Parliament and Council Directive 97/51, *supra* note 89, art. 2(3); Parliament and Council Directive 98/10, *supra* note 92, art. 2(2)(i); Parliament and Council Directive 97/13, *supra* note 90, art. 2(2).

162. See SCHERER, *supra* note 81, at 38.

thereby strengthening the market power of the undertaking.<sup>163</sup>

---

163. Amended Framework Proposal, *supra* note 153, art. 13. The Framework Proposal therefore introduces rather a complex procedure for determining such markets in Article 14:

Market analysis procedure

1. After a public consultation and consultation with national regulatory authorities through the Advisory Communications Group, the Commission shall issue a Decision on Relevant Product and Service Markets (hereinafter "the Decision"), addressed to Member States. The Decision shall identify those product and service markets within the electronic communications sector, the characteristics of which may be such as to justify the imposition of regulatory obligations set out in the Specific Measures, without prejudice to markets that may be defined in specific cases under competition law. The Commission shall also publish Guidelines on market analysis and the assessment of significant market power (hereinafter "the Guidelines"), which shall be in accordance with the case law of the Court of Justice and the Court of First Instance of the European Communities.

The Commission may indicate in the Decision those markets which are trans-national. In such markets, the national regulatory authorities concerned shall jointly conduct the market analysis and decide on any imposition of regulatory obligations under paragraphs 2 to 5 in a concerted fashion.

National regulatory authorities shall seek and receive the prior agreement of the Commission before using market definitions that are different from those identified in the Decision or before imposing sector-specific regulatory obligations on markets other than those identified in the Decision. The Commission shall regularly review the Decision and the Guidelines.

2. Within two months of the date of adoption of the Decision or any updating thereof, national regulatory authorities shall carry out an analysis of the product and service markets identified in the Decision, in accordance with the Guidelines. Member States shall ensure that national competition authorities are fully associated with that analysis. The national regulatory authorities' analysis of each market shall be published.

3. Where a national regulatory authority is required under Articles 16, 25 or 27 of Directive 2000/. . . /EC [on universal service and users rights relating to electronic communications networks and services], or Articles 7 or 8 of Directive 2000/. . . /EC [on access to and interconnection of electronic communications networks and associated facilities] to determine whether to impose, maintain or withdraw obligations on undertakings, it shall determine on the basis of its market analysis referred to in paragraph 2 whether a market identified in the Decision is effectively competitive in a specific geographic area in accordance with the Guidelines.

In practice this means that, as explained in the recital of the FP ex ante obligations, NRAs:

[A]re justified only for undertakings which have financed infrastructure on the basis of special or exclusive rights in areas where there are legal, technical or economic barriers to market entry, in particular for the construction of network infrastructure, or which are vertically integrated entities owning or operating network infrastructure for delivery of services to customers and also providing services over that infrastructure, to which their competitors necessarily require access.<sup>164</sup>

This more general definition, although clarified by ECJ case law, makes a concise (and harmonized) definition of the relevant market even more important, because that market definition now defines the ex ante possibilities for the interventions of NRAs.

On the one hand, the (independent) NRAs remain free in their decision on which undertaking to select as a SMP to become the subject of ex ante measures (as foreseen in the specific directives of the package). However, on the other hand, the criteria for their decision making, the Commission Working Document on Proposed New Regulatory Framework for Electronic Communications Networks and Services (“Draft Guidelines”), and in particular the definition of the markets which are the basis of market power analysis, remain subject to the

---

4. Where a national regulatory authority concludes that the market is effectively competitive, it shall not impose sector specific regulatory obligations set out in the Specific Measures. In cases where such sector specific regulatory obligations already exist, it shall withdraw such obligations placed on undertakings in that specific market. An appropriate period of notice shall be given to parties affected by such a withdrawal of obligations.

5. Where a national regulatory authority determines that a market identified in the Decision is not effectively competitive in a specific geographic area in accordance with the Guidelines, it shall impose the sector-specific regulatory obligations set out in the Specific Measures, or maintain such obligations where they already exist.

6. Measures taken pursuant to paragraphs 4 and 5 shall be subject to the procedure set out in Article 6.

*Id.* art. 14.

164. *Id.* ¶ 20.

discretion of the Commission.<sup>165</sup> Since such “definition decisions” of the Commission are not regulatory in the proper sense, and do not affect the decisions of the NRAs directly, the process of making such definition decisions is not embedded in the usual procedures of Commission decision making power.<sup>166</sup> Such specific procedures are only foreseen where the Commission makes decisions in the area of standardization<sup>167</sup> and harmonization,<sup>168</sup> and in some of the specific directives of the proposal package.

The definition of SMP and the resulting actions by the NRAs are thus embedded in complex definition procedures. In addition, the NRAs have to observe information, consultation and

---

165. See Commission Working Document on Proposed New Regulatory Framework, *supra* note 4.

166. The general rules for Commission decision making power are now set out in Council Decision 1999/468 of 28 June 1999 Laying Down the Procedures for the Exercise of Implementing Powers Conferred on the Commission, 1999 O.J. (L 184) 23. This decision on procedures differentiates between four types of procedures of interaction between the Commission and the Member States for those areas where the Commission has decision making powers: (1) advisory procedure (art. 3); (2) management procedure (art. 4); (3) regulatory procedure (art. 5); and (4) safeguard procedure (art. 6). *Id.* The most important is the regulatory procedure. If there is disagreement between the Commission and the committee of representatives of the Member States during that procedure, a complex resolution procedure takes place involving the Parliament and the Council with a slight structural advantage of the Commission because of the way the procedures are laid out and because of time limits imposed. This structure is generally referred to as “comitology.” For further discussion, see FISCHER, *supra* note 14, at 79. This complex pattern of interaction is not unusual but reflects the framework of the Commission’s rule making power. In the context of the (general) data protection directive, see, e.g., Parliament and Council Directive 95/46 of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 3 [hereinafter Parliament and Council Directive 95/46]. The Commission centralizes the power to make the decisions on the “adequate level of protection” provided by third countries. *Id.* art. 25(6). In this decision, the Commission is advised by the committee of independent data protection authorities which in this case is called the “Working Party on the Protection of Individuals with Regard to the Processing of Personal Data.” *Id.* art. 29. The measures the Commission intends to undertake are submitted to the representatives of the Member States, which together with the Commission representative form the “Committee.” *Id.* art. 31.

167. See Amended Framework Proposal, *supra* note 153, arts. 15(4), 19(2)-(3).

168. *Id.* art. 16(1)-(2).

publication procedures. Having brought the SMP definition nearer to the competition law definition of “dominance” does not exclude differences. As the Draft Guidelines point out:

18. To ensure consistency of approaches, these Guidelines are based on . . . existing jurisprudence of the Court of First Instance and the Court of Justice concerning market definition and the notion of dominant position within the meaning of Article 82 of the EC Treaty . . . .

19. Markets defined by the Commission and NCAs [national competition authorities] in competition cases may, nevertheless, vary from those identified in the Commission Decision and from market definitions identified by NRAs. . . . The market definitions used by NRAs are without prejudice to those used by NCAs and by the Commission in the exercise of their respective powers.

20. In practice, parallel procedures under ex ante regulation and competition law may arise with respect to different kinds of problems in relevant markets. NCAs may therefore investigate a market and market behaviour and impose appropriate competition law remedies alongside any sector specific measures applied by NRAs. However; it must be noted that such simultaneous application of remedies by different regulators would address different problems in such markets.

21. NRAs will exercise their powers under Article 14 of [the Framework Proposal] to determine whether to designate undertakings in the market as having SMP. In so doing, NRAs enjoy considerable discretion in the exercise of their powers, with respect to the complexity of inter-related factors that must be assessed concerning the economic, factual and legal elements of identified markets, subject to the consultation and transparency procedure foreseen.<sup>169</sup>

Even this remaining “decisional freedom” of the NRAs needs additional control to prevent the decisions from undermining the criteria. The “transparency mechanism”<sup>170</sup> in the FP therefore requires NRAs to provide the Commission with draft measures (ex ante measures following from the SMP assessment<sup>171</sup> and measures in the context of the proposed directive

---

169. See Commission Working Document on Proposed New Regulatory Framework, *supra* note 4, at 6.

170. Amended Framework Proposal, *supra* note 153, art. 6.

171. See *id.* art. 14(4)-(5).

on "access and interconnection"<sup>172</sup>) after a period of consultation on the national and EU level. As a backup measure, the Commission reserves the right to intervene if the objectives of an open and competitive market and/or the regulatory principles<sup>173</sup> are not met.<sup>174</sup>

This approach in the new regulatory package has, of course, already created some resistance. The Commission, it was felt, losing out on the ERA model, sought to establish a functional equivalent. Robert Verrue, Director General of the Commission Directorate responsible for telecommunications, answered this criticism in a recent a speech in the U.S.:

[L]et me outline our thinking. The electronic communications market is developing at an unprecedented speed. National regulators are closest to their market, so it should be for them to tailor regulation to fit the circumstances of that market. The new Directives leave a very large degree of flexibility to national regulators. NRAs assess the degree of competition on a given product market in their territory. They decide what obligations to impose. They decide which operators will be subject to those rules. The proposal from the Commission seek [sic] to counter-balance this decentralisation of decision making with strong co-ordination mechanisms to ensure consistency of application of the rules. The over-riding rationale for a regulatory framework at [the] European level is to ensure a minimum level of harmonisation. Similar firms should be subject to similar obligations in similar market circumstances, wherever they operate in the EU.<sup>175</sup>

While the author intended to basically restrict the analysis to the state of the July 2000 proposals, it nevertheless seems useful to warn that the Council (in its meeting in April 2001) has already shown its reluctance to follow the Commission. In its view, the "transparency mechanism" should run only as follows:

The Commission may make public a detailed opinion which it shall communicate to the NRA concerned stating why it considers that the draft measure is not compatible with Community law. The NRA may adopt the envisaged measures after

172. Amended Interconnection Proposal, *supra* note 153, art. 8(2).

173. See Amended Framework Proposal, *supra* note 153, art. 7.

174. See *id.* art. 6(4)-(6).

175. See Verrue, *supra* note 160.

the publication of the detailed opinion of the Commission, and shall communicate them to the Commission. Where the NRA does not follow the Commission's opinion, it shall give its reasoning.<sup>176</sup>

As seen from the Commission proposal which has already taken in the comments of the Parliament's First Reading (although not following them completely), this approach is not what the Commission intended. It will now largely depend on the Parliament's Second Reading and if necessary, the conciliation procedure to arrive at results.<sup>177</sup>

In general, we are witnessing once again an attempt to strike what might be called a "dynamic balance" between centripetal forces, as represented by the Commission, and centrifugal forces, as represented by the Member States. What remains interesting to observe is that the instruments with which the Commission seeks to maintain its influence have become more refined, aiming at setting information and consultation duties, as well as defining criteria for establishing thresholds rather than seeking direct intervention. Closely connected to this tension between the Commission and the NRAs is the other main instrument for regulatory authorities: the licensing (authorization) procedure.

#### a. The Authorization Proposal

The Proposal for a Directive of the European Parliament and of the Council on the Authorization of Electronic Communications Networks and Services ("Authorization Proposal" or "AP")<sup>178</sup> had its First Reading in the Parliament and passed the (Telecommunications) Council in April 2001. Observations are, as above, based basically on the Commission's original AP but not without a glimpse at the Commission's reflections after the First Reading in the Parliament.<sup>179</sup>

---

176. See 2340th Council Meeting, *supra* note 152.

177. For details on the European Union Co-Decision Procedure for Regulations and Directives, see FISCHER, *supra* note 14, at 77.

178. Proposal for a Directive of the European Parliament and of the Council on the Authorisation of Electronic Communications Networks and Services, COM(00)386 final.

179. See Amended Authorization Proposal, *supra* note 153.



The Authorization Proposal sets out the general conditions of authorization for electronic communication services and networks, as defined in the FP. Authorization (licensing) is a particularly crucial area since, in practice, this is where NRAs leave their mark, as the Commission seems painfully aware. In 1992, and independently of its policy as regards a potential ERA, the Commission had already tried to at least introduce a mutual recognition system, an approach always used when Member States' resistance to harmonization seems too strong. But the Commission failed, another example that the telecom regulatory process has witnessed occasional defeat.<sup>180</sup> The Licensing Directive<sup>181</sup> returned to the traditional harmonization approach with the intention of reducing individual licensing occasions,<sup>182</sup> and as remembrance of dreams gone, it opened the way for one-stop-shopping procedures which, however, bundled the licensing decisions of NRAs only organizationally.<sup>183</sup>

The current Authorization Proposal continues with the traditional approach by emphasizing general authorizations, harmonizing and raising the substantive contents of such authorizations. Since the AP is now a "convergence proposal," it has grown larger, incorporating specific sections on radio-frequency authorizations, thus providing an example that convergence can also be reached simply by combining different regulations under a single heading. The most crucial issue, however, is the fee issue. Based on unpleasant experiences, the AP approaches this issue in far more detail than in the old Licensing Directive in order to put stronger control on the Member States' NRA fee policies. There is, of course, the "internal market stick" giving the Commission power of intervention:

Where divergences between national charges, fees, procedures or conditions concerning general authorisation or the grant of

---

180. For a description of the failure, see LAROUCHE, *supra* note 18, at 416 n.450.

181. Parliament and Council Directive 97/13, *supra* note 90.

182. See LAROUCHE, *supra* note 18, at 416.

183. See Parliament and Council Directive 97/13, *supra* note 90, art. 13. This procedure is not restricted to Member States and is organized in the context of CEPT by the European Telecommunications Office ("ETO"). These functions are now being carried out by the European Radiocommunications Office ("ERO"), located in Copenhagen, which took over all ETO functions as of Jan. 2001. See CEPT Organisation, at <http://www.ero.dk> (last visited Mar. 18, 2002).

rights of use create barriers to the internal market, the Commission may adopt measures to harmonise such charges, fees, procedures or conditions in accordance with the procedure referred to in Article 19(3) of Directive [on a common regulatory framework for electronic communications networks and services].<sup>184</sup>

#### b. The Access and Interconnection Proposal

Observations are based on the Amended Proposal for a Directive of the European Parliament and of the Council on Access to, and Interconnection of, Electronic Communications Networks and Associated Facilities.<sup>185</sup> The general principle remains that interconnection agreements may be requested, and are then negotiated among undertakings.<sup>186</sup> Interconnection obligations may be imposed, amended and withdrawn on SMP operators following the procedure set up in the FP.<sup>187</sup> Obligations may also be imposed on undertakings with SMP regarding access to only specific network facilities.<sup>188</sup> Existing interconnection obligations remain in operation, but the NRAs are required to review them taking into account the new definitions of SMP.<sup>189</sup> Interconnection itself remains based on non-discrimination, cost-oriented pricing and transparency, and allows explicitly for access to specific network elements.<sup>190</sup> Providers of conditional access systems (e.g., digital television) are required to offer access on fair, reasonable and non-discriminatory terms.<sup>191</sup> Decisions will be made according to market development on the basis of the comitology structure envisaged in the FP. Again, in working on its common position, the Council is trying to reduce the possible impact of the Commission, mostly in the area of conditional access systems.

---

184. Amended Authorization Proposal, *supra* note 153, art. 16.

185. Amended Interconnection Proposal, *supra* note 153.

186. *See id.* arts. 3-4.

187. *See id.* arts. 5, 8.

188. *Id.* art. 12.

189. *Id.* art. 7.

190. *See id.* arts. 9-12.

191. *See* Amended Interconnection Proposal, *supra* note 153, art. 6.

## c. The Universal Service and Users' Rights Proposal

Observations are based on the Commission Proposal for a Directive of the European Parliament and of the Council on Universal Service and Users' Rights Relating to Electronic Communications Networks and Services ("Universal Service Proposal" or "USP").<sup>192</sup> The USP addresses the traditional universal service obligations. It includes regulations on the choice of designated universal service operators by the Member States, including new provisions on cost assessment and recovery of costs by these operators.<sup>193</sup> Member States must find the most efficient way to attribute universal service, opening the opportunity to all undertakings and using allocation mechanisms for part or all universal service obligations either by tender or auction.<sup>194</sup> There is a specific requirement for the Commission to review the scope of universal service obligations<sup>195</sup> and a prescribed procedure for this task.<sup>196</sup> The rather narrow scope of universal service according to the USP, if compared to the U.S.,<sup>197</sup> is comprised of:

[A]ll reasonable requests for connection to the public telephone network at a fixed location and for access to publicly available telephone services at a fixed location are met by at least one operator. . . . The connection provided shall be capable of allowing users to make and receive local, national and international telephone calls, facsimile communications and data communications, at data rates that are sufficient to permit Internet access."<sup>198</sup>

Further requirements include: (1) adequate directory enquiry services and directories;<sup>199</sup> (2) if so decided by the NRA, public

192. See Universal Service Proposal, *supra* note 136.

193. See *id.* arts. 3-13.

194. *Id.* art. 8.

195. *Id.* art. 15.

196. *Id.* at annex V.

197. For example, the European definition does not comprise the provision of broadband communications for health care establishment, nor internet access for schools. The Commission is of the opinion that such services should be financed by the appropriate government departments and not by the telecommunications sector, although the proposal would allow for direct government payments also within the framework of telecommunications.

198. Universal Service Proposal, *supra* note 136, art. 4.

199. *Id.* art. 5.

payphones with the possibility of free emergency calls;<sup>200</sup> (3) special measures for disabled and specific needs users;<sup>201</sup> and (4) special provisions for users with low incomes or with special needs, including user enabling techniques for cost control.<sup>202</sup> The quality of services is to be monitored by the NRAs.<sup>203</sup>

Cost recovery can be obtained through special funds or from general government budgets. There is no longer a universal service surcharge on interconnection prices.<sup>204</sup> In view of Community enlargement and the ensuing wide variety of market situations and different levels of service quality, special attention is again necessary for undertakings with SMP. These undertakings can be submitted to retail tariff regulation by their NRAs in order to prevent distortions of competition. The NRAs have to observe all procedural obligations, information and publication duties as prescribed for actions in relation to undertakings with SMP in the Framework Proposal.<sup>205</sup>

In the general spirit of EU consumer protection, the Universal Service Proposal relies on information duties in the interest of the consumer rather than on direct intervention. The information requirements of the USP, however, seem either obvious or of rather low quality;<sup>206</sup> tariffs and contractual information are to be made only sufficiently transparent.<sup>207</sup> Yet, while rather grandly including the promotion of interests of European citizens among the tasks of NRAs, the FP had already restricted the means of "requiring transparency of tariffs and conditions for using publicly available electronic communications services; and . . . addressing the needs of specific social groups, in particular disabled users."<sup>208</sup>

Other information related clauses of the USP refer to information on the quality of services.<sup>209</sup> There are further consumer protection elements in the USP which relate to specific issues such as the assurance that all equipment sold in the EU

200. *Id.* art. 6.

201. *Id.* art. 7.

202. *Id.* arts. 9-10.

203. *Id.* art. 11.

204. Universal Service Proposal, *supra* note 136, arts. 12-13.

205. *Id.* art. 16.

206. *See id.* art. 17.

207. *Id.* art. 18.

208. *See* Amended Framework Proposal, *supra* note 153, art. 7(4).

209. Universal Service Proposal, *supra* note 136, art. 19.

for reception of digital television is technically compatible with the relevant European standard,<sup>210</sup> — an assurance which also demonstrates that some of these regulations have an astonishing concern for detail, in contrast, it seems, to the relative importance and relevance of the issue.<sup>211</sup> Further measures comprise: (1) the right to operator assisted calls; (2) a single directory in a fair and non-discriminatory manner;<sup>212</sup> (3) the single European emergency call number (“112”);<sup>213</sup> (4) the existing requirement of a single international access code (“00”) and the obligation of operators to handle calls using the new European regional code (“3883”);<sup>214</sup> (5) the obligation for all public access

210. *See id.* art. 20.

211. *See, e.g., id.* at annex VI. It specifies under which conditions these assurances apply:

Any analogue television set with an integral screen of visible diagonal greater than 42 cm which is put on the market for sale or rent in the Community shall be fitted with at least one open interface socket (as standardised by a recognised European standardisation body) permitting simple connection of peripherals, especially additional decoders and digital receivers.

Any digital television set with an integral screen of visible diagonal greater than 30 cm which is put on the market for sale or rent in the Community shall be fitted with at least one open interface socket (either standardised by a recognised European standardisation body or conforming to an industry-wide specification) permitting simple connection of peripherals, and able to pass all the elements of a digital television signal. Apart from video and audio streams, this includes conditional access information, the full application programme interface (API) command set of the connected devices, service information and copy protection information.

*Id.* Such detail is, of course, less astonishing when remembering the EU industrial policy tradition.

212. *Id.* art. 21.

213. This includes the already existing requirement of emergency services to be available free of charge, and adds a provision stipulating that caller location information be made available to emergency authorities for such calls. *Id.* art. 22.

214. Universal Service Proposal, *supra* note 136, art. 23. The number “3883” will be a “pan-European” country code for subscribers wishing to establish a “European identity,” or rather a “CEPT identity,” since the code will apply to subscribers in the fifteen EU Member States (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and the United Kingdom) and in Bulgaria, Cyprus, the Czech Republic, Croatia, Norway, Poland, Slovenia, the Slovak Republic and Switzerland. *Id.*

operators to provide additional services (tone dialing and itemized billing) to all citizens (and not just obligations only for SMP or designated universal service operators), again, however, NRAs are given the option not to require such obligations if they do not consider them necessary;<sup>215</sup> and (6) the obligation of number portability to mobile operators.<sup>216</sup>

The proposal also confirms the continuing need for leased lines and other mandatory services as already regulated in Directive 92/44 (as amended by Directive 97/51).<sup>217</sup> The Universal Service Proposal contains a new provision which ensures proportionate compensation to network operators that bear must carry obligations in relation to public service broadcasting. One of the few “convergence” rules, it states in full:

“Must carry” obligations

1. Member States may impose “must carry” obligations, for the transmission of specified radio and television broadcasts, on undertakings under their jurisdiction providing electronic communications networks established for the distribution of radio or television broadcasts to the public. Such obligations shall only be imposed where they are necessary to meet clearly defined general interest objectives and shall be proportionate, transparent and limited in time.

2. Member States shall ensure that the undertakings subject to “must carry” obligations receive appropriate compensation on reasonable, transparent and non-discriminatory terms taking into account the network capacity required.<sup>218</sup>

The last chapter of the USP deals with procedure (consultation by national regulatory authorities with user and consumer groups before adopting national measures).<sup>219</sup>

#### d. The Data Protection Proposal

The issue of data protection was dealt with in the working papers, which were part of the consultation processes after the

215. *Id.* art. 24.

216. *Id.* art. 25. This does not apply between mobile and fixed network operators.

217. *Id.*

218. *Id.* art. 26.

219. Universal Service Proposal, *supra* note 136, arts. 29-36.

1999 Communications Review,<sup>220</sup> and later became part of the July 2000 package. Observations are based on the Proposal for a Directive of the European Parliament and of the Council Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector ("Data Protection Proposal" or "DPP").<sup>221</sup>

As known from other contexts, in 1995 the EU enacted Council Directive 95/46, a general directive on data protection covering the private sector and the public sector in as far as there is EU regulatory competence.<sup>222</sup> In 1997, the EU also enacted Council Directive 97/66, a special sector directive on telecommunications.<sup>223</sup> In both cases, the Commission had to open infringement proceedings against certain Member States since they had not transformed the directives into national law within the time frame set by those directives. Some of these proceedings are still pending. There was no intention of introducing large changes to the existing situation created by Directives 95/46 and 97/66. It is not without irony that the intention of this proposal to become (more?) technologically neutral was induced by changes in the technology.

The Data Protection Proposal puts the intended regulations under the umbrella of the framework proposal definition and appends existing regulation accordingly. Since Article 6 ("traffic data") of Directive 97/66, for example, only referred to

---

220. See EUROPEAN COMMISSION, DIRECTORATE-GENERAL INFORMATION SOCIETY, DOC. NO. INFSO A/1DG, COMMUNICATIONS SERVICES: POLICY AND REGULATORY FRAMEWORK (Apr. 27, 2000).

221. Data Protection Proposal, *supra* note 137. See also Parliament and Council Directive 97/66, *supra* note 137. As discussed previously, the proposal is currently under consideration in the Council for developing a Common Position. The First Reading in Parliament is expected in September 2001. The procedure is unusual but possible. Normally, it is the Council who reacts to the position of the Parliament with a Common Position, as in the other elements of the new regulatory package. The Chairman of the Committee on Citizen's Freedoms and Rights, Justice and Home Affairs of the Parliament has already indicated that the amendments of the Council are unlikely to find acceptance in the First Reading of the Parliament. See sources cited *supra* note 153. The Council recognizes that this package is politically, the most difficult element of the package, and since it is the political intention of the Council to see through the whole of the "new regulatory package" on a single date before the end of 2001, there is a certain interest in speeding up procedures. *Id.*

222. Parliament and Council Directive 95/46, *supra* note 166.

223. *Id.*

“calls,”<sup>224</sup> adjustments are made to relate these and other clauses to “the transmission of a *communication*.”<sup>225</sup> Since technical and organizational opportunities as regards traffic data have also increased, there is now an express possibility to allow for processing of this traffic data with the informed consent of the subscriber. Traffic data, however, seems to become a very controversial issue in the current political debate, if not the most controversial in the new regulatory package. Law enforcement interests seek extended periods of data retention on traffic data, as well as access to that data at telecom undertakings.<sup>226</sup> There is currently resistance from the Commission, from some Member States and from telecom undertakings, since Directive 97/66 had affirmed that traffic data may only be kept for billing purposes.<sup>227</sup>

Location data — which will become more important in view of mobile-commerce or “m-commerce” — is strictly speaking, part of traffic data and regulated as such by Directive 97/66. But in view of this information becoming more precise, an explicit article appeared to be necessary. This article, however, only repeats the basic principle of directive 97/66: subscribers should have the choice (of temporarily disabling the location device — similar to “caller ID”) and should give prior consent.<sup>228</sup> This does not alter already existing exemptions — again in the context of caller identification — in emergency situations and by Member States’ legislation for law enforcement purposes.<sup>229</sup>

In view of technological changes and new social and economic uses, the basic assumption of Directive 97/66 — that a central directory service should be maintained with a default rule of entering subscribers into such a directory — can no longer be

224. Parliament and Council Directive 97/66, *supra* note 137, art. 6(1).

225. Data Protection Proposal, *supra* note 137, art. 6(1) (emphasis added).

226. Work is progressing on a resolution to replace the Council Resolution of 17 January 1995 on the Lawful Interception of Telecommunications, 1996 O.J. (C 329) 1, which was not published until the end of 1996. For the current status of this legislation, see Council Resolution 9194/01 on Law Enforcement Operational Needs with Respect to Public Telecommunications and Services, June 20, 2001, at <http://www.ue.eu.int>.

227. See Parliament and Council Directive 97/66, *supra* note 137, art. 6(2).

228. See Data Protection Proposal, *supra* note 137, art. 9.

229. *Id.* arts. 10, 15.



maintained. It will now be the choice of the subscriber to decide in which directories to appear and with what information.<sup>230</sup>

Another issue likely to remain controversial is the protection against unsolicited calls. Here the Data Protection Proposal has, while extending the definition, given up the idea of technological neutrality once again: for “automated calling systems without human intervention (automatic calling machines), facsimile machines (fax) or electronic mail for the purposes of direct marketing,” the default rule is now that such communication is forbidden unless the subscriber has consented.<sup>231</sup> As regards the other forms of “communication,” the opt-out or opt-in choice is left to regulation in the Member States.<sup>232</sup> And this only applies to natural persons — as regards other entities, “Member States shall also ensure . . . that the legitimate interests of subscribers other than natural persons with regard to unsolicited communications are sufficiently protected.”<sup>233</sup> One reason for controversy is that the Electric Commerce Directive already provides for a Member State’s solution for e-mail.<sup>234</sup>

Finally, the Data Protection Proposal addresses the possibilities of privacy enhancing technologies.<sup>235</sup> The DPP suggests that the Commission might propose measures to ensure that terminal equipment incorporates the necessary safeguards to guarantee the protection of personal data and privacy of users and subscribers.<sup>236</sup>

### 3. Summary

Considering all these content descriptions, what then are the main characteristics of change initiated by the 1999 Communications Review, or more precisely, what are the main charac-

230. *Id.* art. 12.

231. *Id.* art. 13(1).

232. *Id.* art. 13(2).

233. *Id.* art. 13(3).

234. *See* Parliament and Council Directive 2000/31, *supra* note 116, art. 7.

235. For a discussion of these technologies, see Herbert Burkert, *Privacy-Enhancing Technologies: Typology, Critique, Vision*, in TECHNOLOGY AND PRIVACY: THE NEW LANDSCAPE 125 (1998).

236. *See* Parliament and Council Directive 1999/5 of 9 March 1999 on Radio Equipment and Telecommunications Equipment and the Mutual Recognition of Their Conformity, 1999 O.J. (L 91) 10; Council Decision 87/95 of 22 December 1986 on Standardization in the Field of Information Technology and Telecommunications, 1987 O.J. (L 36) 31.

teristics of the *proposed* changes that still have to emerge from the rule making process and be implemented in national law?:

(1) After initial hesitation, the EU has addressed the local loop issue as the most pressing structural problem of telecommunication markets with impressive decisiveness: unbundled access to the local loop, either exclusively or shared, has been implemented, with the basic principles of non-discrimination, co-location and cost-orientation on fair, reasonable and non-discriminatory terms and with the requirement of standard publicized offers for undertakings with SMPs.

(2) With regard to the relationship between the Commission and the NRAs, there is an attempt, although somewhat cached in regulatory speech, to arrive at better co-ordination and to ensure faster and more comprehensive alignment with the rules of EU telecommunications regulations. Since this issue is essential for the future of the regulatory landscape in Europe, it will receive further scrutiny in Part IV below.

(3) The new regulatory package attempts to reflect convergence. The approach seems to be more one of verbal regulatory technique than of full functional integration: definitions are extended, articles on specific electronic (mass) media developments are added rather than integrated, not always necessarily reflecting the intention of a more technology neutral approach. The package does not address contents, except when explicitly opening the possibility of must carry obligations.

(4) The basic addressee of ex ante intervention, the undertaking with SMP, will now be defined in closer harmony with the definitions of general competition law intervention, although not necessarily exactly in the same manner and not necessarily with more clarity.

(5) The main intention of the authorization proposal is to achieve better control over the varying fee practices in the Member States.

(6) The access and interconnection proposal mainly ensures that definitions and terminology are adjusted to the new framework and the convergence aim.

(7) The same seems to apply to the more ex post oriented proposals of universal service and users' rights, except perhaps that review procedures for financing models by NRAs have to take place at more regular intervals. Certain service features are now expanded into the area of mobile telephony. There are no fundamental changes to the definition of universal services.

(8) Finally, in the area of data protection, we again see adjustments of terminology to the broader scope of the convergence philosophy, while old conflicts continue, albeit now perhaps with a more data protection minded Commission.

In all, there is no basic change observable. Whether the regulatory hand of the Commission will be lighter or heavier on NRAs is yet to be decided or rather experienced. The regulatory material now appears better structured and organized, and it might facilitate *regulatory orientation* for NRAs, undertakings, users and consumers. This would then be the general description of the emerging post-deregulatory landscape for telecommunications in the EU, with one exception: in the material examined, the original plans analyzed, the pre-1999 Communications Review spirit remembered, the discussions watched and the exchanges followed, there seem to be indications of a deeper change, a change that does not necessarily originate in developments of the telecommunications markets, but one that might eventually influence the outcome of the tensions between the Commission and the Member States' authorities, or rather between the Commission and the Member States' view on the role of their NRAs.

#### IV. A SECOND LOOK: A "NATURAL HISTORY OF REGULATION" OR THE "UNIQUE EUROPEAN EXPERIENCE"

There are, of course, many other questions to be asked about the role of transparency and the involvement of consumers and users outside the traditional structures of the current built-up of regulatory agencies. There is enough writing on the wall; even the imperfect and perhaps soon obsolete Internet Corporation for Names and Numbers model is casting its shadow. To this day, there is no comprehensive comparative study on national regulatory authorities that focuses on the transparency of procedures or the integration of public interest representations in their organizational and procedural structure.<sup>237</sup>

---

237. This approach would, of course, also be necessary on the level of EU institutions. In the area of transparency, there have been considerable efforts by Community institutions over the last years. See, e.g., Parliament Council Regulation 1049/2001, *supra* note 75. Against the general trend of skepticism, the EU has enforced its attempts to address its legitimacy, governance and acceptance problems, again, however, mainly in view of preparing acceptance for yet further treaty changes and, of course, the enlargement. See

We, however, shall put ourselves to a less ambitious task. The general understanding of the changes described above, taking the 1999 Communications Review as the watershed, often summarizes as if they provided a sort of “natural history of telecommunications regulations” where one moves from the natural monopoly to breaking this monopoly, taming the incumbents, ensuring access and entry and gradually making regulation disappear. This Article has shown these developments — as unfinished as they are and as limited to a particular period in EU telecommunications regulations — in some detail because they may answer the long-standing question whether the development towards the post-deregulatory landscape, towards regulation *with a lighter touch*, may indeed be read as a *natural* development where the Commission and the Member States only had to make one effort in the early 1980’s to give the clauses on services in the general economic interest a push.

#### *A. Revisiting the NRA and ERA Issue*

Already, the current situation does not reflect such easiness, if we review the previous account. The local loop problem had to be addressed by a *regulation*, the strongest instrument in EU telecommunications law. The Commission still carries on with a large number of breach of treaty procedures against the Member States who are still battling with the pre-1999 Communications Review regulatory package. The issue of an ERA appeared, and seems to have disappeared again. The relationship between the NRA and the Commission is characterized as critical in the new regulatory package. The universal service issue seems to stand fairly high on current agendas, while in the early telecommunications policy documents the issue was hardly evident. Telecommunications privacy does not have a clear cut profile. And there is a highly critical debate on the regulatory package as such, and neither in the Council nor the Parliament do all elements of the package receive an equally easy ride.

The issue of an ERA seems to show most clearly the first cracks of deeper tectonic changes. At minimum, the outside

observer will see that the Commission's (and the Parliament's) toying with the idea of an ERA was at least influenced by the example of the Federal Communications Commission ("FCC"). EU competition law in general has been driven by the American example, and to a large extent was designed by Americans, even if the empirical and historical evidence is, while basically acknowledged, occasionally downplayed.<sup>238</sup> Would it be useful to have an institution like the FCC on the European level, eventually as a counterpart in the "regulatory world series"?

Although there are a number of constitutional problems in setting up a regulatory agency of some sort on the EU level, or delegating rule-making power from existing institutions to such an institution,<sup>239</sup> the issue of an ERA has always been and continues to be a strong wish, although it is not always clear who the wisher is. The ERA theme certainly provides a leitmotiv of the regulatory developments described so far and also echoes the old (albeit not always clearly expressed) double-bind situation in which Europe looks at the United States: always a dream and always a fear, always an attraction and always a repulsion.

With or without that American-centered addition, the notion of an ERA has been put forward by the Parliament at various occasions.<sup>240</sup> Even the "euro-centric world open," — then famous (and now somewhat lesser referred to as such) — "Bangemann Group" had suggested such an authority in 1994, at a time when reference to a "High Level Group" consisting purely of industrialists was still considered to bring enlightened guidance to European policies.<sup>241</sup>

While it was the Parliament that put the issue on the agenda of the 1999 Communication Review, the Commission itself had undertaken various studies on its own to test the ground.<sup>242</sup> The actual position of the Commission remained difficult to

---

238. For a history of European integration and the influence of U.S. competition law, see DAVID J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS* 334 (1998).

239. For further detail, see Yataganas, *supra* note 125.

240. For further references to EU action in this field, see LAROCHE, *supra* note 18, at 414.

241. Robert Queck, *The Future of National Telecommunications Regulatory Authorities*, in 2 *THE JOURNAL OF POLICY, REGULATION AND STRATEGY FOR TELECOMMUNICATIONS INFORMATION AND MEDIA* 251, 259 (2000).

242. For further detail, see LAROCHE, *supra* note 18, at 415.

ascertain. There are different currents of opinion in the Commission, and which of these currents or which mix of those currents see the light of an official document is the result of complex interactions within and among the General Directorates. In a statement in the *EC Competition Policy Newsletter*, a Commission official from the Competition General Directorate elaborated on the issue, indicating that a commissioned study did favor a specific EU institutional arrangement short of an ERA.<sup>243</sup> The official, of course, remained non-committal and emphasized, as usual, “subsidiarity” and “co-operation.”<sup>244</sup> In the Green Paper on Convergence, there were, however, some comments alarming for those who had been skeptical of a new European authority. Since these comments are a very good example of “Commission speak” and the way the Commission deals with critical points, a quote seems illustrative. Appropriately, the Commission starts with a bow to subsidiarity:

In looking at the options for a possible future regulatory model, account must be taken of the way in which responsibilities will continue to be shared between the Community and Member States and within Member States, between national, regional and sometimes local authorities. From a Community perspective, the EC Treaty defines on the basis of subsidiarity those areas in which the Community has a role to play. Such action may be taken, assuming it is an area for which the Community is competent, “only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.”<sup>245</sup>

The Commission then takes the decisive turn:

Given the regional and global nature of many of the services being delivered, that subsidiarity test may be met. Diverse national approaches may harm rather than promote users’ interests, could undermine the diversity which the internal market offers, and may well introduce distortions which fa-

---

243. See Alexander Schaub, *Competition in the Telecoms Sector*, EC COMPETITION POLICY NEWSLETTER, Apr. 1, 1996, at 1, 6-7, available at [http://europa.eu.int/comm/competition/speeches/text/sp1996\\_030\\_en.html](http://europa.eu.int/comm/competition/speeches/text/sp1996_030_en.html).

244. *Id.*

245. Green Paper on Convergence, *supra* note 40, at 31.

vour the establishment of production facilities in regions where a lighter regime applies.<sup>246</sup>

Not surprisingly, some of the questions which the Commission put forward in the Green Paper on Convergence on this issue may be seen by some as leading questions. However, something else happened. By explicitly or at least implicitly turning telecommunications regulation into a convergence issue, and by proposing — again mostly between the lines — to take the spirit of telecommunications liberalization into mass media, the Green Paper on Convergence helped to create new alliances of opposition mainly between the public service telecommunications operators, or rather the “incumbents” and the providers of public service broadcasting. Traditionally, these broadcasters still have a high political standing and considerable political impact in at least some Member States. And *their* regulatory authorities started to see issues they shared with telecommunications regulatory authorities, but not necessarily in the same way as the Green Paper on Convergence seemed to insinuate.

Nor was the pressure without reaction from the telecommunications NRAs. Apart from the usual pressures and exigencies, many of these authorities see themselves under a double weight. On the national level, they have to justify their existence as *special* regulatory agencies, in addition to general regulators of competition. On the EU level, they have to defend their existence as *national* authorities. The reaction to the Green Paper on Convergence insinuations regarding a need for an ERA was then, it seemed, sufficiently reserved to lead to the withdrawal of the ERA idea in the 1999 Communications Review. Another way to confront the pressure for an ERA model has been to show, at least symbolically, the inherently imperfect logic of such an authority. It is imperfect because the process of European unity is still far from complete, and any authority on the EU level would then be asked how European it really is. Consequently, as one is almost inclined to assume, NRAs from the EU joined with NRAs from the European Free Trade Association (“EFTA”) states<sup>247</sup> and had formed the Inde-

---

246. *Id.*

247. European Free Trade Association, at <http://www.efta.int/structure/main/index.htm>. Member States are Iceland, Liechtenstein, Norway and

pendent Regulators Group, slightly emphasizing, perhaps, the qualification *independent*.

But something else had also changed. By now, the general climate had become more skeptical towards liberalization, particularly since the positive, even if only secondary economic effect of liberalization was not yet evident. Unemployment remained the main economic issue in the EU; *euro-skepticism* was growing. December 1998 saw the refusal of the EU budget by the Parliament, and in January 1999, the “Commission crisis” — the vote of non-confidence by the Parliament which forced the demission of the Commission — followed.<sup>248</sup> And most important: The new treaty — the Treaty of Amsterdam — which had already been in the making at least since October 1997, saw its ratification ensured only in the first half of 1999, and not without difficulties.

So, with the 1999 Communications Review, the wording for the relationship between the Commission and the Member States’ NRAs had changed significantly; there was no longer any talk of an ERA, and the key word now became “cooperation.”<sup>249</sup> However, against the current political background described above, NRAs may suspiciously look at *cooperation* for signs of a functional equivalent of an ERA, even if the term is no longer fashionable and the window of opportunity for centripetal forces in this area may well be closed for some time. As we shall see, this is not the only change which, while not necessarily introduced *with* the new regulatory package, will nevertheless have its impact *on* that package.

### *B. The Great Climate Change: The Return of the Public Service and the Consumer?*

A more fundamental change seems to be underway, although it is far from certain what the result will be. In his speech in the Summer of 2001, from which this Article quoted several times, Robert Verrue answered the question “[w]hy have we made these proposals?” by giving, *inter alia*, as the main objec-

---

Switzerland. The EU and EFTA (except Switzerland) cooperate on the basis of the Agreement on the European Economic Area of 1992. *Id.*

248. See Peter Schwartz, *The Failed Vote of No-Confidence in the European Parliament*, at <http://www.wsws.org/articles/1999/jan1999/parl-j2l.shtml> (Jan. 21, 1999).

249. Queck, *supra* note 241, at 259.



tives: "(1) to benefit the citizen; (2) to promote, sustain and deepen an open and competitive market; [and] (3) to consolidate the EU's internal market."<sup>250</sup>

While this, at first glance, is restating the obvious, the ranking of the objectives is still remarkable. The author recalled in Part III.A.5., *supra*, that the notion of the universal service had entered the regulatory debate at a relatively late stage, only shortly before the complete liberalization of the market. This Article has also shown that only about thirty years after its entry into force, the interpretation of the then EC Treaty Article 90 had changed somewhat dramatically. And it has also seemed as if this change has largely been accepted in the Member States and in the perception of the general public, to the extent that the general public was following these developments at all, due to the disappointment with the level of public service and the changing perception of the natural monopoly.

Recall, however, the increasing influence of the Parliament due to changes in the general power structure of the EU. Since the introduction of direct elections (only in 1979), the co-decision procedure (1993) and the enlargement of this procedure (1999), the Parliament was moving closer to the "end user" and consumer (and as a side effect, is also now more exposed to temptations from lobbying). It was the Parliament which started to re-emphasize public interest considerations and the importance of services in the general economic interest. In telecommunications, the Parliament had simply to pick up those cards which the Commission and the Member States had not yet sufficiently played, because they were to leave the public telephony service until the very last.

The Commission and the Council had appeased the *re-discovery* of the public interest partly by introducing universal service parts into the various directives and partly (but mainly due to other pressures, incentives and developments)<sup>251</sup> by emphasizing data protection more strongly. As so often in European politics, and as exemplified with the ERA issue above,

---

250. Verrue, *supra* note 160.

251. It should be remembered that it had taken the EU more than twenty years to move from the first discussions of data protection issues in the then not yet directly elected European Parliament (1974) to the Data Protection Directive.

legal policy developments cannot be explained by looking simply at application areas and application specific developments.

Again, one must recall general political developments. There have been other players emphasizing public interest and public services. There had been national developments, most strongly signaled first by the end of the Thatcher administration and later with the Conservative government in the U.K. by 1997. Although this did not lead to a recognizable change of the British position on telecommunications, these developments were perceived as symbolic indicators of change.

As noted above, unemployment remained an important issue in public debate. This is not the place to expand on unemployment and telecommunications liberalization and their complex interrelations; reference is only made in view of the changes in public opinion and its view on the role and responsibility of the EU. Furthermore, certainly since 1989, and well before the European crisis years already referred to, the end of East/West confrontations favored centrifugal tendencies in the EU which gained further momentum as a counterbalance to the intention of the EU to become more integrated in the area of foreign and military policy.

Last but not least, end users' views gradually changed as well. Changes brought by, or at least with, liberalization had been welcome. Services had improved. Prices had gone down on long-distance calls, but they had also gone up for local calls and continue to do so. Choice had increased, but the burden of choice had become heavier and information costs had increased as well, leaving the consumer with an undercurrent of feeling that there might always be a better choice than the one made (and ironically because of these choices), which seems to lead to a lingering feeling of being trapped, if not cheated.<sup>252</sup>

The Commission, of course, has not and will not stop at telecommunications. Other areas are undergoing similar changes: energy and water, public banking and public transport and (tentatively) public radio and television. This multi-front ap-

---

252. EOS Gallup Europe, *The European Commission: The Situation of Telecommunication Services in the Regions of the European Union*, at <http://europa.eu.int/ISPO/infosoc/telecompolicy/en/EOStudy/Resid/accueil.htm> (last visited Mar. 18, 2002) (based on over 44,000 household interviews in 130 regions within the fifteen Member States, in conjunction with a survey of 7500 small companies).

proach of the Commission with or without direct support from the Council has also generated — as already shown in the reactions to the Green Paper on Convergence — a multi-front opposition.

With its general loss of appeal, the EU also seemed to have lost control over its regulatory playing field. The need for institutional reform, and the then upcoming Treaty of Amsterdam in particular, allowed players to carry their sectoral concerns to other levels. Players could choose to take the specific issue to the national or to the European level, they could choose to turn the specific issue into a general issue or they could choose a combination thereof.<sup>253</sup> This approach was strongly emphasized, for one, by the French government.<sup>254</sup> Also, the European courts increasingly seemed to have rediscovered the charm of services of a general economic interest and specific state involvement.<sup>255</sup> So, in European politics, concessions for services in the general economic interest had to be made. The willingness to make such concessions was expressed in the Commission Communication on Services of General Interest in Europe<sup>256</sup> and in a 2000 update to the Communication.<sup>257</sup> Furthermore, due to changes in the Treaty of Amsterdam, the EC Treaty now contains a specific article:

Article 16 (ex Article 7d)

Without prejudice to Articles 73, 86 and 87, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting

253. As regards these multi-player, multi-level politics, see generally Adrienne Héritier, *The Politics of Public Services in European Regulation*, in PREPRINTS AUS DER MAX-PLANCK-PROJEKTSGRUPPE RECHT DER GEMEINSCHAFTSGÜTER (2001).

254. The account provided by Héritier, *id.* at 11, slightly overemphasizes the impact of French developments, most likely due to the source material used.

255. See, e.g., Case T-106/95, *Fédération Française des Sociétés d'Assurances (FFSA) & Others v. Commission*, 1997 E.C.R. II-229; Case C-392/92, *Municipality of Almelo and Others v. Energiebedrijf IJsselmij NV*, 1994 E.C.R. I-1447; Case T-32/93, *Ladbroke Racing Ltd. v. Commission*, 1994 E.C.R. II-1015; Case C-320/91, *Criminal Proceedings Against Paul Corbeau*, 1993 E.C.R. I-2565.

256. See Services of General Interest, *supra* note 41.

257. See Communication from the Commission, Services of General Interest in Europe, COM(00)580 final [hereinafter Services of General Interest 2000].

social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions.<sup>258</sup>

And public broadcasting, in particular, found special recognition in the Protocol on the System of Public Broadcasting in the Member States:

THE HIGH CONTRACTING PARTIES,

CONSIDERING that the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism,

HAVE AGREED UPON the following interpretative provisions, which shall be annexed to the Treaty establishing the European Community,

The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account.<sup>259</sup>

EC Treaty Article 16 remains rather guarded and the Communication on Services of General Interest sounds rather cautious, and defensive, particularly the 2000 amendment.<sup>260</sup> All these developments are indications that the tone has changed and that the burden of argumentation may be shifting. Recently, services of general economic interest have even found their place in the Charter of Fundamental Rights of the EU:

Article 36

258. EC TREATY art. 16.

259. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts - Protocol Annexed to the Treaty of the European Community - Protocol on the System of Public Broadcasting in the Member States, 1997 O.J. (C 340) 109, 109.

260. See generally EC TREATY art. 16; Services of General Interest 2000, *supra* note 257.

Access to services of general economic interest

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.<sup>261</sup>

Furthermore, consumer protection has gained considerable momentum. Again quoting from the EC Treaty where, since the changes introduced with the Treaty of Amsterdam, consumer protection now has its own title:

TITLE XIV (ex Title XI)  
CONSUMER PROTECTION  
Article 153 (ex Article 129a)

1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.

2. Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities.<sup>262</sup>

It should be remembered in this context that it was only in 1995 that consumer protection was seen as worthy of receiving its own General Directorate. Again the Charter of Fundamental Rights reads: "Union policies shall ensure a high level of consumer protection."<sup>263</sup>

Finally, consumer protection has gained an even higher political standing against the background of yet another "Commission crisis," this time in the area of agriculture. The reports on the implementation of the regulatory tools in telecommunications become, in spite of the ever increasing annexes, more concise. Unfortunately, but for obvious reasons, they emphasize quantitative data or approaches where qualitative statements are quantitatively operationalized.<sup>264</sup> But, in the new spirit of consumer orientation, even these reports can be sur-

261. Charter of Fundamental Rights of the European Union, art. 36, 2000 O.J. (C 364) 1, 17 [hereinafter Charter of Fundamental Rights].

262. EC TREATY art. 153(1)-(2).

263. Charter of Fundamental Rights, *supra* note 261, art. 38.

264. For the most recent data, see Sixth Report, *supra* note 95.

prisingly blunt when assessing or trying to assess the current situation of consumer protection in telecommunications:

There is still little evidence of a systematic effort at [the] national level to monitor the protection of consumers and the promotion of users' interests as regards telecommunications services. While institutional arrangements vary from country to country, there appears to be a disappointingly low level of coordination between NRAs and other agencies responsible for consumer protection. This makes it difficult to discern particular trends or problems at [the] EU level, even in relation to the services and quality of service indicators the use of which is obligatory under the EC framework.<sup>265</sup>

In sum, the climate *is changing*. It is against the background of these changes that the new regulatory package will have to be re-read and eventually implemented.

*C. Concluding Observation: On Comparison and Uniqueness*

The subject of the post-deregulatory landscape invites or insinuates at least comparison. To compare is a deliberate act in which one is prepared to reduce differences, to move towards generalizations to reach at least some common ground for comparison. Emphasizing the specifics of the EU environment and of the European approach was driven not so much by an attempt to avoid comparison or to neglect common challenges and common responses. Rather, this Article has attempted to introduce some of the "ethnological" differences in regulatory environments for telecommunications and to help to create — generally — a more critical distance between "the foreign example" and the need to develop an intrinsic policy that absorbs the specific cultural needs (but also the temporary fashions) of one's own regulatory environment. In doing so, from a perspective of historical and institutional observation, this Article echoes conclusions of the authors of another analysis who in contrast to this author have chosen a primarily economic and empirical approach. Olivier Boylaud and Giuseppe Nicoletti conclude their extensive empirical analysis *Regulation, Market Structure and Performance in Telecommunications*:

---

265. *Id.* at 22.

These findings underscore the limits of purely descriptive cross-country comparisons of regulation and performance, insofar as they fail to account for economic and policy developments in different countries, as well as the danger of using such analysis for policy purposes without an understanding of the different markets and their specific characteristics.<sup>266</sup>

In fact, European telecommunications regulation, or at least the examples chosen from this area, illustrate how issues apparently manageable mainly by reflections on economic efficiency remain deeply connected and dependent on economic, but also on cultural and political developments of the European region. Such phenomenon is due to the complex and specific patterns of interaction between European players on the various levels provided to them by the specific structure of the EU.

---

266. OLIVIER BOYLAUD & GIUSEPPE NICOLETTI, REGULATION, MARKET STRUCTURE AND PERFORMANCE IN TELECOMMUNICATIONS 24 (OECD Econ. Dep't, Working Paper No. 237, 2000).